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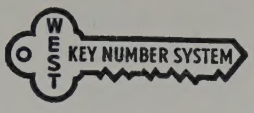
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[2] On leave of absence to enter military service.

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20 Cal.2d 793

BLANTON et al. v. CURRY et al.

L. A. 18313.

Supreme Court of California.

Sept. 14, 1942.

1. Appeal and error ⇐1064(1)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile while crossing street at night, the giving of an instruction on doctrine of res ipsa loquitur did not result in a "miscarriage of justice" where undisputed evidence proved conclusively that defendant failed to yield right of way to boy as the latter was crossing street in an unmarked crosswalk.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

2. Trial ⇐296(7)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile, the fact that instruction concerning boy's right to presume that defendant would obey the law did not require that boy should have been exercising ordinary care before being entitled to such an assumption did not require reversal of judgment for plaintiff where trial court also instructed that defendant was entitled to assume that plaintiff would cross street in a careful manner.

3. Appeal and error ⇐1195(3)

The conclusion of the Supreme Court on former appeal after considering instructions given at first trial constituted the "law of the case" relating to subject matter of those instructions and was binding upon the parties in subsequent trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

4. Automobiles ⇐11

Where a street joins with or crosses another street having two traveled portions separated by a private right of way or parkway, there is one "intersection" within the vehicle code section defining an intersection. Vehicle Code, § 86, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Intersection".

5. Automobiles ⇐246(51)

Where side street did not go beyond a thoroughfare consisting of two roadways separated by a parkway, but ended at westerly curb of thoroughfare, there was an "intersection" within provisions of Vehicle Code defining an intersection and also defining an unmarked "crosswalk" as portion of roadway ordinarily included within prolongation of boundary lines of sidewalks and intersections, and therefore there was no error in use of term "crosswalk" in instruction upon right of way at a crosswalk, in action for injuries sustained by boy struck by automobile while, crossing west roadway of thoroughfare. Vehicle Code, §§ 85, 86, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Crosswalk".

6. Trial ⇐295(6)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile while crossing street at night, instruction that a motorist must take precautions against injuring any users of highway was not prejudicially erroneous when considered with preceding portion of instruction stating that both the boy and motorist had a right to expect that the other would exercise care.

7. Trial ⇐253(4)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile, a portion of instruction stating that a motorist must take precaution that he will not do injury to any of users of highway, when standing alone, was subject to criticism for not taking into

consideration whether user of highway was himself negligent.

8. Trial ⇐296(4)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile, deficiency in instruction stating in effect that care required of boy depended upon his age was cured by other instructions relating to care required of a child.

9. Automobiles ⇐246(35)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile, the plaintiff, being a minor, was entitled to an instruction as to duty of care exacted of minors.

10. Appeal and error ⇐1064(1)

In action for injuries sustained by 12 year old boy when struck by defendants' automobile, instruction that burden was on defendants to establish affirmative allegations of their answer, although incomplete in form, was not harmful.

11. Negligence ⇐122(2)

Negligence of a plaintiff is a matter of defense to be proved affirmatively by defendant unless it can be inferred from evidence given in plaintiff's case.

12. Trial ⇐296(4)

In action for injuries sustained by 12 year old boy when struck by defendant's automobile, instruction that to establish defense of contributory negligence it must be first shown that plaintiff's negligence concurred and cooperated with negligence of defendant up to the very time of injury, although not a complete statement of the rule, was not harmful in view of other instructions. Civ.Code, § 1714.

13. Negligence ⇐56(1)

The "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury and without which the result would not have occurred.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

14. Negligence ⇐82

The defense of contributory negligence is predicated upon a defendant's own negligence, and any want of care on part of plaintiff which is appropriate under the circumstances is negligence and will prevent a recovery if it is one of the proximate causes of injury.

15. Trial ⇐244(4)

In action for injuries sustained by 12 year old boy when struck by automobile, the fact that trial court, in giving instructions as to duty of both boy and motorist to use sense of sight, stated that age of boy and maturity of motorist could be considered did not render instructions erroneous on ground that court overemphasized the matter of the boy's age and cast the greater burden on motorist to look and see.

16. Trial ⇐244(1)

Courts should not unduly emphasize matters contained in instructions which would be detrimental to either party.

17. Negligence ⇐85(2)

Minors as well as adults are required to exercise ordinary care, but the ordinary care required of a child is to be determined by a different rule than is required in case of adults.

18. Appeal and error ⇐1064(1)

In action for injuries sustained by 12 year old boy when struck by defendants' automobile, an oral instruction that judgment might be for $10,000 against driver of automobile but could be for only $5,000 against owner, but if owner was principal and driver was the agent, then there was no such limitation as to owner was not prejudicially erroneous as suggesting amount of damages, where trial court specifically informed jury that amount stated was an example, notwithstanding that jury returned a verdict of $10,000 against both.

19. Appeal and error ⇐1064(4)

In action for injuries sustained by 12 year old boy when struck by defendants' automobile, instruction that in making award for damages resulting in the future, jury could consider future pain and suffering which were the result proximately of collision was not prejudicially erroneous because of failure to use term "certain to result". Civ.Code, § 3283.

20. Witnesses ⇐397

Evidence which was admitted solely for purpose of impeachment could not be considered as independent evidence of any fact to which the impeaching evidence related.

21. Trial ⇐252(8)

In action for injuries sustained by 12 year old boy when struck by defendants' automobile while crossing street, refusal of defendants' requested instruction in language of Vehicle Code stating that pedestrians crossing roadway at point other than crosswalk must yield right of way to vehicles was not error, where there was no evidence that boy was crossing street outside the unmarked crosswalk when he was first seen by motorist. Vehicle Code, § 562(a), St.1935, p. 188.

22. Appeal and error ⇐768

Where plaintiff-respondent's brief, in answer to defendant-appellant's claim of error in refusal to give an instruction in automobile accident case, contained a statement that at no time was any suggestion made to jury that defendant was operating his automobile in an improper roadway or in an improper direction, and there was no denial of such statement by defendant in his reply brief or in his reply to petition for hearing, Supreme Court could assume that no claim was made during trial that defendant was negligent in driving in a certain direction on driveway.

23. Trial ⇐251(8)

In action for injuries sustained by pedestrian when struck by defendants' automobile while it was being operated on an avenue consisting of two driveways separated by a parkway, refusal of defendants' requested instruction that it was lawful to travel in both directions on each driveway was not error where no claim was made during trial that defendant was negligent in driving in an improper driveway.

24. Appeal and error ⇐1170(7)

In action for personal injuries, cross-examination of defendant's witness by trial judge upon assumption that witness' testimony had been purchased by defendant was improper and injury resulting therefrom was not removed by admonition that jury should not, by reason of examination, reach a conclusion prejudicial against defendant, but such examination did not require reversal of judgment for plaintiff where witness' evidence related to only one phase of the case, and negligence of defendant was clearly proven as proximate cause of accident. Const. art. 6, § 4½.

25. Automobiles ⇐162(5)

That defendant motorist was not negligent in driving without his lights burning did not excuse him in failing to yield right of way to minor pedestrian, where the latter was crossing a street in an unmarked crosswalk.

26. Appeal and error ⇐1170(1)

Where errors committed during trial were not of such serious character as to unduly prejudice appellants' rights, the errors did not justify reversal of judgment. Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, San Bernardino County; Edward J. Kelly, Judge assigned.

Action by John Blanton, Jr., a minor, etc., and another, against Robert B. Curry, and others, for personal injuries sustained when the minor plaintiff was struck by an automobile as he was crossing a street, and for consequential damages sustained by his father. From a judgment for plaintiffs, defendants appealed to the District Court of Appeal, 121 P.2d 125, which reversed the judgment and ordered a new trial. The cause was by an order of the Supreme Court transferred for hearing from the District Court of Appeal after decision by that court.

Judgment affirmed.

For supplemented judgment, see 121 P. 2d 125.

Martin J. Coughlin and Fred A. Wilson, both of San Bernardino, for appellants.

Bautzer & Ryan, G. Bentley Ryan, and Gregson Bautzer, all of Hollywood, Flanagan & Sampson, of Los Angeles, Robert E. Ford, of Hollywood, and Perry Bertram, of Los Angeles, for respondents.

PER CURIAM.

This cause was by an order of this court transferred for hearing from the District Court of Appeal, Fourth District, after decision by that court. At the time of granting said order we were and now are in agreement with the conclusion reached by the District Court of Appeal upon many of the questions considered by that court in its decision, and for that reason we have adopted those portions of the opinion dealing with said questions as the opinion of

this court upon the matters therein considered. The opinion of the District Court of Appeal was written by Justice Griffin.

We were not, however, in accord with the final conclusion of said court reversing the judgment. We have accordingly made an independent discussion of those matters in which we are in disagreement with the District Court of Appeal. The discussion of these matters, together with those portions of the opinion of the District Court of Appeal with which we agree and which we have adopted, constitute the opinion of this court. It is as follows:

"This action has been before the court heretofore on an appeal from a judgment in favor of the defendants which was reversed for reasons therein stated. Blanton v. Curry, 36 Cal.App.2d 575, 98 P.2d 221. Most of the essential facts regarding the accident and injuries are there related.

"About 5:30 p. m. on December 12, 1936, John Blanton, Jr., was attempting to cross a thoroughfare known as Euclid avenue in the city of Upland, when he was run into by a Buick roadster automobile being operated by the appellant Curry. Euclid avenue is a street consisting of two roadways, each running north and south and having a 65-foot parkway in the center thereof planted with large pepper trees. Euclid avenue intersects G street. G street is a 34-foot street extending east and west but which at its intersection with Euclid avenue does not continue through to the west in a straight or right-angle course but dead-ends at the westerly curb of Euclid avenue. John Blanton, Jr., aged 12 years, and his brother Virgil, aged 14, were walking southerly on the sidewalk on the west portion of Euclid avenue, which roadway is 44 feet wide for a short distance before arriving at G street. They then pursued a course on an angle toward the southeast to cross the parkway above described and both the east and west roadways of Euclid avenue, which roadways are 37 feet wide. It was their intention to cross to the sidewalk of G street on the southeast corner of the intersection. As they reached the west curb of Euclid avenue, John Blanton, Jr., looked south but saw no cars coming from that direction. He then looked north and saw a car quite a distance away slowly approaching, with its lights burning. After stepping off the west curb of Euclid avenue at a place described by at least one witness as within the area which would be encompassed by the prolongation of the south curb line of G street and the south sidewalk line on the south side of G street near the middle of the roadway, John looked to the south. He then for the first time 'heard the motor' and saw a 'dark object' approaching 'almost on me' but he did not observe any lights on it. Seeing that the car approaching would strike him if he remained in the position he was in when he observed the car for the first time, he darted in a northeasterly direction to complete the crossing and in an attempt to run out of the way of the car, but was struck while in the easterly half of the west roadway of Euclid avenue by the right portion of the appellants' automobile. He was rendered unconscious by a severe injury to his head. Virgil testified that he did not see any lights on the automobile of the appellants until after the car had come to rest, and at that time he did see the lights shining on the body of his brother which was about ten feet ahead of the standing automobile. Although the foundation for the opinion was quite unsatisfactory, he estimated the speed of the automobile at between '30 and 35 miles at least' when the car passed by, approximately a foot or two in front of him. Appellant Curry testified that he was operating his car in a northerly direction on the easterly half of the west roadway of Euclid avenue at approximately 20 miles an hour when suddenly there appeared in front of his left headlight the figures of the boys who approached his car from a northwesterly direction, apparently from a point just north of the unmarked crosswalk in question; that he did not see them until he was immediately upon them and was unable to avoid colliding with one of them.

"On a retrial of the case the jury returned a verdict for plaintiff John Blanton, Jr., in the sum of $10,000, and for plaintiff John Blanton in the sum of $466.10, against each of the defendants.

"It is now contended (1) that the giving of and refusal to give certain instructions was prejudicially erroneous. After giving an instruction to the effect that 'the burden of proof in litigation is on the party holding the affirmative of an issue; * * * It is not enough that the parties charged with the burden of proof produced some scintilla of evidence or enough evidence to raise a suspicion that the fact is as they contend; to maintain such contention it must be established by a preponderance of the evidence,' the court, on its own initia-

tive, gave the following instruction (our letters used for identification):

"(A). 'The court further instructs you that the plaintiffs are not required to show particularly what the specific act of negligence was which produced the accident, but are only required to show that the collision is one which ordinarily would not have occurred had due care been employed by defendant; when and if the plaintiffs made such proof, the burden of proof shifts to the defendants to show their freedom from negligence, or to show that the plaintiff, the minor plaintiff, was also negligent, and that his negligence proximately contributed to the collision.'

"Appellants contend that in effect this was an application of the doctrine of res ipsa loquitur; that the jury was instructed that the plaintiffs were not required to show any special act of negligence on the part of the defendant; that if the accident would not ordinarily have occurred had due care been employed by the defendants then the defendants were required to establish by a preponderance of the evidence their freedom from negligence; that the doctrine of res ipsa loquitur was not applicable to the case at bar and the giving of the instruction was prejudicial error." This instruction was taken almost verbatim from one given in the case of Gonzalez v. Nichols, 110 Cal.App. 738, 742, 294 P. 758. While the court in that case held that the giving of the instruction was error, it further held, however, that the giving of it did not result in a miscarriage of justice, and affirmed the judgment in favor of the plaintiff at whose instance the instruction was given. In the discussion of this subject the court said at page 742 of 110 Cal. App. at page 759 of 294 P.: "The giving of this instruction was therefore error. It remains to be determined whether this error is sufficient to require a reversal of the cause. Elsewhere in the instructions the jury were repeatedly told that the burden was on the plaintiff to prove by a preponderance of the evidence that the negligence of the defendant was the proximate cause of the injury. In Tower v. Humboldt Transit Co., 176 Cal. 602, 169 P. 227, an instruction on the doctrine of res ipsa loquitur was held erroneous because not applicable to the facts. While the Supreme Court reversed the case because of that and other instructions, yet the court pointed out that the proof of negligence in that particular case was so unsatisfactory that the errors in instructions could not be disregarded under the provisions of section 4½ of article 6 of the Constitution. Here, however, an exceptionally clear case of negligence is presented. We are therefore of the opinion that the giving of this instruction cannot be said to have resulted in a miscarriage of justice."

[1] In the instant action the proof of defendant Curry's negligence cannot be said to be unsatisfactory. The undisputed evidence, as we will hereinafter show, proves conclusively that he failed to yield the right of way to John Blanton, Jr., as the latter was crossing the roadway in an unmarked crosswalk. The plaintiffs therefore made out "an exceptionally clear case of negligence," to use the language of the Gonzalez case, against the defendant Curry, and therefore the giving of the res ipsa loquitur instruction did not result in a miscarriage of justice.

[2] "The next two questioned instructions (B and C) involved the right of the plaintiff to presume that the defendant would obey the law. It is argued that neither of these instructions contained the necessary limitation that the plaintiff should be exercising ordinary care before he would be entitled to assume that the defendant was exercising ordinary care. A similar instruction with slight variations to meet the factual situation involved was approved in Schroeder v. Baumgarteker, 202 Cal. 625, 628, 262 P. 740. Immediately following the two criticized instructions the court said: 'And the defendant Curry had a right to expect that the minor plaintiff, or anyone else of his age and experience, would cross the highway in a careful and prudent manner.' It thus appears that the court told the jury in effect that both the minor plaintiff and the defendant Curry had a right to assume that the other would obey the law and would exercise due care and caution in respect to their use of the highway. While it may be true that they do not contain all of the elements which should enter into instructions of this character, the instructions, when considered as a whole, were no less favorable to the defendants than to the plaintiffs and not so incomplete as to justify a reversal of the case.

"Objection is made to instruction lettered (D), (plaintiff's instruction No. 7), upon the question of the right of way at a crosswalk. Exception is taken to this instruc-

tion particularly as to the use of the term 'cross-walk,' as defined in section 85 of the Vehicle Code, viz: 'That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, * * *' It is contended that there was no crosswalk at the intersection in question because there was no sidewalk, the boundary lines of which could be prolonged on the highway under consideration; that because there was no sidewalk across the highway adjacent to G street as it intersected the parkway, there was consequently no crosswalk over the westerly roadway of Euclid avenue in the vicinity where the accident occurred which could be attributed to the prolongation of a sidewalk across the parkway; that any claimed crosswalk across the east roadway of Euclid avenue would not constitute the prolongation of any sidewalk paralleling G street, as that sidewalk terminated and merged in the sidewalk paralleling Euclid avenue; that the above-quoted section of the Vehicle Code limited unmarked crosswalks to those which were the result of a prolongation of the boundary lines of sidewalks and removed the portion of the roadway under consideration from those classified as crosswalks. In other words, it is appellants' contention that there was no legally defined crosswalk at the place of the accident.

[3] "Upon the first appeal in this case the appellants urged this identical point and argued that these particular instructions which the court refused to give and which were requested at the first trial were erroneous in defining the rights of pedestrians at crosswalks. It was there held that these instructions were in accordance with the law and that it was error to refuse to give them. In their petition for a hearing in the Supreme Court the appellants again made the same argument which again was disposed of adversely to their contention. The conclusion of the upper court reached on the former appeal, after considering the instructions given at the first trial, constitutes the law of the case in this respect and is binding upon the parties in the subsequent trial thereof. Reid v. Northern Assurance Co., 63 Cal. App. 114, 218 P. 290; Table Mt. T. Co. v. Stranahan, 21 Cal. 548.

[4, 5] "Irrespective of this conclusion, section 85 of the Vehicle Code defines an unmarked crosswalk as the 'portion of a roadway *ordinarily* included within the prolongation or connection of the boundary lines of sidewalks at *intersections*. * * *' [Italics added.] Section 86 of the Vehicle Code defines an intersection as 'the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways *which join* one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.' [Italics added.] It has been uniformly held that where a street joins with or crosses a double street, that is, where one whose two traveled portions are separated by a private right of way or parkway, there is one intersection within the meaning of our statute. Cruzen v. Wilcox, 20 Cal.App.2d 728, 67 P.2d 709; Driscoll v. Shipp, 13 Cal.App.2d 591, 57 P.2d 177; Lowenbruck v. Stiglmeier, 7 Cal. App.2d 204, 46 P.2d 251; Schulman v. Los Angeles R. Corp., 44 Cal.App.2d 122, 111 P.2d 924; Colburn v. Schilling, 41 Cal.App. 2d 541, 107 P.2d 279; Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866. The intersection here involved comes within the provisions of Sections 85 and 86 of the Vehicle Code.

[6, 7] "On its own initiative the court gave this instruction:

"(E) 'Our streets are dedicated to the use of the public at all times, the old and the young, the strong and the active. The driver of a vehicle must, accordingly, take precautions that he will not do injury which may be injurious or fatal to any of the users of the highway.'

"Appellants complain because this instruction in effect, it is claimed, advised the jury that the driver of a vehicle was required to take such precautions as would prevent injury to any of the users of the highway; that the obligation on the part of the driver of an automobile is to exercise ordinary care; that the instruction in question obligates the driver of a motor vehicle to 'take precaution that he will not do injury'; that this, in effect, makes the driver of an automobile an insurer of the safety of the users of the highways; and that appellant was only required to take such precaution as would be taken by an ordinarily prudent person under the circumstances, citing Prato v. Snyder, 12 Cal.App. 2d 88, 95, 55 P.2d 255. This instruction as given and standing alone meets with condemnation for the reason that the question

whether the user of the highway was himself negligent is not taken into consideration. Thompson v. Baldwin, 26 Cal.App.2d 703, 80 P.2d 198. The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that the correlative rights of others may not be unnecessarily impaired or destroyed. Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471. The criticized portion of the instruction was taken out of the context of an instruction in which the court told the jury 'that every person has a right to presume that every other person will perform his duty and obey the law. * * * Specifically applying that instruction to the case before you, the plaintiff in this case had the right to expect that the defendant Curry would drive his car with due care and circumspection and caution; and the defendant Curry had a right to expect that the minor plaintiff, or anyone else of his age and experience, would cross the highway in a careful and prudent manner.' Then followed the criticized quoted portion. The instruction, when considered as a whole, is not prejudicially erroneous.

[8] "Relative to the degree of care required of minors the court gave this instruction which was deficient:

"(F) 'You are to determine with reference to the pleadings what would an ordinarily prudent child *of the age* of the boy at the time of the accident do under similar circumstances, or the same circumstances. (Italics ours.) * * * In determining the question * * * you must take into consideration, as I have indicated to you, that he is to be judged by the standard of due care of a child of his age at the time of the injury, and that the defendant Curry should be judged by the standard of the age which he appears to be, as to care and caution.'

"A more complete rule is stated in Todd v. Orcutt, 42 Cal.App. 687, 691, 193 P. 963, where the court said that 'plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, *or which children of his years ordinarily exercise under like circumstances, taking into consideration not only the boy's age, but his capacity for understanding.*' (Italics ours.) The court did give additional instructions, one covering part of the deficiency complained of which appellants also criticize, without merit, for other reasons. It reads in part:

"(G) 'The plaintiff in the instant case is a minor and judgment is not passed on his conduct with the same strictness as in the case of adults. Children are not regarded as possessing the same mental capacity to appreciate the danger incident to the use of a public thoroughfare as those of mature age. What is required of a child is that he shall exercise the same degree of care as will ordinarily be expected of a reasonably careful child of the same age and intelligence under like circumstances.'

"In addition to many similar instructions, at appellants' request the court gave an instruction to the effect that:

"(H) 'The fact that the plaintiff was a boy between 12 and 13 years of age did not free him of the obligation of exercising ordinary care for his own protection. He was required to exercise that care which an ordinarily prudent person of his age, discretion, and intelligence would have used under the circumstances.'

[9] "The plaintiff John Blanton, Jr., being a minor, was entitled to an instruction as to the duty of care exacted of minors. Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 P. 664. Similar instructions have been upheld. Studer v. Southern Pacific Co., 121 Cal. 400, 404, 53 P. 942, 66 Am.St.Rep. 39; Shannon v. Central-Gaither Union School District, 133 Cal.App. 124, 23 P.2d 769.

"It is argued that it is equally as dangerous for a minor as for an adult to cross a street after ascertaining the approach of an automobile. There can be no claim that the jury was incorrectly advised as to the law in this respect.

[10, 11] "Appellants next complain of an instruction (I) given on the court's own motion, on the question of burden of proof. This instruction informed the jury that 'the burden is on the defendants to establish the affirmative allegations of their answer, for example, regarding the point of contributory negligence * * * that is, negligence of the minor plaintiff, which proximately contributed to the injury of the plaintiff, the burden is on the defendants to sustain that contention.'

"Appellants argue that the instruction did not clearly state the rule which is that the defendants have the burden of proving contributory negligence, *unless it affirmatively appears* from the plaintiffs' own evidence, citing Marr v. Whistler, 49 Cal.App. 364, 371, 193 P. 600; Soda v. Marriott, 118

Cal.App. 635, 642, 5 P.2d 675. The rule, correctly stated, is that negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by a defendant unless it can be inferred from the evidence given in the plaintiffs' case. Marr v. Whistler supra. In Daniel v. Asbill, 97 Cal.App. 731, 276 P. 149, the appellant claimed that a similar instruction was erroneous. In answering that argument the court held that the instruction was a correct statement of the law and did no more than inform the jury as to the question of the burden of proof; that if the defendant desired a further instruction to be given, he should have requested it, but, obviously, no harm could have resulted from the giving of the instruction. To like effect see Richmond v. Moore, 103 Cal.App. 173, 284 P. 681. Appellant offered no additional instruction on the subject. Although incomplete in form, no harm could have resulted from the giving of the criticized instruction.

[12-14] "On its own motion the court gave this instruction:

"(J) 'In order that contributory negligence may be successfully established as a defense, it must be first shown that negligence of plaintiff alleged to be contributory negligence, concurred and cooperated with the negligence of the defendants *up to the very time of the injury.*' (Italics ours.)

"Appellants charge error because this instruction led the jury to believe that the failure of the minor plaintiff to look before crossing the roadway may not have proximately contributed to the accident because it occurred prior to the 'very time of the injury' and did not concur and cooperate with the negligence of the defendants 'up to such time,' and argue that the error was aggravated by the refusal of the court to give two of appellants' instructions bearing on the question. To say that the negligence of a plaintiff, in order to be contributory, must concur and cooperate with the negligence of a defendant up to the very time of the injury is not a complete statement of the rule. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631. It is apparent that the court was endeavoring to paraphrase the rule that the proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injuries, and without which the results would not have occurred; that the defense of contributory negligence is predicated upon a defendant's own negligence; and that any want on the part of a plaintiff of the care which is appropriate under the circumstances is negligence and will prevent a recovery if it be one of the proximate causes of the injury. Civ.Code, § 1714; Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234; Konig v. Lyon, 49 Cal.App. 113, 192 P. 875; Steinberger v. California Electric, etc., Co., 176 Cal. 386, 168 P. 570. The instruction as given, when considered with other proper instructions on the subject, was not harmful. Similar instructions have been approved. 19 Cal.Jur. 649, § 78.

[15-17] "The court voluntarily on its own motion gave several instructions, designated (K), which outline a general rule respecting both plaintiffs and defendants as to the duty to look and see that which they could have seen had they looked. In many instances the court commented with words to this effect: 'In determining that issue, you must take into consideration the age of John Blanton, Jr., and the maturity of Curry, of course.' Appellants contend that the court overemphasized the matter of the age of respondent John Blanton, Jr., and accordingly cast a greater burden on the defendants than on the minor respondent to look and see. No error appears. Duehren v. Stewart, 39 Cal.App.2d 201, 209, 102 P.2d 784. Courts, of course, should not unduly emphasize matters contained in instructions which would be detrimental to either party. Minors, as well as adults, are required to exercise ordinary care, but it is well settled that the ordinary care which a child is required to exercise must be determined by a different rule than is required in the case of adults. Mayne v. San Diego Electric R. Co., 179 Cal. 173, 178, 178 P. 690; Schierhold v. North Beach & M. R. Co., 40 Cal. 447. It was therefore proper to say to the jury in effect that in determining whether or not the failure of the minor plaintiff to see, if he looked, assuming it did find that he looked and failed to see, constituted negligence it should take into consideration the fact that he was a minor. It cannot be said that the action of the trial court in this respect was erroneous.

[18] "The trial court, *by way of explanation and example,* orally instructed the jury (L) that the judgment in the case might be for $10,000 against Curry, the driver, but could be for only $5,000 against Koehler, the owner of the car, but if Koehler was the principal and Curry was the agent, as stipulated, then there was

no such limitation as to Koehler. The jury returned a verdict of $10,000 against both, the same amount suggested in the example. Appellants complain because they believe the jury followed the suggestion of the court and not the evidence as to the amount of damages. It is difficult to appraise the power of suggestion, especially as between the trial judge and the jury. Precaution should be taken to prevent criticism in this respect. In the instant case, however, the trial court did specifically inform the jury that the amount stated was 'as an example, and not in any way as a suggestion.' While this instruction is not to be commended, standing alone, it cannot be considered prejudicially erroneous.

[19] "The court in one instruction (M) upon the issue of damages, on its own motion, said: '* * * damages, if any * * * may be awarded for the detriment resulting after the commencement of the action and for damages *resulting in the future.* * * * You are to take into consideration * * * pain and suffering to the injured in the future, if any, *which are the result proximately of the collision.*' (Italics ours.) The instruction is claimed to be prejudicially erroneous because it did not contain the limitation 'for detriment resulting or *certain to result* in the future,' citing Melone v. Sierra R. Co., 151 Cal. 113, 116, 91 P. 522; Civ.Code, § 3283. This was the only instruction upon the issue of future damages. It is clear that the instruction as worded does not use the term 'certain to result,' as used in section 3283 of the Civil Code. Since the decision of Melone v. Sierra R. Co., supra, [1907] several cases have been before our higher courts which, to some extent, have relaxed the rule therein stated. In several of these cases the courts discuss the propriety of instructions relative to future damages which do not contain the words 'certain to result in the future' and which appear to be less favorable to a defendant than the instructions in question here. They are held to be proper and not to constitute error. Zerbo v. Electrical Products Corp., 212 Cal. 733, 735, 300 P. 825; Learned v. Peninsula R. T. Co., 49 Cal.App. 436, 439, 193 P. 591. We do not believe the language used in the instruction is such that it left the estimation of future damages to the conjecture or whim of the jury as contended. Although the word 'certain' does not appear in the instruction as given, nevertheless the element of certainty is present and there can be no room for conjecture when the jury has been limited to the loss or damage 'resulting in the future' which the evidence shows the minor plaintiff will sustain and 'which are the result proximately of the collision.' The instruction given, while not a model to be followed in the future, cannot be held to be prejudicially erroneous.

"The trial court refused appellants' instruction 25 (N), offered in the language of section 562, subdivision (a) of the Vehicle Code (1935)." Appellants contend that the refusal to give this instruction was error for the reason that there was evidence that John Blanton, Jr., might have been crossing the roadway at a point other than in an unmarked crosswalk at the time he was first seen by defendant Curry. If there was any such evidence it must be found in the testimony of defendant Curry. At most his testimony on the location of John Blanton, Jr., at the time in question is far from satisfactory and in our opinion was entirely insufficient to establish this point. He testified that he saw the two boys coming to him from the west, and "it couldn't have been more than five or six feet from my left-hand bumper." Continuing, he testified: "When I first saw the first boy (John Blanton, Jr.) he was two good steps away; if he had stopped right then, or maintained his course, I would have hit him with my left front fender; as it was, I hit him on the right side of my car." He also testified that when he first saw the two boys, they were coming toward him from a northwesterly direction; that then John turned off in the opposite direction, which would be in a northeasterly direction. Again he was asked the question [121 P.2d 134]: "With relation to that intersection [where G Street intersects the west roadway of Euclid Avenue] where were you when you first observed the Blanton boys?" His answer to this question, and further questions and answers were: A. "I was even with the curve of the curb line; the front of my bumper was *almost* even with the north curb line." (Emphasis ours) Q. "Go down there and point it out and then we will mark it." (A. "I was coming north, here. (indicating)" Q. "Point to the place where you and your car were when you first observed either of the boys." A. "To the best of my ability my car was practically right there. (indicating)" Q. "Make a little cross there in red—just

draw it in there in the form of a rectangle, so we will have some idea where the front of your car and the rear of your car was." A. "(Witness marks on diagram)" Q. "Now we will mark that place 'C 1' off to the right so we will know what it is."

[20] The original of the map used at the trial and referred to by this witness (Plaintiff's Ex. 1) was forwarded to the District Court of Appeal and is now before us. "C 1", the red rectangle apparently placed thereon by the witness as indicating the location of his car when he first saw the Blanton boys, is clearly shown on this exhibit. It bears out the testimony of defendant Curry that at the time in question "he was even with the *curve* of the curb" but it does not show that he had reached the north curb line. The map is drawn to a scale of 1 inch to 10 feet, and shows that the distance between the north end of the red rectangle and this north curb line is practically 6 feet. The testimony of the defendant Curry places John Blanton, Jr., therefore at least on the north line of, if not within the crosswalk. It is interesting to note that in appellants' opening brief they do not rely upon any evidence of the defendant Curry in support of their claim that John Blanton, Jr., was crossing the roadway at a point other than within the unmarked crosswalk. The only evidence cited in their opening brief upon this subject was the testimony of Virgil Blanton, given by him on cross-examination, in an effort by appellants to impeach this witness by showing that he had made contrary statements on other occasions. This evidence was admitted solely for the purpose of impeachment and could not be considered as independent evidence of any fact to which the impeaching evidence related.

Some reliance is also placed on Curry's testimony that when his car stopped, it was approximately 30 feet from the point where he was when he first saw this boy, and that he stopped in about 12 feet after striking John, which, it is contended, shows that his car traveled 18 feet from the point he was when he first saw the boys to the point where he struck John. We do not think that this conclusion follows from this evidence of Curry. He further testified that as soon as he saw the boys he applied the brakes of his car, and that John Blanton, Jr., changed his course and ran in a northeasterly direction away from the car. With the speed of the car slackened by the application of the brakes and the boy running away from the car, the distance of 18 feet may well have been traveled by the boy before the car finally hit him.

[21] We have carefully and minutely examined the evidence in the case relied upon by the appellants in proof of their claim that the boys when first seen by Curry, and when they first saw him, were crossing the driveway outside the unmarked crosswalk, and we fail to find any such evidence in the entire record. It was therefore not error on the part of the trial court to refuse to give instruction No. 25 proposed by appellants.

"The court refused appellants' instruction No. 10 (O). The evidence produced by appellants indicates that some cars use the east roadway or lane of Euclid Avenue, both northbound and southbound; that a portion of the northbound traffic also uses the east half of the west roadway of Euclid Avenue." Upon cross-examination defendant Curry was interrogated with the apparent effort to establish that the westerly roadway of Euclid avenue was used principally by southbound travel. The purpose of this cross-examination does not clearly appear from the record thereof as revealed by the reporter's transcript. It covers only a single page. The refused instruction was as follows: "You are instructed that at the time and place involved in this case, Euclid avenue consisted of two separate highways; that for the purpose of traveling thereon, each highway constituted a complete highway, which could be lawfully used as such, independent of the other highway, and that upon each of said highways, it was lawful to travel in both directions."

It was held in the case of Raymond v. Hill, 168 Cal. 473, 484, 143 P. 743, under the facts of that case, that it was error to refuse to give such an instruction, and the judgment was reversed for that and other errors. That case was decided before the enactment of section 4½ of article VI of the Constitution. There was no occasion therefore to pass upon the question as to whether the error was prejudicial. Nor does it appear from the decision of that case that the court would have reversed said judgment for that single error had not the court held that there were other serious errors committed by the trial court.

[22, 23] In respondents' brief in answer to the appellants' claim of error for the refusal to give said instruction, it is stated: "At no time was any suggestion made to the jury that the defendant was operating his automobile in an improper roadway, or in an improper direction." There is no denial of this statement by appellants in either their reply brief or in their reply to the petition for hearing. We may well assume, therefore, from this statement and the appellants' failure to deny it, that no claim was made during the trial of the case that the defendant Curry was negligent in driving northerly on the westerly driveway. Assuming therefore that said instruction contains a correct statement of the law respecting travel upon a street or avenue consisting of two separate driveways, as no claim was made during the trial of the case before the jury that defendant Curry was negligent in driving in an improper driveway, it cannot be held that the trial court committed error in refusing to give said instruction. Whether the instruction is a correct statement of the law applicable to the subject under discussion is not necessary for us to decide, and we expressly refrain from rendering any opinion thereon.

"The appellants called Paul V. Snyder, a storekeeper in Upland, California, who testified that on the night of the accident appellant Curry came to his store to make a purchase and upon leaving called attention to the fact that one of the lights on his car was out; that thereupon Curry got into his automobile and changed the beam; that the lights were then satisfactory; that the witness so indicated to appellant who then drove away north on Euclid avenue. At the previous trial Snyder had been called by the appellants and testified to the same effect. Before the second trial, for some reason, Snyder was subpoenaed by the respondents through a Mr. Kerr. After the witness testified for the appellants, upon cross-examination respondents endeavored to impeach his testimony as follows:

"'Q. Did you tell Mr. Kerr at that time, before you came up to this trial to testify for the plaintiff that you would want $25 to come up? A. I told Mr. Kerr that it was worth that much to leave my business and lock it up because I operate it almost single-handed, with the exception of a delivery boy. Q. Mr. Kerr told you that he would give you the exact mileage provided by law plus $4? A. No, he didn't. Mr. Kerr refused to pay me anything. I presume it was because he knew I was subpoenaed by the other side; and he said he had no authority to make any payment. * * * Q. But you demanded $25 of him? A. I didn't demand $25; I told him it was worth that if I closed up my business. Q. And you told him you would not do anything unless you get your $25, isn't that correct? A. No, that is not true.'

"Thereupon the court took up the examination and instead of accepting the witness's testimony that he had not demanded $25 as a fee to appear as a witness for the plaintiffs, assumed the attitude of the attorney for the plaintiff that the witness had demanded $25 as a fee for appearing in court. The court then proceeded to examine the witness upon the assumption that his testimony had been purchased by the appellants as evidenced by the following part of the record: 'By the Court: When you were subpoenaed by the defendants, were you paid a fee? (Objection by Mr. Wilson.) The Court: I want to know if this witness is at all partisan. You will answer the question. (A) I was not paid fees at the time. I was paid fees before I came on the witness stand. Q. Did you demand fees of the process server who served process for the defendants? A. I did, and he told me that he would take care of it under the circumstances that he did at the first trial; due to the fact that I would have extra expense of the store, he was glad to take care of that. Q. How much have you been paid for coming in here? A. $15. * * * Q. And you wanted $25 from the process server of the plaintiff also? A. No, I didn't ask him for $25, I told him that it would cost me that much to come—the loss of time and business. Q. You were attempting to get $25 out of the plaintiff, plus the extent of your extraordinary expenses from the defendant? A. * * * I didn't know how much time would be required, and might have to come one day for one side and one for the other. Q. (By the Court): You realize that courts of law are entitled to some consideration, and your duty is to come in and serve the court when you are served with process. (Objection by Mr. Wilson.) The Court: Overruled. What I am concerned with is the demand of this witness for compensation considerably beyond the statutory requirement, the statutory fees and the statutory mileage; and

the reason I am concerned about that is to determine whether or not this witness is interested, by the fact that he has been paid money by the defendant in excess of that to which he is entitled. A. I didn't know in civil actions that I was forced to comply with subpoenas of that kind; I know that I would in criminal actions. Q. You are a citizen, I take it? A. Yes, sir. The Court (addressing the jury): Because of the extraordinary character of the examination of this witness, you are not to reach a conclusion prejudicial to the defendant, except insofar as the weight of the testimony of this witness is concerned. This witness's examination as to his compensation was to determine the weight of his testimony, as to whether he was influenced by receiving fees beyond the statutory provisions. * * * The only prejudice the defendant can suffer is as to the weight of this witness's testimony. The court made a special inquiry because of the surprise of the court that any man, that any citizen, could think that he had a right to fix his own fee for coming in and testifying in the courts of law. The processes of our courts are mandatory; the functions of government are far more important than the personal rights of any individual and our citizens must respond to the agencies of the government *without being bought.*' (Italics ours.) 'Mr. Wilson: With all due respect and deference to Your Honor, may I now note an exception to the concluding remarks of the court insofar as they may, if they do, reflect on the defendant or the defendants' case now on trial? The Court: Very well, you may have an exception.'

"It is now contended by the appellants that the effect of this examination by the court, regardless of his instructions or his statements, was to leave the jury with the impression that the testimony of the witness had been purchased by the appellants; that the witness had committed some irreparable offense for accepting money from a person who was willing to reimburse him against loss; that regardless of the witness's denial, the court was convinced that he had demanded a witness fee of $25 from the defendants and that no weight should be given to this testimony; that the attitude of the court, as expressed by his words and actions, resulted in a complete rejection of the witness's testimony and a natural discrediting of the appellants' case."

[24, 25] The cross-examination of this witness by the court can neither be justified nor approved. It undoubtedly impaired, if it did not entirely destroy, the weight of the evidence given by the witness. The admonition of the court that the jury should not, by reason of such cross-examination, reach a conclusion prejudicial to defendant, could not in our opinion remove the injury resulting from such examination. Had the testimony of this witness related to matters which involved the entire defense of appellants, then it would be necessary to hold that the error of the court was prejudicial to their rights. However, his evidence relates to but one phase of the case before us, that in regard to the lights on Curry's machine. As Justice Marks stated in his dissenting opinion in this case: "If those lights had been illuminated Curry should have seen the two boys in the unmarked cross-walk and should have yielded the right of way to them. If they were not illuminated, that fact, in itself, constituted negligence." Conceding that they were illuminated, then Curry was not negligent in driving without his lights burning, but that fact did not excuse him in failing to yield the right of way to the respondent John Blanton, Jr., as the latter was crossing the roadway in an unmarked crosswalk. With this fact established by the undisputed evidence in the case, the negligence of the defendant Curry was clearly proven as the proximate cause of the injury sustained by the respondents.

[26] While there were errors committed during the trial of the case they were not of such a serious character as to unduly prejudice the rights of the appellants. They do not therefore justify a reversal of the judgment.

The judgment is affirmed.

BEELER v. AMERICAN TRUST CO.*

Civ. 6693.

District Court of Appeal, Third District, California.

Sept. 14, 1942.

Rehearing Denied Oct. 14, 1942.

Hearing Granted Nov. 12, 1942.

1. Mortgages ⇐36

In the absence of language to the contrary employed in a deed, it is presumed to be an absolute conveyance of the land described therein and not a mere mortgage to secure the payment of a debt.

2. Mortgages ⇐38(2)

To overcome the presumption that a deed, in the absence of language to the contrary, is intended to be an absolute conveyance of the land, the proof that it is mutually understood by the parties to be a mere mortgage to secure a debt must be clear, satisfactory and conclusive.

3. Mortgages ⇐32(2)

To convert a deed which is absolute in form into a mortgage, it is not enough to prove merely that the grantor intended it as security only of the debt but it is necessary to show that both grantor and grantee so understood the transaction.

4. Evidence ⇐462

Where a deed is accompanied, as a part of the same transaction, by a written instrument in which the intention of the parties as to the character of the deed is clearly expressed, in the absence of fraud or mutual mistake, the language of the accompanying document may not be changed or varied by oral testimony in conflict therewith.

5. Mortgages ⇐1

Strictly, a "mortgage" is not a conveyance of legal title to land but merely a transfer of equitable title to secure the debt.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

6. Estoppel ⇐83(5)
Mortgages ⇐37(2)

In grantor's action to have a deed absolute in form declared a mortgage, where deed was accompanied by grantor's sworn written statement that it was an absolute conveyance and not a mere mortgage to secure an antecedent debt, and no fraud was charged grantor's oral testimony that the deed was intended only as a mortgage was incompetent as attempt to vary terms of written instrument and grantor was "estopped" from denying the statement.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Mortgages ⇐38(1)

In action to have deed absolute in form declared an equitable mortgage, findings of trial court that the deed was intended to be a mere mortgage to secure an antecedent debt were not sustained by competent evidence.

Appeal from Superior Court, Tehama County; Herbert S. Gans, Judge.

Action by C. W. Beeler against American Trust Company to have a deed absolute in form declared an equitable mortgage, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

Brobeck, Phleger & Harrison, and M. B. Plant, all of San Francisco, and Carr & Kennedy, of Redding, for appellant.

Carter, Barrett & Carlton, of Redding, Howard S. Clewett, of Paradise, and McGregor, McGregor & McGregor, of Santa Barbara, for respondent.

THOMPSON, Justice.

The American Trust Company has appealed from a judgment declaring that a deed to real property in Tehama County which is absolute on its face is a mere mortgage to secure an antecedent debt. The deed was accompanied by a verified affidavit of the grantor asserting that the deed was an absolute conveyance of the property and that it was not intended as a mortgage. Oral evidence of the grantor was received over the objection of the appellant, contradicting his own affidavit.

Prior to June 28, 1937, Henry Weiss owned a large tract of land in Tehama County, subject to a trust deed dated March 21, 1933, to secure two promissory notes for the aggregate sum of $74,000 due and payable July 28, 1937, at 5½ per cent interest, held by the appellant bank. In October, 1936, notice of foreclosure and sale was served. At the request of Mr. Weiss, the sale was delayed to give him an opportunity to try to find a purchaser. In June,

* Subsequent opinion 140 P.2d 814.

1937, Weiss brought the respondent Beeler to see the appellant, saying he would purchase the ranch if the debt was discounted and reduced to a satisfactory figure. Mr. Hammond, the assistant vice president of the appellant bank, agreed to accept $55,000 in cash in lieu of the debt if that sum were paid within thirty days therefrom. June 28, 1937, Mr. Weiss deeded the ranch to the respondent. By the express terms of that deed the respondent Beeler assumed and agreed to pay the debt. Accompanying that deed, Mr. Weiss executed and delivered to the respondent a bill of sale of the personal property on the ranch. As part consideration for that deed the respondent then executed and delivered his promissory note payable to Weiss in the sum of $5,000.

On September 1, 1937, no part of said sum of $55,000 in satisfaction of the debt had been paid. On the last-mentioned date the appellant served upon the respondent and upon Mr. Weiss a second notice of foreclosure and sale. The debt had then increased to the aggregate sum of $81,000.

Subsequent to said notice and on September 22, 1937, the respondent visited the appellant and again urged it to accept in lieu of said debt a substantially-reduced sum and to continue to carry said indebtedness to be secured by mortgage, which the appellant refused to do. The appellant then consented to accept an absolute deed of conveyance to the real property in satisfaction of the debt, but offered to execute to the respondent a lease of the premises for a period of one year at a rental of $3,000 per annum on condition that the respondent pay all taxes and maintenance of the property, including therein an option to purchase said land at any time during the term of the lease for the sum of $60,000. This was agreed to by the respondent, who on September 27, 1937, executed and delivered to the appellant a deed of conveyance to said real property which was absolute on its face. At the same time the appellant executed a deed of reconveyance of the trust deed which it held as security for the payment of said indebtedness in which instrument the appellant acknowledged full satisfaction of the debt. Both of these documents were duly recorded. Accompanying said deed of conveyance and as a part of the same transaction, the respondent executed and verified his affidavit in which he acknowledged that said deed dated September 27, 1937, "is intended to be and is an absolute conveyance of the title to said premises to the grantee named therein, and was not and is not now intended as a mortgage, trust conveyance or security of any kind; that it was the intention of affiant as grantor in said deed to convey, and by said deed, this affiant did convey to the grantee therein all his right, title and interest absolutely in and to said premises; that possession of said premises has been surrendered to the grantee; that in the execution and delivery of said deed affiant was not acting under any misapprehension as to the effect thereof, and acted freely and voluntarily and was not acting under coercion or duress; that the consideration for said deed was and is the full cancellation of all debts, obligations, costs and charges secured by that certain deed of trust heretofore existing on said property. * * * This affidavit is made for the protection and benefit of the grantee in this deed, its successors and assigns."

The respondent failed and neglected to pay the taxes on said property as agreed by the terms of the lease. In July, 1938, the appellant brought suit in unlawful detainer for the breach of the terms of said lease. On account of a defect in the notice of breach the suit was decided against the appellant.

On October 19, 1938, the respondent brought this suit to declare that his deed of conveyance to the appellant was a mere mortgage to secure the antecedent debt. In the complaint in this suit it is alleged that the appellant agreed to reduce the debt amounting to $81,000 to the sum of $60,000 to be paid at the rate of 5 per cent interest per annum within the period of one year as provided by the terms of the lease and that the appellant accepted the deed of conveyance as a mere mortgage to secure that debt.

To this complaint the appellant filed an answer and cross-complaint denying the material allegations of the complaint and asserting that the deed was intended to be and is an absolute conveyance of the real property and not a mere mortgage to secure an antecedent debt.

The court adopted findings favorable to the respondent in every particular. Judgment was accordingly rendered against the appellant, determining that the deed of conveyance was intended to be and is a mere mortgage to secure the indebtedness for the agreed amount of $60,000, together with interest at the rate of 5 per cent per annum,

according to the terms expressed in the lease. From this judgment the American Trust Company has appealed.

The question to be determined is whether there is substantial evidence to support the findings that the deed of conveyance of September 27, 1937, from C. W. Beeler to American Trust Company was absolute in effect or whether it was intended by the parties thereto as a mere mortgage to secure the payment of only the sum of $60,000, together with interest thereon, and whether the court erred in permitting the respondent to vary the terms of his written and verified declaration accompanying the deed to the effect that said conveyance was deemed to be absolute and that it was not the intention of the parties that it should become a mere mortgage to secure the payment of the indebtedness.

Several issues which have been elaborately argued by respective parties are not necessary to determine, in view of our conclusion that the grantor's unqualified declaration in his verified affidavit accompanying the deed, that it was intended to be an absolute conveyance of the land in full satisfaction of his debt and on the contrary that it was not intended as a mortgage to secure the payment of that debt, in the absence of fraud or mistake, is conclusive of that issue and estops the grantor from denying that fact.

[1–3] In the absence of language to the contrary employed in a deed, it is presumed to be an absolute conveyance of the land described therein and not a mere mortgage to secure the payment of a debt. Woods v. Jensen, 130 Cal. 200, 203, 62 P. 473. Since owners of land have frequently executed deeds, absolute in form, and have delivered them with the mutual understanding between the parties that they were intended to become mere mortgages to secure antecedent debts, an exception to the well-established rule of evidence with respect to varying the terms of written instruments has developed, permitting proof of that intention to be established by parol evidence. But, to overcome the presumption that a grant, bargain and sale deed, in the absence of language to the contrary, is intended to be an absolute conveyance of the land, the proof that it is mutually understood by the parties to be a mere mortgage to secure a debt must be clear, satisfactory and conclusive. Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898; Wehle v. Price, 202 Cal. 394, 397, 260 P. 878; Woods v. Jensen, supra. To convert a deed which is absolute in form into a mortgage it is not enough to prove merely that the grantor intended it as security only of a debt, but it is necessary to show that both the grantor and the grantee so understood the transaction. Davis v. Stewart, 31 Cal.App. 2d 574, 577, 88 P.2d 734; Wehle v. Price, supra.

[4, 5] There is sound reason for the rule that when a deed is silent with respect to the intention of the parties regarding its character, parol evidence may be received to show that it was mutually agreed that it should be considered to be a mere mortgage to secure an antecedent debt, but when the deed is accompanied, as a part of the same transaction, by a contemporaneous written instrument in which the intention of the parties in that regard is clearly expressed, in the absence of fraud or mutual mistake, the language of the accompanying written document may not be changed or varied by oral testimony in conflict therewith. People ex rel. Ford v. Irwin, 18 Cal. 117; Bilbo v. Ball, 194 Iowa 875, 188 N.W. 753, 760; Annotation, 111 A.L.R. 448.

The reason for this relaxation of the rule precluding parol evidence to vary the terms of a written instrument accompanying a deed has been accounted for by stating that since a deed is unilateral in nature and contemplates the performance of an antecedent agreement, the real intentions of the parties with respect to the purpose and character of the instrument should be permitted to be shown. Strictly speaking, a mortgage is not a conveyance of the legal title to land, but is merely a transfer of the equitable title to secure a debt. Since deeds are frequently given for the purpose of securing debts only, when the instruments contain no language specifically refuting that fact, as an exception to the parol evidence rule, oral testimony may be received to show the mutual intention of the parties on the theory that the circumstances surrounding the transaction are competent for that purpose. We assume that if the language of the deed specifically declares that the instrument shall be deemed by the parties thereto to be an absolute conveyance and not a mere mortgage to secure an antecedent debt, the grantor will be estopped from orally contradicting that acknowledged fact, in the absence of proper allegations and proof that the deed was procured by fraud or mutual mistake. Third St. Imp. Co. v. McLelland, 23 Cal.App. 369, 137 P.

1089. Certainly when a deed which is absolute in form is accompanied by an executed and sworn statement of the grantor, as a part of the same transaction, indicating that it was the intention of the parties to consider the deed an absolute conveyance and not a mere mortgage to secure an antecedent debt, in the absence of fraud or mutual mistake, that verified written instrument may not be disputed or changed by oral evidence received over objection and in absolute conflict therewith. Such procedure would destroy all barriers with which the law has surrounded written instruments to protect them against fraud and chicanery.

[6] In the present case the court clearly erred in overruling appellant's objections to the respondent's oral testimony contradicting his own verified written declaration which was executed and delivered contemporaneously with the deed, as a part of that transaction, clearly asserting in language which is neither doubtful nor uncertain, that the deed was deemed by both parties to be an absolute conveyance of the land, and not a mere mortgage to secure indebtedness. Fraud with respect to the procuring of neither the deed nor the accompanying affidavit was alleged or proved. Fraud was not an issue in the case. A cancellation or modification of the terms of the written instrument was not sought. In view of the clear declarations of that written instrument, the respondent should be estopped from denying its terms by mere oral testimony in conflict therewith. The introduction of that parol evidence was a violation of the well-established rule against varying the terms of written instruments. It was incompetent. The language of the written instrument is controlling in that regard. There is therefore no competent evidence in the record to sustain the findings of the court to the effect that the deed was intended to be a mere mortgage to secure a debt of $60,000. It becomes necessary to reverse the judgment on that account.

Regarding the application of the rule that parol evidence may not be received to vary or dispute the terms of a written instrument concerning the purpose of executing a deed, the heading to an elaborate annotation of authorities on that subject appears in 111 A.L.R. p. 448, at page 459, correctly stating the law as follows:

"The American decisions (with the exception of that class of cases dealt with in III a, supra) justify the general conclusion that where a memorandum of agreement executed prior to, or contemporaneously with, a conveyance of land, shows without ambiguity the purpose for which the deed is given, and directly, or in necessary effect, negatives the existence of any indebtedness on the part of the grantor to be secured by the deed, parol evidence to show that a mortgage was intended is not admissible.

"Since a deed implies an antecedent contract for the giving thereof, which is not incorporated in the deed, the contract may be inquired into for the purpose of construing the character of the deed as an absolute conveyance, or as a mortgage. If such contract is oral, it is necessarily proved by parol evidence; *while if in writing it is proved by the writing.* 'If by the express terms of the written contract an absolute sale of property is disclosed, parol evidence is not admissible to show that the intent of the parties was something else.'" (Italics added.)

The purpose and limitations of the parol evidence rule under the circumstances above referred to, are aptly stated in the case of Bilbo v. Ball, supra [194 Iowa 875, 188 N.W. 760], as follows:

"The rule invoked herein in its primary form is that a deed absolute on its face may be shown by parol evidence to have been mutually intended as a mortgage, provided the evidence is clear and satisfactory to that end. This rule may be regarded as in the nature of an exception to the parol evidence rule, or its consistency therewith may be maintained in argument, as it often is on the theory that a deed is unilateral; that it is the performance and consummation of an antecedent contract; that it implies an antecedent contract which is not incorporated therein; and that therefore such contract may be inquired into for the purpose of construing the character of the deed.

"This opens the door to the proof of such prior contract, whether it be written or oral. If oral, it is necessarily proved by parol evidence; *if in writing, it is proved by the writing. Whereas it is true, therefore, that a deed absolute on its face may be by parol evidence explained as a mortgage, it is not true that the same rule applies to a written contract between the parties. Where such written contract purports to state the mutual undertakings of the parties thereto, it cannot, in the absence of fraud, mistake, or ambiguity, be contradicted or varied by parol evidence. If by the express terms of the written con-*

tract an absolute sale of property is disclosed, parol evidence is not admissible to show that the intent of the parties was something else." (Italics added.)

The California case of People ex rel. Ford v. Irwin, supra, is in exact accordance with the limitations of the rule as stated above. That decision has never been modified or changed in our state. It appears to be decisive of that issue in the present action. In that case, one Arnold owed the plaintiff, Ford, $8,600. Arnold conveyed the real property in question by grant, bargain and sale deed, to Ford, who, at the same time delivered to Arnold a written agreement to reconvey the property, in which it was stated that,

"This shall only be treated as a contract to convey, and not as an acknowledgment that said conveyance from Arnold and wife to myself was intended as a mortgage."

Litigation subsequently ensued, in which it was contended the deed was a mere mortgage to secure the debt. The trial court so held. On appeal the Supreme Court reversed the judgment and held that the above-quoted language of the agreement accompanying the deed was controlling to the effect that the deed was intended by the parties thereto to be an absolute conveyance of the land and not a mere mortgage to secure the debt.

The Supreme Court said that, except for the controlling language of the written agreement above quoted, there was adequate oral evidence to sustain the trial court's findings that the deed was intended as a mortgage. But the court said as a basis for reversing the judgment:

"In the absence of the contract the inference that the debt was extinguished upon the execution of the deed would necessarily prevail; and when we look to the contract, we find that so far from removing this inference, it contains an express provision confirming and sustaining it."

Applying the foregoing language to the present case there can be no doubt that the written unilateral agreement of the grantor, Beeler, accompanying the execution and delivery of the deed, as a part of that transaction, precluded him from subsequently contending that the deed was intended by the parties thereto to be a mere mortgage to secure the antecedent debt and not an absolute conveyance of the land.

The respondent is mistaken in asserting that the Ford case did not contain oral evidence in conflict with the accompanying written agreement. The court specifically declares that except for the written agreement the deed might be held to be a mere mortgage, but that the language of that contract is controlling in that regard, and precludes that construction of the instrument.

[7] The record is replete with documentary and oral evidence, independently of the respondent's accompanying affidavit, indicating that it was definitely understood by the parties to the deed that it was to be considered an absolute conveyance and not a mere mortgage to secure a debt. The land belonged to Henry Weiss who owed the bank $74,000. To secure payment of that debt, Weiss executed a deed of trust to the bank. He was unable to pay the debt and was in default with respect to accrued interest. After negotiations with the bank and a delay of nine months, during which he sought unsuccessfully to sell the land, he conveyed title to the respondent, Beeler, who merely gave him his promissory note for $5,000, and assumed the mortgage. Beeler did not even pay that note, but was sued by Weiss for the amount. The bank refused to extend or renew the loan to Beeler. The debt had increased until it amounted to over $82,000. Beeler finally executed to the bank a grant, bargain and sale deed, absolute on its face, accompanied by his verified affidavit declaring unequivocally that the deed was intended to be an absolute conveyance and not a mere mortgage to secure the debt. At that time the bank executed and recorded a reconveyance of its trust deed reciting full satisfaction of the debt. The bank then executed a lease upon the property for one year for a rental of $3,000 per annum, with the provision that the lessee should pay all taxes and assessments and cost of upkeep of the property. The respondent failed to pay the first installment of taxes. The lease contained an option permitting the lessee to purchase the property at any time within the term of the lease for $60,000. The bank entered upon its books a memorandum of full satisfaction of the debt by its acceptance of the deed from Beeler. These, and many other facts disclosed by the record, strongly indicate, independently of the respondent's affidavit, that the parties did not mutually agree or intend that the deed should be accepted as a mere mortgage to secure the former debt.

For the reason that the court erred in receiving oral testimony over the objections

of the appellant, impeaching the unqualified declarations of the grantor in his verified affidavit accompanying the deed in question, and that, in the absence of that incompetent evidence, the findings that the deed was intended as a mortgage, are not supported by any substantial evidence, the judgment is reversed and the court is directed to render judgment quieting title to the land described in the pleadings in favor of the appellant, American Trust Company, a corporation.

ADAMS, P. J., concurred.



54 Cal.App.2d 421

CONTRERAS et al. v. GUMMIG.

Civ. 13077.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1942.

Rehearing Denied Oct. 17, 1942.

See 129 P.2d 945.

1. Appeal and error ⇐927(7)

On appeal from a judgment, based on a directed verdict for defendant, the District Court of Appeal was required to view the evidence in the light most favorable to plaintiffs.

2. Trial ⇐178

On defendant's motion for a directed verdict, plaintiffs were entitled to the benefit of all reasonable inferences to be drawn from the evidence.

3. Physicians and surgeons ⇐18(8)

In malpractice action against physician for death of patient from myocarditis after nasal hemorrhage for which physician treated the patient, evidence established a prima facie case of negligence on part of physician.

4. Physicians and surgeons ⇐18(9)

In malpractice action against physician for death of patient from myocarditis after nasal hemorrhage for which physician treated the patient, whether physician's treatment was the "proximate cause" of the patient's death was for the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

5. Evidence ⇐558(1)

In malpractice action against physician for death of patient from myocarditis after a nasal hemorrhage, where medical witness stated that autopsy showed death was caused by chronic myocarditis, and that he could not determine whether decedent had suffered a hemorrhage, excluding plaintiff's questions and offer of proof attempting to show the extent of knowledge of the witness upon which he based his conclusion and whether he would have arrived at a different one as to the cause of death, if he had known that deceased had suffered a hemorrhage was error.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Armando Contreras, and others against Dr. E. A. Gummig, also known as Dr. Ernest A. Gummig, to recover for the wrongful death of Angel Contreras, deceased, as result of alleged malpractice by the defendant in rendering medical treatment to the deceased. From a judgment, based on a directed verdict, the plaintiffs appeal.

Judgment reversed.

Walter Powers and Stephen Monteleone, both of Los Angeles, for appellants.

W. I. Gilbert, Jr., of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff Juana Contreras is the widow of Angel Contreras. The eight other plaintiffs are infant children of Angel Contreras, deceased, and appear herein by their guardian ad litem, Juana Contreras. As the heirs at law of said deceased, the plaintiffs commenced this action for damages for the wrongful death of Angel Contreras allegedly resulting from malpractice by defendant, a physician, in rendering medical treatment to him. Judgment, based upon a directed verdict, was for defendant and plaintiffs appeal therefrom.

When the plaintiffs concluded their evidence the defendant rested his case, did not offer any evidence, and made a motion for a directed verdict upon the following grounds: (1) that no claim, as provided by law, was filed with the defendant, who

was an employee (emergency surgeon) of the City of Pasadena; (2) that the cause of death was acute alcoholism, myocarditis and arteriosclerosis; and (3) there was a failure of proof that defendant did not exercise the ordinary degree of care and skill exercised by physicians and surgeons in the community at that time, and that there was a failure of proof that such negligence, if any, was a proximate cause of the death. The motion was granted.

Respondents concede that under the decision in Jackman v. Patterson, 1940, 42 Cal.App.2d 255, 108 P.2d 682, there was no requirement that plaintiffs should file a claim with defendant. That case held that the statute (Act 5150, as amended, 1937, Deering's Gen.Laws) upon which defendant relied in asserting that the filing of a claim was necessary was unconstitutional insofar as it related to the kind of claim involved herein.

[1] Viewing the evidence in the light most favorable to plaintiffs as the court is required to do in considering a motion for a directed verdict the following appears:

In response to a call for an ambulance of the City of Pasadena, the defendant, a surgeon at the emergency hospital of that city, went in an ambulance on November 25, 1938, about 10 p. m., to a place in that city where Angel Contreras, sitting on a street curb, was having, according to defendant's testimony "a profuse nasal hemorrhage" and "had blood smeared all over his clothing and face." While the defendant was there, about 5 minutes, a spot or pool of blood about 20 inches in diameter was in the gutter in front of Contreras and blood was running out from the edge of the curbing. Defendant did not treat Contreras at the curb scene, but, with assistance of the ambulance driver, put him in the ambulance and took him to the emergency hospital. Defendant did not ask Contreras any questions, or attempt to get a history of his injuries, at the curb or at the hospital. Contreras had a bruised face and nose. He was forty-five years of age. (Contreras was a Mexican, was intoxicated, and had an odor of alcohol on his breath. It did not appear whether he was able to speak English.)

Defendant looked with his "naked eye" into Contreras' nostrils to see from what portion of the nostrils the blood was coming, but did not do anything to determine whether it was coming from the anterior. After arriving at the hospital, defendant spread the nasal openings with a speculum and packed tightly in each nostril about two yards of gauze an inch wide soaked in adrenalin. About 10 minutes thereafter, Contreras having pulled the first packing out and started to bleed, defendant packed the nostrils again in the same manner and fastened the gauze in by putting adhesive tape across the nostrils.

In a conversation with defendant, a police officer "suggested to Dr. Gummig that the man (Contreras) be given further hospitalization and taken to the hospital," and defendant said they would not accept him at the hospital and it was "all right to put him in jail." Contreras then was put in the "drunk tank" in jail. About 12:45 a. m., the jailer noticed that the packing was out of Contreras' nose, he had "bled a pool of blood" about 12 inches in diameter on the jail floor in about 30 minutes, and he took him to the emergency hospital again. Defendant repacked his nostrils in the same manner as on the two previous occasions, did not make any inquiry of anyone concerning when he started to bleed and did not make any physical examination of him. He was taken back to jail about 1:30 a. m., and handcuffs with a long connecting link were put on him which held his hands down to the rear. He was placed in a sitting position on the floor and propped up in a corner. About 3:30 a. m. he was perspiring. At 4:15 a. m. he was dead, in the same sitting position with the manacles on. At the first and last packings he was given a hypodermic of ⅙ of a grain of morphine.

A duly licensed physician and surgeon, who had practiced in California since 1922, was called as a witness by plaintiffs and qualified as an expert in the treatment of nasal hemorrhage. He was asked a hypothetical question based upon assumed facts, justified by and embodied in the evidence concerning the condition and medical treatment of Contreras. In that hypothetical question he was asked whether or not the doctor exercised that degree of skill, care and learning usually exercised by a surgeon in the same or similar community under the same or similar circumstances. In answer to such question he stated, "He did not exercise the ordinary degree of skill and care."

As reasons for his opinion, he stated: that when the hemorrhage started again about midnight and the patient was brought to the doctor for the third packing, the usual practice under such circumstances was to determine the extent of the bleeding which preceded the treatment because the less blood the patient has, the poorer his resistance is, and the more likely injuries may result to the functioning parts of the body; that the heart tries to make up for the loss of blood pressure by increasing its beat, the blood pressure gets less and less, and the heart tries to get faster and faster; that the loss of blood when chronic myocarditis is present would be the same as over-exertion or any tremendous amount of work thrown upon a heart muscle and it would have a "probable effect and (on) his death"; that the usual practice in packing the nose when the doctor first sees a nasal hemorrhage is to put in the plug or pack it back with ordinary gauze, but if it is not effective and the patient continues to bleed something must be inserted behind "in which to pack because the mere fact that you did not stop the hemorrhage proves that the first method was not good enough."; that when the packing was out about midnight and the patient had bled a quantity of blood covering a space of 12 inches in diameter on the floor within 30 minutes, the usual method is to plug up the posterior part of the nose by introducing a catheter through the nose to which a string is attached, then a large piece of gauze, usually roll bandage, is attached to the string and the string is pulled so "the plug is pushed into the back part of the nose so that it gives something against which you can effectively put pressure" necessary to stop the bleeding vascular surface; that the usual method of examining the nose to determine the place from which the blood is coming is to insert a speculum into the nose and with reflected light, from a head mirror with a hole in the center, look parallel with the reflected light into the nose; that the usual practice when the source of the bleeding is located is to apply chromic acid thereto which causes a solid area to develop so bleeding stops; that the usual practice is to inject some substance to increase the coagulate ability of the blood; that adrenalin applied to the nostrils causes a contraction of the small blood vessels and is a temporary means of treatment, lasting about ½ hour.

The autopsy surgeon testified that the cause of death was chronic myocarditis and that the deceased also had arteriosclerosis; that he had a soft flabby heart that showed definite myocardian degeneration; that he could not determine from the autopsy whether he had had a hemorrhage; that he did not examine his bowels or stomach to see whether blood was in them.

[2] The above evidence was that most favorable to plaintiffs. No evidence was offered by defendant. Plaintiffs were entitled to the benefit of all reasonable inferences to be drawn from the evidence. Defendant knew when he was at the street curb that Contreras was having a profuse nasal hemorrage. It was reasonable to infer that defendant knew by reason of the amount of blood on the street, on Contreras' face, and on his clothing, that Contreras had lost considerable blood before defendant arrived at the curb scene.

A qualified medical expert testified that the defendant did not exercise the ordinary degree of skill and care exercised by surgeons in that community in the treatment of such a hemorrhage.

Defendant examined the nostrils with the "naked eye" to locate the source of the bleeding. If he did locate such source, he did not apply chromic acid on that area. He did not inject a substance to increase coagulation. When the second packing was out of the nostrils about midnight and Contreras, bleeding again, was brought to defendant for further treatment, defendant did not determine or attempt to determine the extent of the bleeding (which was the pool of blood 12 inches in diameter on the jail floor) which preceded his return. At that time defendant repacked the nostrils anteriorly in the same manner as he had packed them on two previous occasions.

The expert witness testified that the usual practice was as follows: (1) in locating the source of bleeding to insert a speculum into the nostrils, then with reflected light look therein; (2) to apply chromic acid to the area which was the source of the bleeding in order to cause a solid area to develop; (3) to inject some substance to increase coagulation; (4) upon return of the patient for repacking to determine the extent of the bleeding which preceded such return; and (5) when the doctor first saw the patient, to pack the nostrils anteriorly with ordinary gauze, but if that packing did

not prove effective then to pack the nostrils posteriorly with a large piece of gauze, usually roll bandage.

It therefore appears from the expert's testimony, adopting the view most favorable to plaintiffs, that the defendant did not follow the usual practice in at least four respects: he did not use the speculum to locate the bleeding area; he did not apply chromic acid to that area; he did not inject a substance to increase coagulation; and he did not attempt to determine the extent of the bleeding which preceded the return of the patient.

Whether the defendant, in packing anteriorly instead of posteriorly when the patient was returned, failed in a further respect to follow the usual practice, as stated by the expert, depends upon the fact whether or not the prior packing was effective.

Defendant asserts that the expert's testimony did not condemn the method used by defendant for the reason he said that anterior packing was proper in the first instance, but if it did not prove effective and the bleeding continued then posterior packing was required; that it was not shown that the packing was not effective; that the bleeding continued not because the method of packing was ineffective, but for the reason the packing was removed by Contreras.

It is not a necessary conclusion that Contreras removed the packing which was in prior to his return to defendant. Although the jailer (who was not present when the packing was removed or came out) testified that Contreras "had pulled the packing out," the competent testimony by the jailer was that a "piece of packing" was hanging to Contreras' nose and he was "still in that position" (referring to Contreras as he sat at a table with his head in such a position that the jailer "lifted his head up" in order to "see him").

A pool of blood 12 inches in diameter was upon the jail floor. It may have been there because the anterior packing was not effective or because Contreras or someone removed the packing or interfered with it.

If the packing was not removed or interfered with by Contreras or anyone, the fact that the amount of blood indicated above had accumulated on the jail floor would be some evidence that the packing was not effective and that a posterior packing should have been used when Contreras was returned for a repacking of the nostrils. Whether the packing was removed or interfered with was a question of fact.

If the packing was not removed or interfered with by anyone and nevertheless it came out, the fact that it came out and the bleeding continued would be some evidence that the anterior packing was not effective and that a posterior packing should have been used in the repacking to give, as stated by the expert, "something against which you can effectively put pressure necessary to stop the bleeding vascular surface." Whether the packing came out even though no one interfered with it was a question of fact.

The medical expert testified that adrenalin, in which the packing used by defendant was soaked, caused a contraction of the small blood vessels and that it was a temporary treatment which lasted about ½ hour. If the blood accumulated on the jail floor after the adrenalin had lost its effectiveness and while the packing remained in the nostrils, those facts would be some evidence that the packing was not effective. Whether the packing was effective only while the adrenalin was effective was a question of fact.

It does not appear that defendant, at the time of repacking or at all, made any inquiry, or that he was informed, concerning any happenings in the jail which would be a factual basis for determining whether the prior packing was effective or whether he should use a posterior packing.

Relative to the question whether or not the anterior packing was effective, the testimony presented questions of fact for the jury as above indicated.

The determination of those questions would be the basis for determining the further question of fact whether the anterior packing was effective. If it should be determined it was not effective then a further question of fact would be presented, namely, whether the defendant should have used a posterior packing when Contreras was returned to defendant for repacking of the nostrils.

Irrespective of the question of fact concerning anterior or posterior packing, however, questions of fact for the jury in addition thereto were presented, as above stated, by the testimony of the expert as to whether defendant failed to follow the usual practice in not using the speculum to locate the source of bleeding, in not using chromic acid, in not injecting coagulation substance, and in not attempting to determine the extent of the bleeding which preceded the repacking.

The statement in Nelson v. Painless Parker, 1930, 104 Cal.App. 770, 774, 286 P. 1078, 1080, is applicable here: "But as has been said heretofore, there was some testimony of experts relative to what should have been done by the operating dentist, and it was for the jury to determine the facts."

[3] It therefore appears that a prima facie case of negligence was established.

Defendant claims there was no evidence, if the defendant was negligent, that the negligence contributed proximately to the death. The argument of defendant is that if defendant should have packed decedent's nostrils posteriorly when he was returned for repacking, that his failure so to pack them could not have been a proximate cause of death; that the loss of blood covering areas 20 inches in diameter and 12 inches in diameter occurred prior to the time the expert said a posterior packing was indicated, namely, prior to the time he was returned for repacking; that under the expert's testimony the proximate cause of death was the loss of blood that had already occurred before repacking; that the autopsy surgeon said the cause of death was chronic myocarditis; and that no causal connection was shown between the treatment and the death.

The expert testified that when chronic myocarditis is present a hemorrhage would have an effect on the heart the same as over-exertion or any tremendous amount of work thrown upon a heart muscle, and it would have "a probable effect and (on) his death." He said in giving his reasons for that opinion: "When the general blood pressure falls below a certain level, the heart muscle itself is one of the first tissues to feel that, and the circulation of the heart muscle is naturally very indispensable to the contractions of the heart muscle itself." He also said concerning the heart: "When you have hemorrhage any place in the body the heart first tries to make up for the loss of blood pressure which is necessary for tissues to function, by increasing its beat. One of the first signs of hemorrhage, in other words, is an increase of pulse rate, and a vicious circle starts, because if the point of bleeding is not checked then, of course, the blood pressure gets less and less, and the heart tries to get faster and faster."

In the case of McBride v. Saylin, 1936, 6 Cal.2d 134, 56 P.2d 941, plaintiff was struck in the eye by a nail head and lost his sight in that eye. Defendants, who were physicians, rendered medical treatment to plaintiff for the injury but did not remove a piece of steel from the eye. Later the steel was removed by other physicians. The action was for damages for malpractice. A medical expert called by plaintiff testified that the loss of sight was caused by the entrance, presence and removal of a foreign body; that the removal had nothing to do with the loss of vision, and that the length of time the particle stayed in the eye contributed considerably to the loss of vision. The court said at page 139 of 6 Cal.2d, at page 943 of 56 P.2d, "'* * * the evidence establishes sufficiently at least for a prima facie case, that * * * lack of' professional 'care' and skill 'was the proximate cause of the loss of sight. "If * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312.'"

In Sim v. Weeks, 1935, 7 Cal.App.2d 28, 45 P.2d 350, the action was for damages for malpractice. Defendant, a physician, reduced a bone fracture in plaintiff's arm. Paralysis, caused by the impairment of the blood circulation, developed in the arm. Defendant claimed the evidence was not sufficient to establish a causal connection between the treatment and the paralysis. A medical expert called by plaintiff testified that the elbow joint had been flexed as far as it could possibly go under pressure, that the bandage was too tight, and the treatment in that regard was not usual when measured by the requisite standard. In quoting from another case the court said at page 38 of 7 Cal.App.2d, at page 355 of 45 P.2d: "'Upon the issue of whether defendants were guilty of malpractice * * the expert could and did give opinion evidence. * * * When a result may or may not be occasioned by malpractice, an expert medical witness invades the province of the jury when permitted to go beyond stating that it could and in saying that it did occasion the result. Such an opinion is but the private judgment of the witness and not competent evidence. Whether the alleged malpractice could occasion the result complained of was one of science only. Whether malpractice did occasion such result was in controversy, and therefore not one of mere science. * * * But, when

a result could have been occasioned by one of two or more causes, the ultimate fact of which cause occasioned the result is for determination by the jury, and a medical expert may not, in case of conflicting evidence, invade the province of the jury and testify that the result was in fact occasioned by one cause only.' An expert should not be permitted to express an opinion as to an ultimate fact which is to be decided by the jury."

[4] There was no conflicting medical expert testimony herein. The expert called by plaintiff testified that such a loss of blood would have a probable effect on Contreras' death. The evidence established sufficiently for a prima facie case a causal connection between the treatment and the death. The question of proximate cause was for the jury to determine.

[5] Appellants (plaintiffs) contend further that the court erred in sustaining objections to certain questions which plaintiffs asked the autopsy surgeon, and in sustaining an objection to an offer of proof. The witness stated that the autopsy showed that death was caused by chronic myocarditis. He said he could not determine from the autopsy whether decedent had suffered a hemorrhage.

Thereupon plaintiffs asked the autopsy surgeon the following question: "Now, doctor, assuming that this man had a profuse nasal hemorrhage previous to his death, what in your opinion would the hemorrhage—what effect, in your opinion, would that hemorrhage have on the man who had the heart condition that you determined that this man had from your autopsy?" An objection was made to this question on the ground that the witness had not said that he had an opinion. The trial judge then stated that if plaintiffs would include in the facts assumed in the question that the amount of blood was unknown, he would overrule the objection. The question was supplemented by plaintiffs to include the additional fact suggested by the court. The witness then said that he had an opinion. He was asked: "What would be the opinion?" The answer was: "The opinion would be if he lost a large amount of blood * * *." The answer was not completed apparently for the reason that defendant's counsel interrupted and made a motion to exclude the answer. The witness then stated: "You must know at least in a relative manner about the amount of blood before you can draw an opinion." He then was asked: "Well, what, if any effect would the loss of blood have on a heart condition of this kind assuming that in addition to losing blood within a half hour covering an area of 12 inches, he had previously within a period of about three hours lost blood which showed an indication of about 20 inches in diameter?" The trial judge then said: "I think the witness has answered the question. You gave him the hypothesis and he says without knowing the amount of blood he cannot answer the question, so—was I correct in that?" The witness said, "Yes, sir." Counsel for plaintiffs then asked the following questions to which objections were sustained: "I want to know, doctor, not knowing the extent, I want to know whether or not in certain cases a hemorrhage would have an effect upon a heart of this kind?" and "How much bleeding is necessary before the bleeding will have an effect on a heart, in the condition of this man's heart?" Plaintiffs then made the following offer of proof to which an objection was sustained: "We offer to prove by this witness that where a person has chronic myocarditis as was determined to have existed in the case of Angel Contreras by this witness in the performance of an autopsy, a profuse nose bleed or hemorrhage of an extent which will cover an area of 12 inches of a floor space, regardless as to the depth or density of the blood, within a period of half hour, it would have a detrimental effect on the man's heart, and that effect would in all probability result in his death."

Plaintiffs were entitled to present for the consideration of the jury the extent of the knowledge the autopsy surgeon had upon which he based his conclusion. They were entitled also to present to the jury his opinion as an expert whether he would have arrived at a different conclusion as to the cause of death if he had known that decedent suffered a hemorrhage. Those questions and the offer of proof should have been allowed.

The judgment is reversed.

SCHAUER, P. J., and SHAW, J. pro tem., concur.

54 Cal.App.2d 368

FOHL v. METROPOLITAN LIFE INS. CO.

Civ. 13221.

District Court of Appeal, Second District, Division 1, California.

Sept. 11, 1942.

Rehearing Denied Oct. 9, 1942.

Hearing Denied Nov. 9, 1942.

1. Appeal and error ⇐931(1)

On appeal, the District Court of Appeal was bound to view evidence in light most favorable to the judgment.

2. Insurance ⇐400

In action to recover total and permanent disability benefits under life policy, testimony offered by insurer as basis for finding that disability from which insured was suffering was result of disease originating before issuance of policy was admissible to show that insured's disability was not a risk assumed by insurer, notwithstanding that policy provided that it should be incontestable two years after date of issuance, and that action was brought more than two years after such date.

3. Insurance ⇐400

In action to recover total and permanent disability benefits under life policy, insured was not relieved from burden of proving that disease from which he claimed to be suffering originated after execution of policy by a clause providing that policy should be incontestable two years after date of issuance.

4. Insurance ⇐516

A disease does not "occur or originate", within meaning of disability benefit provisions of a life policy covering disability ensuing as result of disease occurring or originating after issuance of policy, until it becomes a disease in the general acceptation of the term.

See Words and Phrases, Permanent Edition, for all other definitions of "Occur or Originate".

5. Insurance ⇐516

Under disability benefit provisions of a policy covering disability ensuing as result of disease occurring or originating after issuance of policy, the beginning of insured's disability from disease dates from time when disabling disease first manifested itself or became acute.

6. Insurance ⇐516

Even though the medical cause of disease which resulted in insured's disability may have antedated issuance of policy, where the disease did not manifest itself for years after the issuance, insured is entitled to disability benefits under a policy providing such benefits for disability ensuing as result of disease occurring or originating after issuance of policy.

7. Insurance ⇐516

That the medical cause of insured's insanity might have been syphilis from which insured suffered prior to issuance of life policy providing benefits for total and permanent disability ensuing as result of disease occurring or originating after issuance of policy did not relieve insurer from liability for benefits, where disabling disease did not manifest itself for eight years after policy was issued.

8. Insurance ⇐516, 646(6)

Where group policy provided that on receipt of due proof that employee, while insured thereunder and prior to his 60th birthday, had become totally and permanently disabled as result of bodily injury or disease, insurer would make certain payments to employee, to entitle employee to benefits under policy it was necessary that his disability occur while insurance was in force, and burden so to prove rested upon plaintiff in action for disability benefits under policy.

9. Insurance ⇐516

Where insured is ordinarily working at or engaging in an occupation for which he is being substantially remunerated, he is not "totally and permanently disabled" within an insurance policy, but if by engaging in such occupation, insured is endangering his health or should not in the exercise of common prudence engage in such occupation, then the fact that he is working does not prevent him from being deemed totally and permanently disabled.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally and Permanently Disabled".

10. Insurance ⇐665(5)

Evidence warranted denial of total and permanent disability benefits under a group policy on ground that insured was not totally and permanently disabled while insured under the policy.

11. Insurance ⇐559(2)

Where insurer, after being notified in 1929 that insured had been adjudged incompetent, refused to recognize guardian's in-

formal claims for disability benefits under life policy and did not request more formal or written claims, insurer's action constituted a "waiver" of any other proof of disability, and hence insurer could not claim that guardian was guilty of "laches" by failure to file formal proofs of disability until 1938. St.1935, p. 510, §§ 552–554.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches" and "Waiver".

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Charles E. Fohl, as guardian of the person and estate of William E. Fohl, an incompetent, against Metropolitan Life Insurance Company, a corporation, to recover total and permanent disability benefits under a limited payment life policy and under a group policy, both of which were issued by defendant, and to recover damages allegedly resulting to plaintiff personally by reason of the cancellation of the group policy. From a judgment for defendant, plaintiff appeals.

Reversed and remanded with directions.

Hearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.

Hunter R. Skinner and C. P. Von Herzen, both of Los Angeles, for appellant.

Walker, Adams, Duque & Smith, Henry Duque, and Mark E. True, all of Los Angeles, for respondent.

WHITE, Justice.

This action was instituted by Charles E. Fohl, guardian of the person and estate of William E. Fohl, an incompetent, to recover total and permanent disability benefits under a limited payment life policy and under a group policy of insurance, both issued by defendant Metropolitan Life Insurance Company upon the life of said incompetent. In addition thereto, the plaintiff guardian seeks to recover damages allegedly resulting to him personally by reason of the cancellation of the group policy.

Trial before the court sitting without a jury resulted in a judgment for defendant insurance company, from which plaintiff prosecutes this appeal.

Epitomized, the facts are that on December 21, 1921, defendant issued a limited payment life policy in the face amount of $1,500 to William E. Fohl in consideration of the payment of semi-annual premiums in the amount of $24.90. Concurrently with the issuance of the just mentioned policy, and in consideration of the payment of an additional semi-annual premium of $2.67, defendant insurance company issued to William E. Fohl a supplemental insurance agreement covering total and permanent disability. By this last mentioned agreement the insurance company in effect promised that upon receipt at its home office of due proof that the insured was totally and permanently disabled within the meaning and terms of the supplemental agreement, the company would waive all premiums falling due after it had received due proof of such disability and would pay to the insured monthly the sum of $10 for each $500 of the original insurance under the policy. Among others, the supplemental agreement contains the following provision: "* * * if while the above numbered policy is in full force and effect, and before default in the payment of any premium, the company receives due proof that the insured, *as the result of injury or disease occurring and originating after the issuance of the policy,* has become totally and permanently disabled so * * * the company will allow the following benefits * * *."

It appears from the record that on June 15, 1939, the semi-annual premium on the limited payment life policy then due remained unpaid, and by reason of such nonpayment of premium this policy lapsed on July 17, 1939, at which time it had a paid-up value of $1,254, and at the time of the trial the policy was in effect as paid-up insurance in that amount.

The policy of group insurance involved in this litigation was issued by defendant insurance company to the Southern Pacific Company on December 31, 1923. On January 1, 1930, William E. Fohl, being at that time employed by the Southern Pacific Company, received a serial certificate issued to him evidencing his coverage under the group insurance policy in the sum of $250, which coverage was increased to $1,500 on July 1, 1930. The provisions of this group insurance policy relating to total and permanent disability will be hereinafter set forth. William E. Fohl's employment with the Southern Pacific Company terminated on December 23, 1930, and the insurance company canceled the provisions of such policy so far as William E. Fohl was concerned.

By the first cause of action of his complaint and amended complaint, plaintiff alléged the issuance of the limited payment

life policy and the supplemental agreement relating to total and permanent disability, and charged that from December 23, 1930, to January 1, 1930 (sic), William E. Fohl was totally and permanently disabled; that he was intermittently totally and permanently disabled from January 1, 1930, to December 23, 1930, from and after which date he has been continuously totally and permanently disabled. It was alleged that due proof of such total and permanent disability was made to defendant insurance company during the years 1929 and 1930, and again in 1938; that from and after December 15, 1923, the policy by reason of its terms was and is incontestable, and that there was due plaintiff as disability benefits and return premiums paid since he became totally and permanently disabled the sum of $3,390.27.

The second cause of action alleged the issuance of the group policy of insurance to the Southern Pacific Company and the issuance of a serial certificate thereunder evidencing coverage of William E. Fohl on January 1, 1930; that the latter became totally and permanently disabled on December 23, 1930; that notwithstanding due proof of such disability was furnished defendant insurance company, the latter refused to pay disability benefits allegedly due in the amount of $1,542.50. Plaintiff guardian further alleged that he did not discover the existence of this policy until 1938.

By his third cause of action plaintiff alleged that he did not learn of the terms of the group policy until July, 1940; that the group insurance policy contained certain provisions not contained in the serial certificate; that no notice was given to the guardian of the termination of the employment of William E. Fohl; that the cancellation of the serial certificate on December 23, 1930, deprived plaintiff guardian of the privilege of converting said coverage, as provided in the group policy, whereby he was damaged in the sum of $1,500, the amount of such policy.

By its answer defendant insurance company admitted the issuance of the limited payment life policy, the group policy of insurance, and the serial certificate issued thereunder, but denied generally and specifically all other allegations of the complaint, including the allegations that William E. Fohl was disabled and that certain proofs of disability were made and filed. By way of separate and affirmative defenses it was alleged in the answer:

First: That the alleged total and permanent disability from which plaintiff claimed to be suffering was the result of disease occurring or originating prior to the issuance of the limited payment life policy, and hence was not a risk insured against by the supplemental agreement.

Second: That no due, or any, proof of the alleged total and permanent disability of William E. Fohl was received by defendant until January 10, 1939, and that by virtue of the terms of said supplemental agreement no disability payments were due or payable until six months after the date of receipt of said proof of alleged disability.

Third: That the cause of the alleged disability did not occur while William E. Fohl was insured under the group policy and serial certificate issued thereunder.

Fourth: That William E. Fohl did not become totally and permanently disabled while he was insured under the said serial certificate.

Fifth: That William E. Fohl and Charles E. Fohl, his guardian, were fully aware of the facts surrounding the alleged disability from and after 1930, and that the failure to file due proof of said alleged disability until 1938 constituted an unreasonable delay, as a result of which defendant has been seriously prejudiced in its defense in the within action, wherefore plaintiff and William E. Fohl are and each of them has been guilty of laches.

Sixth: That plaintiff and William E. Fohl are and each of them has been guilty of laches and unreasonable delay by reason of having failed to file proofs of the alleged disability under the group policy and serial certificate issued thereunder, in that they failed to file said proofs until 1939 although fully aware of all the pertinent facts relating to said alleged disability as early as 1930.

During the progress of the trial defendant insurance company moved the court for permission to file an amendment to its answer wherein it alleged by way of further affirmative defense that plaintiff's action herein was barred by the statute of limitations. Code Civ.Proc., § 337, subd. 1. The court permitted the amendment to be filed, but refused to make any findings upon the issue thereby tendered.

[1] Stating the evidence, as we are required to do, in the light most favorable to the judgment rendered, we find testimony

that prior to the issuance of the limited payment life policy on December 15, 1921, William E. Fohl had been employed as a driver with a bakery concern in the city of Stockton, and to all appearances enjoyed good health. However, on February 21, 1920, nearly two years prior to the issuance of the policy, William E. Fohl was received as a patient at the Clark Sanitarium in Stockton, this being an institution for the care and treatment of mental, nervous, drug and alcoholic patients, where he remained until March 22, of the same year. Soon after his entrance into the hospital blood samples and specimens of the spinal fluid of Fohl were taken and forwarded to the Stockton State Hospital. Examination of the tests of this blood serum disclosed a two-plus Wasserman, which was equivalent to what is now denominated a four-plus reaction. That this indicated a strongly positive syphilitic reaction was the testimony of one of the pathologists. This diagnosis of syphilis was further confirmed by the analysis of the cerebro-spinal fluid, which gave indication of an equally positive Wasserman reaction. Further testimony along this line need not be here repeated, because appellants, as they put it, "frankly admit that the incompetent was suffering from syphilis prior to the issuance of the policy on December 15, 1921." While making this concession, however, it should be noted that appellants contend that there is absolutely no testimony of any kind or character that the incompetent was suffering from epilepsy or insanity in 1921, or at any time thereafter prior to December, 1928. Some time after March 22, 1920, the incompetent returned to the Clark Sanitarium, where he submitted another blood specimen, an examination of which disclosed a strongly positive Wasserman reaction. Following his discharge from the sanitarium in the spring of 1920, he returned to his home at Stockton, at which time he appeared to be quite nervous, irritable and uncommunicative. He secured employment, however, as a trucker and freight handler. The written application filed by the incompetent for insurance, represented by the policy issued December 15, 1921, did not disclose any of the medical history of and concerning the foregoing ailment.

From 1920 to 1928 the incompetent continued his work as a trucker and freight handler although it should be stated that his relatives noted a vast difference in his ability to think and remember things as compared with his capacities in this regard prior to 1920. In October, 1928, he came to Los Angeles and resided in the home of plaintiff guardian, the latter of whom was operating a store, where he asked William E. Fohl to assist him, but found that he could not concentrate on his work, was unable to make proper change, and was "generally dull." In December, 1928, while at the home of the guardian, the incompetent experienced a seizure, which rendered him unconscious. He was hospitalized in a sanitarium in Los Angeles County, where he remained until June, 1929. During portions of this time he was unable to carry on a conversation or to comprehend what was being said to him. While William E. Fohl was a patient at the last named sanitarium, guardianship proceedings were instituted by plaintiff guardian, and William E. Fohl was adjudged incompetent on January 14, 1929. It further appears that during the month of June, 1929, following the adjudication of incompetency, his guardian requested information from respondent with respect to the incompetent's rights under the life insurance policy issued in December, 1921. Thereafter, during the last mentioned and succeeding years, the guardian, acting on behalf of the incompetent, attempted on various occasions to obtain for the latter some of the benefits under the disability provisions of the insurance policy. Various letters were exchanged between the guardian of the incompetent, or his attorney, and the insurance company. The insurance company, through the manager of its Pacific Coast head office, advised appellant guardian that the life policy would not be contested, but that if a disability claim were submitted it would be denied "if the cause of the then present claimed disability originated and occurred before the policy date." Premiums on the policy were paid under protest to and including December 15, 1938, and on January 10, 1939, formal proofs of claim were filed with defendant, and upon rejection thereof this action was commenced.

The record indicates that following the appointment of a guardian, the ward, William E. Fohl, continued to improve, and that on or about June 28, 1929, he entered the employ of Southern Pacific Company in San Francisco as a trucker. On January 1, 1930, the group policy hereinbefore referred to was issued. The incompetent continued in the employ of the Southern Pacific Company until September 10, 1930, when he was hospitalized for a

surgical operation to remove an ulcer. During this surgery a blood Wasserman was taken, which showed a negative reaction. During his convalescence and post-operation period the incompetent suffered two epileptic seizures, diagnosed as "petit mal", and upon his discharge from the hospital on October 27, 1930, he was released by the company physicians for work effective January 1, 1931. However, during the Christmas rush of railroad business he was recalled to duty by the railroad company and continued in such employment from December 2 to December 23, 1930, at which time he left the railroad service and has not since been gainfully employed. After leaving his employment with the railroad company, the incompetent became violent and uncontrollable, damaging furniture and destroying property at his residence. His condition becoming progressively worse, in June, 1931, he was committed to Napa State Hospital, and since that time he has been an inmate there. Upon his admission to the state hospital, a blood test showed positive and a spinal Wasserman negative, and within seven months thereafter both spinal and blood Wasserman reacted negatively, which last named condition prevailed up to the time of trial. The doctor in whose charge the incompetent was placed at the state hospital diagnosed his condition as "epileptic psychosis with deterioration." The incompetent's epileptic seizures continued unabated, averaging from one to five per month, and the prognosis given by the physicians was that he would never recover, and would continue in his mentally afflicted state throughout his life.

It is first contended by appellant that the disabling cause within the meaning of the disability clause of the policy issued upon the life of William E. Fohl originated and occurred in December, 1928, and within the meaning of the policy became permanent in September, 1930. It is conceded that the right of the insured to recover is dependent upon the definition and interpretation of the words "occurring and originating", as such words appear in the disability supplemental agreement issued by the defendant insurance company and hereinbefore set forth. In other words, the monthly disability payments by defendant insurance company were due the insured when his disability ensued "as a result of injury or disease occurring or originating after the issuance of the policy." Upon this issue the trial court found "* * * that the said William E. Fohl is at the present time and at all times since June 23, 1931, the date of his commitment to Napa State Hospital, has been, totally and permanently disabled so as to be unable to perform any work or engage in any business for compensation or profit, but that said disability is not the result of an injury or disease which occurred and originated after the issuance of said policy of insurance No. 5025602-3-4C. In this connection, the court further finds that said total and permanent disability from which the said William E. Fohl is suffering as aforesaid is the result of a disease or diseases, to-wit: syphilis and syphilitic meningitis, which occurred and originated during or prior to the month of February, 1920, and from which said disease or diseases the said William E. Fohl has suffered continuously since said date."

[2, 3] It is urged by appellant that the evidence introduced by respondent upon which the aforesaid finding was predicated, and which testimony was received in support of defendant insurance company's denial of appellant's first and second causes of action and in support of respondent's first, third, fourth and fifth affirmative defenses, was inadmissible, and that the objection of plaintiff thereto should have been sustained. We are not in accord with this claim. It is true that the life insurance policy contained a clause that it should be incontestable two years from and after the date of its issuance, while the group insurance policy which is the subject of the second cause of action contained a similar provision limiting the contestable period to one year after issuance date. However, we are not here concerned with a case where the defendant insurance company by its proffered evidence seeks to raise any issue of fraud or other deception on the part of the insured in the procurement of the policy. The testimony was relevant and material to show, as contended by defendant, that by reason of the provisions contained in the supplemental agreement, the disability suffered by the insured was not a risk assumed by the insurer for the reason that it resulted from disease occurring or originating prior to the issuance of the policy, whereas the coverage thereunder extended only to disability resulting from disease occurring and originating after the policy was issued. In the instant litigation the coverage of the policy was not extended beyond the terms of the policy, nor did such clause relieve plaintiff from the burden of prov-

ing that the disease from which he claimed to be suffering originated and occurred after the execution of the insurance agreement. Such being the case, it follows that defendant insurance company was entitled to rebut this claim by presenting evidence to prove that the disease causing disability had its inception and origin prior to the date the policy was issued. Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 346, 89 P.2d 732. The ruling of the trial court admitting the challenged evidence was proper and correct.

On the question of whether the disability of the insured was the result of injury or disease occurring and originating after the issuance of the policy, appellant, while admitting that the incompetent suffered from syphilis prior to the issuance of the policy on December 15, 1921, nevertheless contends that the cause of his disability was epilepsy or insanity, and that he suffered from neither ailment prior to or at the time the policy was issued, or at any time thereafter prior to December, 1928; while respondent urges that the evidence establishes the fact that the insured was disabled as a result of syphilis and syphilitic meningitis, and that such diseases originated and occurred prior to the issuance of the policy, thereby precluding the plaintiff from recovering under the policy for such disability. There is in the record evidence that in 1920, prior to the issuance of the policy, the insured was afflicted with syphilis and syphilitic meningitis; that an examination of the spinal fluid of the insured in February, 1920, indicated that there was an involvement of the central nervous system at that time. There was also testimony that syphilitic meningitis could cause a lesion of the brain, and also that such a lesion could produce a psychosis or form of insanity. It was also testified that syphilis may or may not induce that epilepsy.

[4-6] But though we assume that the epilepsy was caused by syphilitic infection, the question arises as to whether the cause was the original infection in 1920, prior to the issuance of the policy, or the subsequent reinfection in 1931. Though the insured suffered from syphilis in 1920, he nevertheless continued to work, and was gainfully employed until stricken with his first violent attack of epilepsy in December, 1928. In other words, the disease which caused the insured's disability first became manifest or active in 1928, although he was again able to work from June, 1929, until 1930, when he became violent and his condition so bad that it was necessary to confine him in June, 1931. From September, 1930, he was unable to work except for a three-week period in December of that year. Whatever may have been the insured's condition prior to and at the time of the issuance of the policy, it was certainly, according to the evidence, a latent condition which failed to manifest itself so far as disability was concerned for some eight years after the issuance of the policy. As was said in Reiser v. Metropolitan Life Ins. Co., 262 App.Div. 171, 28 N.Y.S.2d 283, 286, "A disease does not occur or originate within the meaning of the policy until it becomes a disease in the general acceptation of that term." In other words, the beginning of the insured's disability dates from the time when the disabling disease first manifested itself or became acute, and not from the time when the medical cause of the disease may have originated or begun. Provident Life & Acc. Ins. Co. v. Jemison, 153 Miss. 53, 120 So. 180, 182. Whatever syphilitic infection may have been in the body of the insured when he received the insurance policy, according to the evidence it certainly had not manifested itself up to that time, so far as any disability was concerned. It did not disable him from work, as the record shows without contradiction that he continued in his employment and paid premiums on the policy for years after its issuance. Smith v. Benefit Ass'n of Ry. Employees, 1932, 187 Minn. 202, 244 N.W. 817, 819. To us it appears to be the better rule that even though the medical cause of the disease which resulted in the incompetent's disability may have antedated the issuance of the policy, where, as here, the disease did not manifest itself for years after such issuance, the plaintiff is entitled to the disability benefits under the policy."

In Metropolitan Life Ins. Co. v. Reynolds, 1936, 48 Ariz. 205, 60 P.2d 1070, 1071, the court had under consideration a policy containing, as does the one before us, the provision that the insured was entitled to benefits "as the result of bodily injury or disease occurring and originating after the issuance of said Policy." The evidence in the case just cited concededly showed that the general paralysis from which the plaintiff suffered was caused by syphilis. In affirming an instructed verdict for plaintiff, the court said:

"The disabling disease with which the insured was afflicted was insanity. The insured had been able to work and earn money thereby right along until 1934, nine years after the policies were issued. Defendant contends, however, that because the insured's insanity was the result of syphilis with which he was afflicted when the policies were issued, his disability was not covered. If the syphilis was the disabling disease, defendant would be right, but the evidence shows that it was not. The disabling disease occurred and originated nine years after the policies were issued. *The medical or pathological cause of the insanity may have been the syphilis, but that would not relieve the defendant from liability.* * * *" (Italics added.)

[7] So, in the case at bar, the medical or pathological cause of the incompetent's brain lesion, psychosis, epilepsy, or insanity, may well have been the syphilis and syphilitic meningitis from which he suffered prior to the issuance of the policy, but that does not relieve the defendant insurance company from liability where, as here, the disabling disease did not manifest itself for some eight years after the policy was issued.

We come now to a consideration of plaintiff's right to recover under the terms of the group policy issued to Southern Pacific Company and the certificate issued thereunder to the insured plaintiff. In this regard the group policy provides as follows:

"8. Total and Permanent Disability.—

"Upon receipt at the Home Office in the City of New York, of due proof that any Employee, not working in Mexico, while insured hereunder, and prior to his sixtieth birthday, has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the Company will, in lieu of the payment at death of the insurance on the life of the said Employee, as herein provided, pay equal monthly installments as hereinafter described to the said Employee, or to a person designated by him for that purpose. * * * The first monthly installment will be paid upon receipt of due proof of total and permanent disability, in which event the insurance hereinbefore provided under this policy, on the life of said Employee, shall cease to be in force and no further premiums will be payable on account thereof."

With reference to its termination, the group policy states: "* * * Upon termination of employment, the insurance of any discontinued Employee under the Policy automatically and immediately terminates as of the last day of the insurance month during which termination of employment occurred, and the Company shall be released from any further liability of any kind on account of such person unless an individual policy is issued in accordance with the above provision."

[8, 9] Manifestly, the provisions of the group policy clearly establish that to entitle the insured to benefits thereunder his disability must occur while the insurance is in force in his favor. Fritz v. Metropolitan Life Ins. Co., 50 Cal.App.2d 570, 123 P.2d 622. The burden so to prove rested upon plaintiff, but in the instant case he failed to sustain that burden, for the evidence without contradiction establishes that from July, 1929, to December 23, 1930, the incompetent was employed by and actively working for the Southern Pacific Company, except for a period from the middle of September through the month of November, 1930, during which time he was confined in the Southern Pacific Hospital suffering from duodenal ulcers. During the remainder of the period first above mentioned William E. Fohl satisfactorily performed the duties required by his employment, and the records of the Southern Pacific Company disclose that during that period of time he received as compensation for his work the sum of $1,209.40. The record also indicates that Mr. Fohl was laid off by the Southern Pacific Company on December 23, 1930, by reason of a "reduction in force." The record is barren of any evidence from which it could be inferred that his employment was terminated because of his disability or inability to perform his duties with satisfaction to his employer. As heretofore noted, Mr. Fohl was recalled to duty December 2, 1930, during the Christmas rush of business, which warrants the assumption that when the particular occasion for his December employment expired, his employment would naturally be terminated. No citation of authority is necessary in support of the proposition that where a person is ordinarily working at or engaging in an occupation for which he is being substantially remunerated, he cannot be

deemed to be totally and permanently disabled. The single limitation upon this rule, to the effect that if by engaging in such occupation the insured is endangering his health or should not in the exercise of common care and prudence engage in such occupation, then the fact that he is actually working does not prevent him from being deemed totally and permanently disabled, is answered in the case at bar by the fact that there is no evidence whatever to indicate that the insured was endangering his health or was not exercising common care and prudence in fulfilling the duties of his occupation as a trucker. As a matter of fact, the evidence affirmatively establishes that William E. Fohl was physically and mentally able to return to work, and it was recommended by the physicians attending him, under date of October 28, 1930, that he be advised to return to duty as of January 1, 1930, because the ulcer ailment was cured and the epilepsy condition was stationary.

[10] The trial court's findings numbered XIII and XIV, to the effect that plaintiff was not totally and permanently disabled while insured under the group policy, are therefore amply supported by substantial evidence, and must be upheld.

Finally, respondent urges that appellant is precluded from recovery under the limited payment life policy and the group policy as well because of the asserted unreasonable delay in furnishing defendant insurance company with due proof of disability. In this connection, it becomes unnecessary to discuss the claim so far as the group policy is concerned, because as heretofore indicated, we have held upon other grounds that the insured is not entitled to recover disability payments under such policy. As to the limited payment life policy, we are persuaded that respondent's claim cannot be sustained. No attack is leveled at the sufficiency of the evidence to substantiate and support the findings of the trial court that "it is true that during the month of January, 1929, or shortly thereafter, defendant was notified by plaintiff's attorney, Mr. C. P. Von Herzen, that the said William E. Fohl had been adjudged incompetent by the Superior Court of the State of California, in and for the County of Los Angeles, and that plaintiff had been appointed as guardian of the said William E. Fohl. It is also true that defendant, through its duly authorized representatives and agents, refused to recognize the claim which was asserted by plaintiff, as guardian of the said William E. Fohl, during the year 1929 for the disability benefits under policy of insurance No. 5025602-3-4C, and in this connection the court finds that said refusal to recognize said claim was based upon the fact that any disability which allegedly existed at that time was the result of a disease occurring and originating before the issuance of said policy of insurance."

[11] At no time during the negotiations between the parties, extending from 1929 to 1938, did the insurance company request or demand any further or different proof than that furnished to it through the correspondence and personal conversations with its agents. While the court found that it was not until August, 1938, that plaintiff requested of defendant blank forms for the purpose of making a claim for disability benefits, and that the filing of such blanks properly filled out in December, 1938, was the first formal written or due proof of the permanent disability of William E. Fohl received by defendant insurance company, nevertheless, when, as the trial court found, upon competent evidence, defendant insurance company refused to recognize claims made, though not formal ones, in January, 1929, and thereafter, and based its denial of such claims on the ground that the asserted disability was the result of a disease occurring and originating prior to the issuance of the policy and did not request or demand more formal or written claims, such action by the insurance company amounted to and constituted a waiver of any further or other proof of disability than that which the insurance company acted upon and rejected. Ins.Code, §§ 552, 553, 554, St.1935, p. 510; Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 180 P. 607.

For the foregoing reasons, the judgment is reversed, and the cause remanded with directions to the court below to enter judgment for plaintiff in the amount of the disability payments accruing under the supplemental agreement issued pursuant to the limited payment life policy from June 23, 1931, and for the return to plaintiff by defendant insurance company of all premiums paid on said policy on and subsequent to June 15, 1931.

YORK, P. J., concurred in the judgment.

DORAN, J., dissented.

54 Cal.App.2d 297

PACIFIC GREYHOUND LINES v. JOHNSON, State Treasurer.

Civ. 6707.

District Court of Appeal, Third District, California.

Sept. 2, 1942.

Hearing Denied Oct. 29, 1942.

1. Statutes ⇐219

The provisions of the act imposing a license fee for transportation of persons or property for hire for compensation on the public streets, roads and highways by motor vehicle, as to what shall constitute gross receipts are not ambiguous, and hence the construction put on those provisions by the State Board of Equalization would not be given great weight by the court in action by motor carrier to recover license taxes paid under protest. Gen.Laws 1937, Act 5130d, § 1(d).

2. Statutes ⇐228

A statement in a statute of exceptions excludes all other exceptions.

3. Automobiles ⇐98

Amounts which were collected by motor carrier from passengers and paid over by motor carrier for "ferry fares" and "bridge tolls" were "gross receipts" on which carrier was required to pay license fee under the act imposing a license fee for the transportation of persons or property for hire or compensation on the public streets, roads and highways by motor vehicle. Gen.Laws 1937, Act 5130d, §§ 1(a, d), 4, 5, 7, 15, 22.

"Gross" means whole, entire, total; without deduction.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross" and "Gross Receipts".

4. Automobiles ⇐98

"Gross receipts" within meaning of act imposing a license fee or tax for the transportation of persons or property for hire or compensation on the public streets, roads and highways in the state by motor vehicle, are not the same as "gross earnings" and no deductions from gross receipts are justified except such as are provided for by the act itself. Gen.Laws 1937, Act 5130d, § 1(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Earnings".

5. Statutes ⇐220

The fact that the legislature amended the Motor Vehicle Transportation License Tax Act without expressly disapproving the practice of the State Board of Equalization in excluding bridge and ferry tolls from gross receipts subject to the tax did not give legislative approval to such practice of the board. Gen.Laws 1937, Act 5130d, § 1(d).

6. Statutes ⇐225¾, 230

The presumption that a legislature in amending or reenacting a statute is familiar with the construction which courts have put on terms used therein does not necessarily apply to all constructions or practices adopted by administrative boards and should not be too generally indulged in the absence of a showing that such construction or practice was brought to the legislature's attention.

7. Taxation ⇐204(2)

Exemptions from taxation are to be strictly construed against the taxpayer.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Pacific Greyhound Lines against Charles G. Johnson, as state treasurer, etc., to recover license taxes paid under protest. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting; TRAYNOR, J., not participating.

H. C. Lucas and J. D. Maatta, both of San Francisco, for appellant.

Harry A. Encell, of San Francisco, J. C. James and Russell B. James, both of Chicago, Ill., and Robert Brennan and Wm. F. Brooks, both of Los Angeles, amici curiae for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment in favor of defendant as treasurer of the State of California, in an action for the recovery of license taxes paid under protest.

Plaintiff sued to recover additional taxes assessed for the month of April, 1939, under the provisions of the California Motor Vehicle Transportation License Tax Act, as enacted in 1933 (Stats. 1933, p.

928, as amended Stats. 1935, p. 2176, and as amended Stats. 1937, p. 1919, Deering's Gen.Laws, 1937, Act 5130d), and paid under protest. Judgment having been rendered for defendant, plaintiff appeals.

The act is entitled, "An act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the public streets, roads and highways in the State of California by motor vehicle * * *." Section 1(a) defines the term "operator," as used therein, to include "all persons engaging in the transportation of persons or property for hire or compensation by or upon motor vehicles upon any public highway in this State, either directly or indirectly," with certain exceptions not pertinent here.

Section 1(d) provides:

"The term 'gross receipts' shall include all receipts from the operation of motor vehicles entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from the operation of motor vehicles passing through, into or out of this State, or partly within and partly without this State. The term 'gross receipts' shall not include revenue derived by an express company from the shipment of property over the lines of common carriers, but shall include revenue derived by such express companies from the transportation of property in motor vehicles operated by them."

Section 4 is as follows:

"A license tax is hereby imposed upon operators at the rate of three per cent of the gross receipts of such operators from operations on and after the first day of the month after the effective date of this act. Such tax shall be paid at the time and in the manner hereinafter provided."

Section 5 provides that each operator shall make a return on or before the twentieth of each month, on such form as the State Board of Equalization may prescribe, showing "the gross receipts of the operator" for the preceding calendar month, and other information.

Section 7, which was added in 1937, provides, among other things:

"For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross receipts from all operations of operators are subject to the tax hereby imposed until the contrary is established."

Section 15 charges the State Board of Equalization with enforcement of the provisions of the act, and authorizes it to prescribe, adopt and enforce rules and regulations relating to its administration and enforcement.

Section 22 provides that the act shall not apply "to motor vehicles operating exclusively within incorporated cities or towns, nor shall it apply to such vehicles operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation, nor shall this act apply to motor vehicles operated exclusively off of public highways in this State."

It does not appear that the State Board of Equalization (hereinafter called the "Board"), prescribed or adopted any rule or regulation exempting ferry fares and tolls from gross receipts subject to the tax, or defining the term "gross receipts from operations"; it did prepare and furnish to operators a sheet of instructions, and a form entitled "Transportation Tax Return." Said return, under the head of "Gross Receipts from Operations," provided for returns of, 1. Freight or property; 2. Passengers; 3. Mail and all miscellaneous items. Then followed the heading, "Allowable Deductions," under which was listed, 5. Amounts paid to licensed sub-haul operators; 6. Ferry fares and tolls; 7. Business all within city limits; 8. Business all on private roads; 9. Out of state portion of interstate operations; 10. Other nontaxable items; 11. Total allowable deductions (Items 5 to 10, inclusive); 12. Tax—Gross Receipts (Item 4, minus Item 11).

The instruction sheet, under Item 6, stated that ferry fares and bridge tolls would be allowed as an "offset against gross revenue" if proper receipts were retained for examination by the board's auditors.

On March 30, 1939, the Attorney General rendered an opinion to the effect that an "operator" is not entitled to deduct from "gross receipts of operation" disbursements for bridge tolls, or ferry fares and charges. Because of this ruling, on the form furnished by the board to plaintiff for the April, 1939, return, Item 6,

"Ferry Fares and Tolls" was stricken out. Plaintiff made its return for that month without deducting any amount for such ferry fares and tolls, but paid under protest the sum of $585.27, representing 3 per cent of the amount alleged to have been collected by it from its passengers to defray the cost of bridge and ferry tolls. Thereafter it began this action to recover said sum from defendant, treasurer of the state.

Appellant's contentions are that "gross receipts" upon which operators are required to pay the prescribed tax under the aforesaid act, do not include ferry fares and bridge tolls; that the term "gross receipts," as used in said act is ambiguous, and, therefore, the construction put upon it by the board charged with the duty of executing it should be given great weight by the courts; and that, as the Legislature has amended the act three times without indicating its disapproval of the administrative interpretation of the board, such interpretation and construction have been given the force and effect of law; also, that in cases of doubt tax statutes are to be construed in favor of the taxpayer rather than the state.

[1-3] We are of the opinion that the provisions of the act as to what shall constitute gross receipts are not ambiguous. As stated in section 1(d), the term "gross receipts" is to include all receipts from the operation of motor vehicles entirely within this state, and a proportion of the receipts from interstate operations on a mileage basis. That the term does not include certain revenues derived by express companies is then stated. And that the act shall not apply to operations exclusively within incorporated towns, nor to those between incorporated cities and towns where no portion of the public highway outside of their corporate limits is traversed, nor to vehicles operated exclusively off public highways, is provided by section 22, supra. There is no provision that the term does not include ferry and bridge fares and tolls. A statement of exceptions excludes all others. That all receipts not specifically excluded are to be included is not only a necessary conclusion, but this conclusion is fortified by the provision of section 7, supra, that it shall be presumed that the gross receipts from all operations of operators are subject to the tax until the contrary is established. "Gross" means "whole; entire; total; without deduction." 18 Words and Phrases, Perm. Ed., p. 697. Furthermore, the term "gross receipts from operations," has been held in this state to be plain language requiring no interpretation. Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 167 P. 845.

The Legislature presumably had in mind the decision in the Pacific Gas & Electric Company case when it enacted the statute under consideration. When it excepted operations not to be included, it further evidenced its intention that all others were to be included; and to make the meaning of gross receipts as all receipts doubly sure, it subsequently created the presumption referred to above. Ferry and bridge fares and tolls collected by operators are plainly a part of their gross receipts; that such operators do not act as agents for others in the collection of same was found by the trial court. Whether it is or is not equitable to require operators to pay a tax upon the amounts they are compelled to pay for ferry fares and bridge tolls is a matter for the Legislature and not the courts. No reason appears why, if the Legislature did not intend "gross receipts" to include such amounts, it should not have said so in plain terms.

[4] Gross receipts are not the same as gross earnings, and no deductions from gross receipts are justified except such as are provided by the act itself. It specifies what shall not constitute "gross receipts," but no distinction between "gross receipts" and "taxable gross receipts" is made by the act, or justified under its terms.

The term "gross receipts from operations" as used in the statute, being unambiguous, it becomes unimportant that the board heretofore, in the enforcement thereof, may have deduced from the gross receipts, subject to tax, the portion thereof representing bridge and ferry tolls. Conceding the existence and force of the rule contended for by appellant, that where ambiguity exists, the contemporaneous construction of a statute by executive officers charged with the duty of enforcing it is entitled to great respect, such rule is not controlling. Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86; Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 325, 326, 109 P.2d 935.

[5, 6] Nor does it follow from the fact that the Legislature has amended the act without expressing disapproval of the prac-

tice of the board of excluding bridge and ferry tolls from "gross receipts," subject to the tax, that it has given legislative approval of such practice. The presumption that a Legislature, in amending or reenacting a statute, is familiar with the construction which the courts have put upon terms used therein, is well recognized; but such presumption does not necessarily apply to all constructions or practices adopted by administrative boards, and should not be too generally indulged in the absence of a showing that such construction or practice has been brought to the attention of the Legislature. San Francisco-Oakland Terminal Rys. v. Alameda County, 66 Cal. App. 77, 83, 225 P. 304; Dollar Savings Bank v. United States, 86 U.S. 227, 237, 19 Wall. 227, 22 L.Ed. 80, 81, 82.

The rules contended for by appellant are only aids in statutory construction of a legislative enactment which is so general in its terms as to render an interpretative rule or regulation appropriate. They are not conclusive upon the courts. Helvering v. Reynolds, 313 U.S. 428, 432, 61 S.Ct. 971, 85 L.Ed. 1438, 1441, 134 A.L.R. 1155; 25 R.C.L. 1046. Also, it does not appear here that the board ever promulgated a rule or regulation construing the term "gross receipts from operations."

[7] Exemptions from taxation are to be strictly construed against the taxpayer. Bay Cities Transp. Co. v. Johnson, 8 Cal. 2d 706, 68 P.2d 710; Cypress Lawn, etc., Ass'n v. City and County of San Francisco, 211 Cal. 387, 390, 295 P. 813; Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424. We are not impressed with the argument of appellant that amounts received by it for ferry fares and tolls are not to be considered as "exemptions" or "deductions" under the foregoing rule, but are rather "eliminations"; that "deductions" are from receipts which are taxable, while "eliminations" are from receipts that are not taxable. It may be noted that they are designated in the board's form of return as "allowable deductions," and in its instructions, as "offsets against gross revenue." But whatever designation may be applied, we are of the opinion that the rule above cited applies.

The judgment is affirmed.

THOMPSON, J., and SCHOTTKY, J. pro tem., concurred.

54 Cal.App.2d 278

SATARIANO et al. v. SLEIGHT et al.

Civ. 12054.

District Court of Appeal, First District, Division 2, California.

Sept. 1, 1942.

Hearing Denied Oct. 29, 1942.

1. Automobiles ⇐223(4)

A minor pedestrian crossing the street between intersections where there was no marked crosswalk was required to yield the right of way to passing automobiles.

2. Automobiles ⇐242(8)

In action for injuries sustained by minor pedestrian when struck by an automobile while crossing street, the burden of proving contributory negligence was on the defendants.

3. Automobiles ⇐245(74)

In action for injuries sustained by minor pedestrian when struck by an automobile while crossing the street, testimony given on the plaintiffs' case, in order to establish contributory negligence as a matter of law, must have been totally inconsistent with the exercise of ordinary care by the pedestrian, even disregarding the disputable presumption as to exercise of ordinary care for his own safety to which pedestrian was entitled because of his inability to testify due to loss of memory resulting from injuries.

4. Automobiles ⇐245(74)

In action for injuries sustained by minor pedestrian when struck by an automobile while crossing street, if on the pedestrian's case the jury could reasonably find that it was more probable or even equally probable that pedestrian was not guilty of contributory negligence, the granting of a nonsuit on that ground would be error.

5. Automobiles ⇐242(8)

Plaintiffs who had produced no evidence on the subject of minor pedestrian's conduct at and immediately before the time of injury and who were precluded from producing pedestrian's testimony on that subject by his loss of memory due to brain concussion were entitled to the benefit of disputable presumption that pedestrian was exercising ordinary care for his own safety.

6. Automobiles ⇐245(74)

Where minor pedestrian was precluded from testifying as to his conduct at and immediately before he was struck by automobile because of loss of memory, evidence from which it could reasonably be inferred that pedestrian who had been running down an alley had reduced his speed while crossing street to less than one-half of what it was before entering street, was not so totally inconsistent with the exercise of ordinary care by pedestrian as to show contributory negligence as a matter of law warranting nonsuit.

7. Trial ⇐139(1)

Testimony as to automobile driver's admission that he was looking for a parking place and did not see minor pedestrian who was crossing street between intersections where there was no marked crosswalk until automobile struck him, was sufficient in itself to take case to the jury on the question of driver's negligence. Code Civ.Proc. § 1832.

8. Trial ⇐105(2)

Failure of minor's father who signed application for a driver's license for his son to object to admission of testimony that son admitted he was looking for a parking place and did not see pedestrian until automobile struck him amounted to a "waiver" of objection that father was not bound by such admission.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

9. Negligence ⇐7

The amount of care due to minors increases with their immaturity and consequent heedlessness to danger.

10. Schools and school districts ⇐89

In determining the amount of care owed by school authorities to a boy nearly 18 years of age, court should not disregard the fact that even boys of 17 and 18, particularly in groups where herd instinct and competitive spirit tend naturally to relax vigilance are not accustomed to exercise the same amount of care for their own safety as persons of more mature years.

11. Schools and school districts ⇐89

Public school authorities are responsible for the safety of children during school hours and are bound to exercise an amount of care for their safety during such period commensurate with the immaturity of their charges and the importance of their trust.

12. Schools and school districts ⇐122

Where school authorities knew of dangerous practice of a large part of the students of crossing, at a point outside of a crosswalk, a fairly heavily traveled street that they were required to cross in going from class to class, whether failure of school authorities to attempt to prevent such practice by means other than specific warnings to individuals or groups in those accidental instances when teachers happened to be present, constituted negligence rendering school district liable for injuries sustained when a student was struck by an automobile while crossing the street en route to class was for jury.

13. Schools and school districts ⇐121

In action against school authorities for injuries sustained by high school student when struck by an automobile while crossing street, plaintiffs should be allowed full latitude to develop the extent and duration of practice of students in crossing street at the point outside of a marked crosswalk where injury occurred, school authorities' knowledge of practice, amount of traffic on the street, and reasonableness of time allowed students between classes to go from classroom to gymnasium, change their clothes and proceed to athletic field.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by Anthony Satariano, a minor, etc., and others, against William R. Sleight and others for injuries sustained by named plaintiff when struck by an automobile. From a judgment of nonsuit granted at the close of their case, plaintiffs appeal.

Judgment reversed.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

R. V. Bressani and D. T. Jenkins, both of San Jose, for appellants.

Louis Oneal, Duncan Oneal, Frank V. Campbell, and Campbell, Rankin & Hayes, all of San Jose, for respondents.

DOOLING, Justice pro tem.

The plaintiffs appeal from a judgment of nonsuit granted at the close of their case. The action was one for personal injuries. On February 16, 1940, Anthony Satariano, a minor seventeen years of age, was a student in the San Jose High School. The

gymnasium of the San Jose High School was located on the westerly side of Seventh Street in San Jose and the athletic field of the high school was located in the block between Eighth and Ninth Streets. In order to reach the athletic field from the gymnasium it was necessary for the students to cross Seventh Street.

On the morning in question young Satariano and a fellow student named Davis, after changing their clothing in the gymnasium, started to go to the athletic field for a 9:21 class in physical education. They went from the gymnasium into an alley which led to Seventh Street. Being somewhat late they started to run. Satariano was three or four feet ahead of Davis. When they reached the corner of the gymnasium building Davis turned to his left and went in a northerly direction for some distance before turning to go across Seventh Street. Satariano went straight forward from the alley across the sidewalk and into the street. Davis did not see Satariano from the time that Davis turned to his left at the corner of the gymnasium until he had reached a point in Seventh Street twenty or more feet from the westerly curb line. His attention was then attracted by a sound of automobile brakes to his right and he looked in that direction "and saw Tony flying up in the air a little there, and then I couldn't see him any more." At the time that Davis turned to his left, and thus lost sight of Satariano, Satariano was near the curb and still running.

Young Satariano suffered a brain concussion and remembered nothing of what had happened after leaving the gymnasium, and no witness was produced by the plaintiffs who gave any testimony of Satariano's conduct from the time that he was last seen by Davis running toward the street to the moment when Davis saw him "flying up in the air" after his impact with the automobile. The portion of Seventh Street on which Satariano was crossing was not at an intersection and was not a marked crosswalk.

The respondents claim that the evidence produced by the plaintiffs shows that Satariano was guilty of contributory negligence as a matter of law. We cannot so hold.

[1-6] The duty was cast on Satariano to yield the right of way to the automobile. Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 109 The most that can be said of the plaintiff's evidence is that it is silent upon the question of whether he exercised reasonable care to do so. Respondents say that it is clear that Satariano ran blindly in front of the automobile. It is not at all clear that he did so. From the evidence, including a map of the scene of the accident marked by Davis as a part of his testimony, the jury could have found that between the time that Davis turned to his left and the moment of impact Davis traveled more than twice the distance covered by Satariano. If so, Satariano in going from the sidewalk to the point of impact must have reduced his speed to less than one-half of what it was when Davis last saw him. The burden to prove contributory negligence was on the defendants. Far from compelling a finding that Satariano ran in front of the automobile, the evidence would be entirely consistent with the conclusion that he was yielding the right of way when struck. With the burden of proof on defendants, testimony given on the plaintiffs' case must be totally inconsistent with the exercise of ordinary care by the plaintiff to establish contributory negligence as a matter of law. If on the plaintiff's case the jury could reasonably find that it was more probable, or even equally probable, that plaintiff was not guilty of contributory negligence, the granting of a non-suit on that ground would be error. This conclusion is arrived at without the aid of the disputable presumption that plaintiff was exercising ordinary care for his own safety. Under the decisions of the Supreme Court, by which we are bound, plaintiffs, having produced no evidence on the subject of Satariano's conduct at and immediately before the time of his injury and being precluded from producing his own testimony on that subject by his loss of memory due to brain concussion, are entitled to the weight of this presumption. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16; see Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575, holding expressly that where plaintiff cannot testify because of loss of memory he is entitled to the benefit of the presumption. We conclude that the evidence did not show contributory negligence as a matter of law.

[7, 8] Respondents Sleight say that there was no substantial evidence of their negligence to go to the jury. Disregarding all other evidence, a police officer, who investigated the accident, testified that Wil-

liam R. Sleight, the driver of the automobile, stated to him that he was "looking for a parking place and did not see Anthony Satariano until the car struck him." The testimony of this admission, standing alone, would be enough to take the case to the jury on the question of the driver's negligence. Jacobus v. Brero, 190 Cal. 374, 212 P. 617; Code Civ.Proc. § 1832. William H. Sleight, who signed the application for a driver's license for his son William R. Sleight (a minor) made no objection to the admission of his testimony. He does not claim on appeal that he is not bound by it, and under the circumstances we need not consider whether if he had made objection the evidence would have been admissible against him. His failure to object amounted to a waiver in any event. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156.

On the question of the liability of the San Jose Unified School District the plaintiffs' evidence showed the following facts: On the morning in question Satariano had attended his first class at the Horace Mann School, a block or more from the gymnasium building, and was dismissed from that class two or three minutes late by his teacher, about 9:02 or 9:03 a. m. It was then necessary for him to go to the gymnasium, change his clothes and traverse Seventh Street, the block between Seventh and Eighth Streets and Eighth Street and be at the athletic field by 9:21. Upon arriving at the gymnasium he found that he was late. It was after the bell had rung for the classes to change at 9:05. He and Davis were the last to leave the gymnasium. Being late he asked the two instructors in the gymnasium if he could stay there and play basketball instead of going to the athletic field. "They told me no, to go out on the field * * *. To hurry up and get over to the field." He and Davis went into the alley at the side of the gymnasium and started to run. At the point where the alley entered Seventh Street there was no marked cross-walk crossing Seventh Street. It was the habit of the boys in going from the gymnasium to the athletic field to use this alley and cross Seventh Street in a direct line. Somewhat north of the alley there was an entrance to the gymnasium on Seventh Street and in front of this entrance a marked crosswalk across Seventh Street. This was used mostly by the girls. At this marked cross-walk there was also a "traffic sally" but none at the point opposite the alley where the boys were accustomed to cross. Cars were customarily parked diagonally in this block on Seventh Street and there were several so parked on either side of the alley on the day of the accident. Seventh Street in this block carried a considerable load of vehicular traffic. The boys had been crossing Seventh Street at this point between gymnasium and playing field for several years, both walking and running, and the principal of the high school knew this fact. No sign warning the boys against crossing at this point had ever been placed by the school authorities, no teacher or other person was stationed there to prevent their doing so, and no general rule had been formulated or called to their attention prohibiting the practice or warning them against it. Occasionally when teachers found individual boys crossing at this point they would correct their conduct whenever it was out of line and warn them not to run across the street. No one had ever told Satariano not to walk or run across the street at this point.

This evidence presents the question whether a jury could reasonably find that the high school authorities, knowing that the boys during school hours on their way to a regular class were in the habit of walking and running across a well-traveled street in the middle of a block where there was no marked crosswalk and no sign of any sort to warn automobile drivers of their presence, and with the view of their crossing obstructed by diagonally parked automobiles, were bound in the exercise of ordinary care to take some or any steps for their protection from injury.

[9, 10] It is well settled that the amount of care due to minors increases with their immaturity and consequent heedlessness to danger. Shannon v. Central-Gaither Union School Dist., 133 Cal.App. 124, 23 P.2d 769; Brizzolari v. Market Street Ry. Co., 7 Cal.App.2d 246, 46 P.2d 783; Hernandez v. Murphy, 46 Cal.App.2d 201, 115 P.2d 565. The boy in this case was nearing eighteen, but we should not close our eyes to the fact that even boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years. In Guyer v. Sterling Laundry Co., 171 Cal. 761, at page 763, 154 P. 1057, at page 1058, the

court had this to say of a nineteen-year-old girl at a time when under our law a woman reached her majority at eighteen:

"The time fixed by our law for attaining full legal majority * * * embodies a useful and indeed a necessary declaration of the law, since some time must be named when the individual will become entitled to the full rights of the adult and be charged with his full duties and responsibilities. But the law itself cannot change the facts of existence, and no one will argue that merely because a girl of 18 or a boy of 21 has attained legal majority they have thus and thereby been endowed with the care and discretion and judgment of full maturity. Physically they may be fully mature. Mentally a tremendous growth must take place and usually does take place before knowledge has ripened into wisdom, and wisdom coupled with experience has developed a sound and sane judgment. A girl of 19 is still in her youth. Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else."

[11] We entrust the safety of our children to our public school authorities during school hours. They are bound to exercise an amount of care for their safety during that period commensurate with the immaturity of their charges and the importance of their trust. This case, except for the fact that here in going from class to class the children were compelled to cross a public street, is not unlike the case of Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 110 P.2d 1044. There the court said at page 600 of 17 Cal.2d, at page 1048 of 110 P.2d:

"It is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citing cases.] The school district is liable for injuries which result from a failure of its officers and employees to use ordinary care in this respect."

[12] It was apparently the view of the trial court that this duty ceased once the child was on a public street, but this overlooks the fact that in going from the gymnasium to the playing field the children were still subject to the school authorities and were merely passing from class to class during the regular hours of school. In a sense the public street under these circumstances became an extension of the school grounds. At least it was incumbent upon the children to cross it daily during regular school hours in going from one class to another. In our judgment the evidence presented a question of fact for the jury as to whether with knowledge of the dangerous practice of a large part of the students in crossing Seventh Street outside of a crosswalk ordinary care for their protection did not require of the school authorities something more than sporadic warnings to individuals and groups in those accidental instances when teachers happened to be present.

[13] Appellants complain of many rulings of the trial court in excluding evidence offered by them. For the guidance of the court in retrying the case it is sufficient to say that as against the San Jose Unified School District plaintiffs should be allowed full latitude to develop the extent and duration of the practice of the boys in crossing Seventh Street at the point where the injury to Satariano occurred, the knowledge of the school authorities of this practice, the amount of traffic on Seventh Street, and the reasonableness of the time allowed the students between classes to get from the classrooms to the gymnasium, change their clothes and proceed to the athletic field. These matters all have a probative value in determining whether in the exercise of ordinary care the school authorities took proper steps for the protection of the boys enrolled in the high school.

The judgment of nonsuit is reversed as to all defendants.

SPENCE, J., concurred.

NOURSE, Presiding Justice (concurring).

I concur in the judgment because of the decisions controlling it. But I do not agree with the court-made rule therein culminating in Speck v. Sarver, supra.

54 Cal.App.2d 304

Ex parte SOZZI.

Cr. 1803.

District Court of Appeal, Third District, California.

Sept. 2, 1942.

1. Monopolies ⇐9
Municipal corporations ⇐607

The gathering of garbage is not a "trade", "business" or "occupation" within meaning of the rule that a municipal corporation cannot, under grant of a power to regulate a lawful business, either create a monopoly or prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Business", "Occupation" and "Trade".

2. Health ⇐8

Sanitary district which was authorized to collect waste and garbage, to make and enforce all necessary and proper regulations for removal of garbage and to do any act necessary or proper to the complete exercise and effect of any of its powers or for the purposes for which it is performed, could, by ordinance, validly reserve to itself the exclusive right, through its own agents or employees, to collect garbage within its limits. St.1939, pp. 646, 647, §§ 6518.5, 6521(a, c), 6522, 6523.

3. Municipal corporations ⇐607

A municipality may reserve to itself, through its duly authorized employees, the exclusive right to remove garbage accumulating within its limits or may grant to one person such exclusive right.

4. Municipal corporations ⇐607

Property rights are not affected by a municipal regulation that garbage may not be removed by other than a licensed collector or one having a permit for that purpose.

Habeas corpus proceeding by L. L. Sozzi to secure his release from custody.

Writ denied, and petitioner remanded.

Charles Reagh, of San Francisco, for appellant.

Otis D. Babcock, Dist. Atty., Elvin F. Sheehy and Robert Holstein, Deputy Dist. Attys., and Benjamin Frantz, Sp. Prosecutor, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

Petition for writ of habeas corpus.

Petitioner alleges in his petition that he is imprisoned and restrained of his liberty by the Sheriff of Sacramento County, pursuant to a purported conviction in the Justice's Court of Sacramento Township, County of Sacramento, of a violation of section 7, Ordinance and Regulation No. 1 of Hagginwood Sanitary District, in that he wilfully and unlawfully collected garbage in said district, he not then being a collector employed thereby; that on appeal to the Superior Court of Sacramento County, his conviction was affirmed, and that his conviction and imprisonment are illegal for the reason that section 7 of Ordinance and Regulation No. 1 of said Sanitary District is unlawful and void, and not within the power of said Sanitary District to enact. Said Section 7 provides:

"On and after the 1st day of January, 1942, the District Board will provide a garbage collection service in Hagginwood Sanitary District. On and after said 1st day of January, 1942, it shall be unlawful for any person, other than collectors employed by Hagginwood Sanitary District, by and through its District Board, to collect any garbage or waste in Hagginwood Sanitary District; and, on and after said date, it shall be unlawful for any person, firm or corporation to deliver or allow to be delivered to any person, other than such collectors employed by Hagginwood Sanitary District, any garbage or waste removed or to be removed from any premises in Hagginwood Sanitary District."

It is admitted by petitioner that he collected garbage as charged, and that he was not employed by Hagginwood Sanitary District, by or through its District Board. The only question presented is whether section 7 of the Hagginwood Sanitary District is valid.

The formation of sanitary districts is provided for in division 6 of the Health and Safety Code. Government of such Districts is vested in a board of five members. Its powers as defined in sections 6510 to 6522, inclusive, of the Health and Safety Code, St.1939, p. 645 et seq. Section 6518.5 provides: "It may collect waste and garbage." Section 6521 provides: "It may make and enforce all necessary and proper regulations for: (a) The removal of garbage. * * * (c) All other sanitary purposes not in conflict with the laws of this

State." Section 6522 provides: "It may do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed." Section 6523 provides: "A violation of a regulation or ordinance of a district is a misdemeanor punishable by fine not to exceed one hundred dollars [$100], imprisonment not to exceed one month, or both."

[1] Petitioner concedes that under the foregoing provisions, Hagginwood Sanitary District can engage in the collection of garbage. He contends, however, that its right to do so is not exclusive, for the reason that "a municipal corporation cannot, under grant of a power to regulate a lawful business, either create a monopoly or prohibition." He cites numerous authorities in support of this assertion, but the cited cases do not deal with the police power respecting disposal of garbage. They are not in point here. The gathering of garbage is not a trade, business or occupation in any proper sense. In re Santos, 88 Cal.App. 691, 264 P. 281; In re Zhizhuzza, 147 Cal. 328, 81 P. 955; City of Grand Rapids v. De Vries, 123 Mich. 570, 582, 82 N.W. 269; In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389; City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651; Gardner v. City of Dallas, 5 Cir., 81 F.2d 425, and cases cited in Note 1 thereto; Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684, 15 A.L.R. 275.

[2-4] The Sanitary District, being authorized "to make and enforce all necessary rules and regulations for the removal of garbage," and "to do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed," may reserve to itself the exclusive right, through its own agents or employees, to collect garbage within its limits. The foregoing cases so hold. Extensive notes dealing with the validity of statutory or municipal regulations as to garbage are found in 15 A.L.R. 287, 304, 72 A.L.R. 520, 526, and 135 A.L.R. 1305, 1311, and demonstrate that it is well settled that a municipality may reserve to itself, through its duly authorized employees, the exclusive right to remove garbage accumulating within its limits, or may grant to one person such exclusive right; and that it cannot be said that property rights are affected by a regulation that garbage may not be removed by other than a licensed collector or one having a permit for that purpose.

The writ is denied and the petitioner remanded.

THOMPSON, J., and SCHOTTKY, J., pro tem., concurred.



54 Cal.App.2d 306

Ex parte TIPTON.

Cr. 1804.

District Court of Appeal, Third District, California.

Sept. 2, 1942.

1. Habeas corpus ⇐25(1)

Where it was alleged in unanswered verified petition for habeas corpus that petitioner without his presence in court and without knowledge that case was set for trial was convicted in justice's court for collecting garbage while not a regular collector in the employ of sanitary district, and that he neither waived his presence at trial nor authorized anyone else to do so, petitioner was entitled to discharge from custody. Pen.Code, §§ 1434, 1451.

2. Habeas corpus ⇐90

Unverified statements in respondent's brief as to waiver by attorney of petitioner's presence at trial in justice's court could not be considered in view of allegations of verified petition for habeas corpus that trial was held without petitioner's knowledge and that he neither waived his presence at trial nor authorized his attorney to do so. Pen.Code, §§ 1434, 1451.

Habeas corpus proceeding by George Tipton to secure his release from custody.

Writ allowed and petitioner ordered discharged.

Charles Reagh, of San Francisco, for appellant.

Otis D. Babcock, Dist. Atty., Elvin F. Sheehy and Robert Holstein, Deputy Dist. Attys., and Benjamin Frantz, Sp. Prosecutor, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

Petition for writ of habeas corpus.

This is a companion case to In re Sozzi, 129 P.2d 40, this day decided. As in the Sozzi case petitioner alleges that he is imprisoned and restrained of his liberty by the sheriff of Sacramento County, pursuant to a purported conviction in the Justice's Court of Sacramento Township, in that he wilfully and unlawfully collected garbage in said District, he not then being a collector employed thereby; that on appeal to the Superior Court of Sacramento County, his conviction was affirmed, and that his conviction and imprisonment are illegal for the reason that section 7 of Ordinance and Regulation No. 1 of Haginwood Sanitary District, upon which the charge against him was based, is unlawful and void.

In the Sozzi case, wherein the same issue was presented, we have held that said enactment is valid, the writ of habeas corpus has been denied and petitioner remanded. That decision would be controlling here, were it not that petitioner has also alleged that he was "tried in his absence in said Justice's Court, and never waived his right to be present in court, nor authorized anyone to waive such right, nor knew when his said case was set for trial"; also, "that your petitioner was informed by his employer, one Jennie Sozzi, that he had been charged with violating said Ordinance, and he appeared March 3rd, 1942, in Justice's Court in American Township, County of Sacramento, State of California, with counsel provided by his said employer, and was informed by said counsel, to-wit, Charles Reagh, that said case would not proceed further as to him because it had been agreed that a companion case against one L. L. Sozzi should be treated as a test case, and that counsel representing the said Sanitary District and the District Attorney had so agreed with said Charles Reagh. On such appearance, petitioner filed an affidavit for change of venue and was informed that proceedings against him would be stayed until the determination of said case of In re Sozzi. Your petitioner was never again informed of any proceedings against him until Sunday, May 3rd, 1942, when he learned that there stood of record against him the judgment of conviction above mentioned as the result of proceedings on March 20th, 1942, and April 10th, 1942, in the court first above mentioned. Your petitioner never waived his presence in court or trial by jury or any of his other constitutional or statutory rights, nor authorized Charles Reagh nor anyone else to waive any of such rights on his behalf." The petition is verified, and no answer thereto was filed.

It is conceded in the brief filed by the District Attorney on behalf of respondent, that Tipton was not present at the trial. It is asserted, however, in the said brief, that this was the result of the request of his counsel that a stipulation be entered into releasing Tipton from the necessity of appearing at the trial, and that such stipulation was entered into between Mr. Reagh, petitioner's counsel, and Mr. O'Shea, Chief Deputy District Attorney.

Section 1434 of the Penal Code provides that a defendant must be personally present before his trial in a justice's court can proceed. In People v. Aymar, 98 Cal.App. 1, 276 P. 595, it was held that in view of section 1434, supra, the presence of a defendant in a misdemeanor case, in a justice's court is required. Petition for hearing of this case in the Supreme Court was denied. Also, see People v. New Amsterdam Casualty Co., 112 Cal.App. 293, 296 P. 653; Pacific Indemnity Co. v. Superior Court, 102 Cal.App. 566, 283 P. 345; In re Casas, 9 Cal.App.2d 122, 48 P.2d 990.

[1, 2] While section 1451 of the Penal Code provides that in justice's courts a new trial may be granted "When the trial has been had in the absence of the defendant, unless he voluntarily absent himself with full knowledge that a trial is being had," which language suggests that a defendant may waive his right to be present, in the case before us it is asserted by petitioner, and not denied, that he did not know that his case was set for trial, so it cannot be said that he voluntarily absented himself with full knowledge that a trial was being held; and whether in view of the language of section 1434, supra, and the decision in People v. Aymar, supra, a defendant may waive his presence at his trial, or his attorney can waive it for him, need not be determined here, since the unverified statements in respondent's brief as to any stipulation or waiver by petitioner's attorney cannot be considered in view of the allegations of the verified petition.

The writ is allowed, and petitioner is ordered discharged.

THOMPSON, J., and SCHOTTKY, J., pro tem., concurred.

54 Cal.App.2d 398

WINKLER v. WINKLER.

Civ. 2863.

District Court of Appeal, Fourth District, California.

Sept. 14, 1942.

1. Divorce ⇐177, 184(1)

Orders refusing to reopen wife's case for the purpose of presenting corroborating evidence as to alleged grounds for divorce and denying wife's motion for a new trial were not "appealable" but such orders were reviewable on an appeal from the judgment denying relief. Code Civ. Proc. § 956.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Divorce ⇐127(3)

In divorce action all the evidence of the prevailing party need not be corroborated.

3. Divorce ⇐127(3)

A divorce cannot be granted on the ground of extreme cruelty of the husband upon the uncorroborated testimony of the wife, but in determining whether the leaving of the husband by the wife constituted wilful desertion or was justified by husband's cruel treatment, court may believe the uncorroborated testimony of the wife as against the testimony of the husband.

4. New trial ⇐6
Trial ⇐377(2)

Generally trial court has a wide discretion in passing upon motions to reopen for the purpose of presenting additional evidence and motions for new trial.

5. Divorce ⇐145

Where wife's attorney proceeded to trial of husband's action for divorce and wife's cross-complaint in the belief there was sufficient corroborating evidence to establish wife's allegations and that son of parties would be available in time to corroborate his mother's testimony, court upon finding that corroborating evidence was lacking abused its discretion in refusing a two weeks' continuance until son should return and supply such evidence.

6. Divorce ⇐151

Where undenied affidavits showed that wife's attorney proceeded to trial of husband's action for divorce and wife's cross-complaint in belief that there was sufficient corroborating evidence to establish wife's allegations and that son of parties would be available as witness and showed further that testimony of son which would be available at retrial would fully establish mother's right to a divorce, court having denied relief to either party abused its discretion in refusing to grant wife a new trial.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by John Samuel Winkler against Roxie Viola Winkler for a divorce on the ground of desertion, wherein defendant filed a cross-complaint. From that portion of judgment denying her a divorce or any relief by way of maintenance or support, cross-complainant appeals.

Judgment reversed and cause remanded with directions to grant new trial.

Charles B. Provence, of San Diego, for appellant.

G. L. Holloway, of San Diego, for respondent.

GRIFFIN, Justice.

Respondent commenced this action against his wife for divorce based upon the ground of desertion. Appellant wife answered, denied the allegations of respondent's complaint and by way of cross-complaint alleged: (1) extreme cruelty; (2) habitual intemperance; and (3) wilful neglect on the part of respondent. After hearing the evidence produced, the trial court refused to grant a divorce to respondent or cross-complainant and appellant and denied her a judgment for support and maintenance. Cross-complainant appealed from that portion of the judgment denying her a divorce or any relief by way of maintenance or support.

Appellant and respondent were married in 1908. They have four children, all of the age of majority. The parties hereto accumulated some property in the State of Oregon, where they resided. About January 1st, 1939, appellant came to San Diego County and lived at the homes of her several children. Later respondent came here and now resides at Sunnyside, San Diego County, where he maintains a filling station. The property in Oregon consisted of a home and a filling station.

By agreement that property was mutually divided between them.

In support of her allegation of cruelty, appellant produced evidence consisting mainly of her own testimony, of a quarrel between appellant and respondent which occurred in Oregon shortly before their separation and at the time when the mutual deeds to the property above mentioned were exchanged.

Appellant testified that on December 28, 1938, at about 5:30 p. m., Mr. Winkler came home from his work; that their boy Winifred was present with a friend of his on that occasion; that the family were in the habit of eating their evening meal at 6 p. m.; that on respondent's arrival home he immediately demanded his supper; that he grabbed a frying pan; that appellant told him that dinner was not ready but it would be at 6 o'clock; that as the outgrowth of this argument Mr. Winkler set the frying pan down, grabbed appellant by the arm and shook her; that she screamed and her son came in from the front room; and that respondent was threatening her and using bad language. She then testified that "until he got so rough that I kept saying a little louder every time he would shake me—squeeze my arm and shake me—until I spoke so loud that my son come in, and he had his fist drawed back on me and my son said, 'Don't hit her,' or 'Don't strike her,' I don't know which words he used. Then he yelled to him and he ordered him out of the house and my son says, 'Do you mean it, Dad? If you do, I will go.' * * * they kept arguing backward and forth and they had their fists drawed on each other and finally he said, 'I will put you out of here,' said, 'I got something I can put you out of here,' and he run for his gun. He stepped inside his bedroom door and picked up the gun and made the remark, says, 'I am ready for you.' And I said 'Winnie, don't do that.' I says, 'Please go outside; don't let this happen to me.' I said, 'Don't let this happen to me,' and he stepped outside. His father came in with the gun and just hunted for him like he was a dog, with the gun in his hand ready to shoot, and he looked all around in that room and I said, 'He is not in here.' He looked in my second room and he wasn't there, and he ran to the back door and looked to one side and the other and then came back and grabbed me and he threatened me; threatened to hit me. He grabbed my head and stuck it under his arm and drawed the gun back and said, 'I will just hit you with the side of it,' and I jerked my head out from under his arm and I said, 'Hit.' * * * Then he said, 'I will just shoot the pots off the stove,' and I said 'all right' and he pulled the trigger three times and it did click but didn't fire. Then he ran to the bedroom to hunt for his shells * * * and I left the house." She further testified that "when that occurred, I felt that my life was in danger and my son's life was in danger and I asked him for a settlement. That is when the settlement came about." She then testified that on a previous occasion respondent had been drunk for a period of nine months; that he left her and went to Florida; that he was "drunk and just got mad and run off"; that he came back to her on the terms "that he was to quit drinking and running around at night, and within two or three weeks time he come in drunk, drinking; and he kept it up for the nine months. There wasn't hardly a day but what he was drinking and I never knew what time he was going to come in, raising a racket, and some times when I would see him coming he would just give me a nervous chill, and it worked on my nerves continuously."

Respondent, in testifying as to this affair, was quite evasive, and to a great extent corroborated appellant's testimony on this subject. He testified in answer to the question "Did you ever strike Mrs. Winkler?" "A. One time * * * 1930 * * * Struck her with my hand, open hand." He denied striking her in December, 1938, but said, "I just shook her, that's all"; that "I don't remember anything about drawing a gun." As to the intoxication, he stated that "Well, I drink some; not excessively * * * I have had some drinks, but I haven't been so drunk but what I know what I was doing and take care of my own business."

One other witness testified that one time in Oregon when Mr. Winkler came home he "tried to force Mrs. Winkler to drink"; that she refused to drink with him; that he "poured it, spilled it on her face, and the liquor, whatever it was, ran down." This was in 1932.

After considering the evidence presented, the trial court announced that respondent did not make out a case of desertion; that none of the testimony "would furnish affirmative ground for granting anybody

any divorce, for the reason it isn't corroborated, either her story or his, by anybody outside of the parties, and section 130 of the Civil Code requires such corroboration before any divorce may be granted"; that "So far as now appears, either party might propose the resumption of cohabitation to the other and place the other in default, were such cohabitation refused. Neither party appears to have done it. The situation is that they are simply living apart de facto without any sufficient showing here for the court to award any affirmative relief on the ground that either the one party or the other is entirely to blame for it."

Counsel for appellant then announced that the boy Winifred was on vacation and would be back in ten days; that "Since your Honor has indicated how he feels about the matter, I think in fairness to both parties we should have the testimony so that we can get this definitely settled and prevent future action. I therefore move for a continuance of two weeks until the boy returns so that we can put that evidence on." The court then remarked that "there ought to have been an application before the case was brought to trial. Motion denied."

On a motion for a new trial counsel for appellant made an affidavit that on September 15, 1941, he received notice that the case was set for trial on September 19, 1941; that "Winifred Winkler * * * was on vacation at that time and could not be located; that he was not within the County of San Diego and could not be reached by any form of communication; that the defendant sent telegrams in an effort to have him here for the trial, but could not contact him in time; that affiant was informed by the defendant that it was very probable that the said Winifred Winkler would return in time to appear as a witness on the 19th of September, the trial date * * *, that affiant believed said witness would appear in time to testify * * *; that affiant called the court's attention to the absence of said witness on the trial date and on that day requested an opportunity to produce the testimony of said witness. That the said witness * * * has now returned to San Diego County, that he is now and will be available to testify in this action to the facts as set forth in his affidavit filed herewith." The affidavit of the witness above mentioned recites generally that in December, 1938, his father, "John Winkler, came home half drunk, about 5:30 p. m. and demanded his supper to be served to him immediately, that dinner was not yet ready and the customary time for dinner was 6 p. m.; that the plaintiff used abusive language towards the defendant, Mrs. Winkler, grasped her with his hands and shook her and became so violent and abusive that affiant intervened and stopped him by telling him that he had better be careful; that thereupon the plaintiff, Mr. Winkler, started to attack affiant and then said 'I will get something that will stop you' and went for his gun; that at the request of my Mother I then left the house and hid behind a tree and saw my Father come out of the house with a pistol in his hand looking for me. That prior to the above occasion Mr. Winkler, the plaintiff, habitually drank intoxicating liquors, was around the house in an intoxicated condition and was abusive to the defendant Mrs. Winkler. That Mrs. Winkler was at all times a good mother and wife and was a good housekeeper and cook. That Mrs. Winkler's health is now bad and she is unable to earn her livelihood. That the plaintiff is an able bodied man and earning good money and able to support himself and the defendant."

The facts set forth in these affidavits were not denied by respondent and no counter-affidavits were filed. The trial court nevertheless denied the motion for new trial. The only question here presented is whether it abused its discretion in refusing to reopen appellant's case for the purpose of presenting the evidence offered and in denying her motion for a new trial under the circumstances here related.

[1, 2] While these orders are not appealable they are reviewable on an appeal from the judgment. § 956, Code Civ. Proc.; Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687. It has often been held that it is not entirely necessary that all the evidence of the prevailing party in a divorce action be corroborated. Keller v. Keller, 132 Cal.App. 343, 348, 22 P.2d 798; Bastjan v. Bastjan, 215 Cal. 662, 664, 12 P.2d 627.

[3] In White v. White, 86 Cal. 219, 24 P. 996, it was stated (quoting from syllabus):

"Though the court cannot grant a divorce on the ground of extreme cruelty of the husband upon the uncorroborated testimony of the wife, it is not under such

restraint when considering whether the leaving of the husband by the wife constituted willful desertion, or was justified by his cruel treatment, and upon that issue the court may believe the uncorroborated testimony of the wife as against the testimony of the husband."

[4] The trial court found that appellant refused and neglected to furnish cross-complainant with the common necessaries of life, but that "during the times therein mentioned defendant and cross-complainant was living separate and apart from plaintiff and cross-defendant and therefore not entitled to support from him." The court then found that she did not desert respondent and that the respondent did not desert her. We fully recognize the general rule that a court has a wide discretion in passing upon such motions as were here presented. Nevertheless, these motions should be examined, not only in accordance with legal principles, but in accordance with the ends of justice. Counsel for appellant proceeded to trial believing he had sufficient corroboration of his client's testimony. Due to her illness and extreme nervousness, he thought it advisable to proceed under these circumstances without the presence of the boy whom he expected would return before the case was finally completed. Counsel's inadvertence in this respect should be considered and appellant should not necessarily be deprived of her right to the benefit of the testimony of her son under the facts of this case.

[5, 6] Considering all of the testimony before the trial court and the most substantial corroboration offered by the son, if true, it would appear to us that the appellant would be entitled to a decree of divorce, at least. From the evidence and the affidavit presented, had a new trial been granted, a different decision would no doubt have been reached. We believe, under the peculiar circumstances here existing, the trial court should have granted a continuance of the case for the purpose of hearing the evidence offered or, upon the showing made by the undenied affidavits considered by the court, it should have granted a new trial for the purposes suggested. It is our belief that the ends of justice would have been better subserved by so doing and that the court's refusal so to do amounted to an abuse of discretion. Christina v. Daneri, 22 Cal.App.2d 190, 70 P.2d 983; Leslie v. Federal Finance Co., Inc., 14 Cal.2d 73, 82, 92 P.2d 906; Spear v. United Railroads, 16 Cal.App. 637, 117 P. 956.

For the reasons given the portion of the judgment appealed from is reversed with directions to the trial court to grant the motion for new trial.

BARNARD, P. J., and MARKS, J., concurred.



AMERICAN FRUIT GROWERS, Inc., et al. v. PARKER, Director of Agriculture, et al.*

Civ. 13315.

District Court of Appeal, Second District, Division 3, California.

Sept. 19, 1942.

Hearing Granted Nov. 12, 1942.

1. Statutes ⇐141(1)

Constitutional provision prohibiting revision or amendment of a law by reference to its title is "mandatory" and an act which violates the prohibition is void. Const. art. 1, § 22; art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Statutes ⇐141(1), 161(1)

Where legislature passes a new statute covering same subject as existing statute, embodying therein such parts of existing statute as it wishes to retain and omitting or altering other parts and inserting new provisions, but making no reference to former statute, the result is usually a "repeal by implication" of existing statute, but new statute is not subject to constitutional provision prohibiting a revision or amendment of a law by reference to its title. Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Repeal by Implication".

3. Statutes ⇐141(3)

The legislature may expressly amend specified sections of a sectionized act, leaving the other sections to stand unchanged, and, in such case, the constitution requires

* Subsequent opinion 140 P.2d 23.

only that sections amended be set forth in full as amended. Const. art. 4, § 24.

4. Statutes ⇐141(1)

Where it appears that mode of legislature in altering provisions of an existing act reaches status of a revision of former act, the whole of the former act as altered, including the sections left unchanged, must be set forth in full. Const. art. 4, § 24.

5. Statutes ⇐212

The legal intendment is that each clause of an act has been inserted for some useful purpose, and when rightly understood may have some practical operation.

6. Statutes ⇐141(1)

The line between mere amendments and a revision of an act, within constitutional provision prohibiting revision or amendment of a law by reference to its title, is to be so drawn as to include within category of "revision", at least in some cases, an act changing less than all of the sections of a former act. Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Revision".

7. Statutes ⇐131

Mere fact that legislature has designated a statute as an amending act, though entitled to consideration, is not conclusive.

8. Constitutional law ⇐48
Statutes ⇐141(1)

The presumption is in favor of validity of legislative action, but if a statute is unmistakably a revision of a former act, legislature cannot escape effect of constitutional provision prohibiting revision of a law by reference to its title by labeling it otherwise. Const. art. 4, § 24.

9. Statutes ⇐141(1)

If an act consisting of many sections is changed in many respects, the subjects treated differently, the sections differently arranged and differently numbered, the subsequent act would be a "revision", within constitutional provision prohibiting revision of a law by reference to its title, even though one or more sections of the original act are retained. Const. art. 4, § 24.

10. Statutes ⇐141(1)

Where amendment to Agricultural Adjustment Act of 1935 declared new and different policies and purposes, set up new and different standards, and established entirely different methods of procedure, amendment constituted a "revision", and was invalid, where it appeared that constitutional provision requiring that revised or amended law shall be published at length as revised or amended, was not complied with. St.1935, pp. 1032, 1468, as amended, Gen.Laws 1937, Act 146; Const. art. 4, § 24.

11. Agriculture ⇐1

The Agricultural Adjustment Act of 1935 authorizing Director of Agriculture to issue licenses to persons engaged in producing, marketing, processing, packing, shipping, handling or distributing any agricultural commodity, is valid. Gen.Laws Supp.1935, Act 146.

12. Agriculture ⇐2

Under statute authorizing Director of Agriculture, when one person is licensed to engage in intrastate marketing transactions, to subject all persons engaged in same business to identical license provisions, a license which attempted to deal with growing and handling of both grapefruit and oranges as a single industry was not authorized. Gen.Laws Supp.1935, Act 146, § 6a.

13. Agriculture ⇐2

A statute directing Director of Agriculture, when one person is licensed to engage in intrastate marketing transactions, to subject all persons engaged in same business to identical license provisions, does not authorize director to regulate marketing of all agricultural products by one general license fixing a total quota for them divisible ratably between shippers without regard to difference in nature of crop and other factors. Gen.Laws Supp. 1935, Act 146, § 6a.

14. Injunction ⇐147

Where affidavit by witness who was not a party to action opposing application for a preliminary injunction stated that affiant admitted a part of allegations of complaint and as to the rest "affiant denies each and every allegation of fact and controverts each and every conclusion of law", without showing which statements affiant deemed to be allegations of fact and which conclusions of law, neither trial court nor District Court of Appeal was required to give any weight to such statements in the affidavit.

15. Appeal and error ⇐954(1, 2)
Injunction ⇐135

The granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though evidence with respect to absolute right therefor may be conflicting, rests in the discretion of the trial court, and the order may not be interfered with on appeal, except for an abuse of discretion.

16. Injunction ⇐147

Where verified complaint alleged that license issued by Director of Agriculture under Agricultural Adjustment Act of 1935, regulating handling of oranges and grapefruit in intrastate commerce was invalid as an attempt to regulate more than one industry, and application for preliminary injunction was submitted on the verified complaint and a number of affidavits and counter-affidavits, trial court did not abuse its discretion in granting the preliminary injunction. Gen.Laws Supp.1935, Act 146, § 6a.

17. Agriculture ⇐2

If license issued by Director of Agriculture under Agricultural Adjustment Act of 1935 regulating handling of oranges and grapefruit in intrastate commerce was invalid because attempting to regulate two distinct industries, that invalidity inhered in it from time of its issuance and would not be removed by failure of those in authority to enforce license against all whom it purported to regulate. Gen.Laws Supp. 1935, Act 146, § 6a.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the American Fruit Growers, Inc., and others, against W. B. Parker, as Director of Agriculture of the State of California, and others, to restrain the defendants from enforcing against plaintiffs a license issued by him to regulate the handling of oranges and grapefruit in intrastate commerce. From an order granting a preliminary injunction, the defendants appeal.

Affirmed.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for appellants.

G. V. Weikert, of Los Angeles, for respondents.

SHAW, Justice pro tem.

Plaintiffs are engaged in packing, handling, shipping, marketing, and distributing citrus fruits, including oranges, and in most cases grapefruit also, in intrastate commerce in this state. Some of them are also growers of these fruits. They brought this action to restrain the Director of Agriculture of this state, and others acting under him, from enforcing against them a license issued by him to regulate the handling of oranges and grapefruit in intrastate commerce. A preliminary injunction to that effect was granted and defendants appeal from the order granting it.

In 1935 the legislature passed an act self-denominated "The California Agricultural Adjustment Act of 1935" Stats.1935, Chap. 307, p. 1032, Deering's Gen.Laws, 1935 Supp.Act 146. At the same session this act was amended in some respects. Stats. 1935, Chap. 416, p. 1468. This act authorized the Director of Agriculture, in order to carry out the purposes of the act, to issue licenses to persons engaged in producing, marketing, processing, packing, shipping, handling or distributing any agricultural product or commodity. Acting under this statute, the Director, in 1935, issued a license "regulating the handling in intra-state commerce of oranges and grapefruit grown in the State of California," and applying to all persons engaged in said industries, and in 1936 he amended this license. This is the license, enforcement of which was restrained by the temporary injunction above mentioned.

In 1937 the legislature undertook to amend the above mentioned statute and to rename it, designating it as "The California Agricultural Products Marketing Act of 1937". Stats.1937, Chap. 910, p. 2501, Deering's Gen.Laws 1937, Act 146. In his brief plaintiff's counsel said of this act: "while the 1937 act is nominally a mere amendment of the 1935 act, it is actually a complete revision thereof." Upon this statement was based an argument that the 1937 act completely repealed that of 1935. To our minds the statement above quoted, taken with the fact that two sections of the 1935 act left unchanged by that of 1937 were not set forth in the latter act, suggested an entirely different question; that is, whether the 1937 act was in viola-

tion of section 24 of article IV of the Constitution of California and hence void because the act revised by it was not reenacted and published at length as revised. We therefore restored the case to the calendar for argument of this question. After considering that argument, we conclude that the question must be given an affirmative answer.

[1] Section 24 of Article IV of the Constitution, just referred to, provides: "No law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall be reenacted and published at length as revised or amended;" These provisions of the Constitution "are mandatory and prohibitory", Cal.Const. § 22, art. I, and an act which violates them is therefore wholly void. Lewis v. Dunne, 1901, 134 Cal. 291, 293, 66 P. 478, 55 L.R.A. 833, 86 Am.St. Rep. 257.

[2-6] When the Legislature desires to alter the provisions of an existing act, it may proceed in either one of several modes to do so. First, it may simply pass a new statute covering the same subject, embodying therein such parts of the former act as it wishes to retain and omitting or altering other parts and inserting new provisions, as it may desire, but making no reference to the former act. When it has so proceeded the result may be, and usually is, a repeal of the former act by implication, but the new statute is not subject to the constitutional provision now under consideration, relating to amending and revising statutes. Matter of Coburn, 1913, 165 Cal. 202, 211, 131 P. 352; Evans v. Superior Court, 1932, 215 Cal. 58, 65, 66, 8 P.2d 467. Second, the Legislature may expressly amend specified sections of a sectionized act, leaving the other sections to stand unchanged. In this case, the constitution requires only that the sections amended be set forth in full as amended. It is obvious that, as far as the mechanics of this process are concerned, it might extend to one, or any greater number, or all of the sections of the former act. But the constitution, by the provision now under consideration, compels a line to be drawn, so that at some stage of the process this second mode of action must be regarded as passing over into the third, that is, revision of the former act, and when it reaches that status, the whole of the former act as altered, including the sections left unchanged, must be set forth in full. If the later act should change all the sections of the former act, compliance with the requirements for an amending act would, at the same time, satisfy those for a revising act, and if this case were the only one to which the provisions regarding revisions were intended to apply, those provisions would be entirely useless. So to limit their application would be contrary to the established rule of constitutional construction that, "The legal intendment is that each and every clause has been inserted for some useful purpose, and when rightly understood may have some practical operation." Hammond v. McDonald, 1942, 49 Cal.App.2d 671, 683, 122 P.2d 332, 339. Consequently we must conclude that the line between mere amendments and a revision is to be so drawn as to include within the category of revisions, at least in some cases, an act changing less than all of the sections of a former act. This is the conclusion stated in Beach v. Von Detten, 1903, 139 Cal. 462, 464, 73 P. 187.

[7, 8] It may, of course, be difficult at times to ascertain the precise location of that line, so as to determine on which side of it a given statute altering a former act lies. Clearly, the mere fact that the Legislature has designated a statute as an amending act, while entitled to consideration, cannot be conclusive as to the nature of such statute. The presumption is always strongly in favor of the validity of legislative action, but if a statute is plainly and unmistakably a revision of a former act, the Legislature cannot escape the effect of this constitutional provision by labelling it otherwise.

This constitutional provision regarding revisory statutes has received attention from the courts. In Lewis v. Dunne, 1901, 134 Cal. 291, 292, 66 P. 478, 479, 55 L.R.A. 833, 86 Am.St.Rep. 257, the Supreme Court held the 1901 act amending the Code of Civil Procedure to be void on two grounds; first, it was in effect a revision and the act revised was not published at length; and second, a mere reference to the Code of Civil Procedure did not state a single subject as a title. On the first point the court said: "And when we look at the body of the act we see clearly that it is a revision. It covers 150 pages of the published statutes of 1901; it amends over 400 sections; it repeals nearly 100 sections; it changes the numbers of other sections; it adds a great

many new sections, and it contains this clause: 'Certain title and chapter headings of the said Code of Civil Procedure are hereby inserted, changed and amended, as hereinafter provided;' and then follow several pages of insertions, changes, and amendments of such headings. If this is not a revision, then it would be difficult to state what would constitute a revision." We note that the Code of Civil Procedure then had sections numbered up to 2104, but probably it actually contained a somewhat smaller number of sections, by reason of omissions of numbers not completely offset by some duplications.

In Beach v. Von Detten, supra, 1903, 139 Cal. 462, 464, 73 P. 187, 188, a statute which amended 58 sections of the County Government Act but left 176 sections untouched was held not to be a revision within this constitutional provision. Examination of this statute (Stats.1901, p. 685) shows that of the sections amended, one section determined the population of the several counties of the state, and one classified the counties according to population, both of which had to be done under the constitution as it then stood (§ 5, art. XI) in order to enable the Legislature to regulate the compensation of officers in the several counties, fifty-three sections related solely to the compensation of officers in the various counties, one section dealt with eligibility to office, one with the number of officers of a township, and one with certain fiscal reports to be made by the auditor, treasurer and board of supervisors. The court held this amending act not to be a revision, saying: "Nor does it make any difference that 58 sections of the original act of 234 sections were thus amended. * * * The remaining 176 sections of the act of 1897 were not changed in any way, nor was the general plan of the original act changed, nor the matter rearranged. * * * But in this case, where the title refers plainly to the original act, and the general plan of the original act is not changed, but three-fourths of the original sections remain the same, with the same numbers, it is evident that the amendatory act was not intended to be, nor was it, a revision, within the meaning of the Constitution." In the course of its discussion the court quoted from another case the statement that "As long as there is one section of the original act untouched there is no revision" and said of it: "The above statement is evidently too broad, because it is apparent that an act consisting of many sections might be changed in many respects, the subjects treated of differently, the sections differently arranged and differently numbered, and yet retain one or more complete sections of the original act. In such case the act would be a revision."

In People v. Oates, 1904, 142 Cal. 12, 13, 75 P. 337, 338, the court held that an act amending one hundred and eight sections of the Penal Code (which then had sections numbered up to 1614, but probably a slightly less number of sections, by reason of some omissions of numbers), repealing two sections and adding one new section was "in no sense a revision of the entire Code," distinguishing Lewis v. Dunne, supra, 1901, 134 Cal. 291, 66 P. 478, 55 L.R.A. 833, 86 Am.St.Rep. 257, on the ground that there "the attempt made was a revision of the Code of Civil Procedure."

Defendant cites Evans v. Superior Court, 1932, 215 Cal. 58, 8 P.2d 467, and argues that it overrules Lewis v. Dunne, supra. It is true, the court did say there, of Lewis v. Dunne, "We are not inclined to adopt or to follow the rather narrow interpretation applied by the court in that case," (215 Cal. 62, 8 P.2d 468); but it appears, from a reading of the whole opinion, that this statement was directed at the part of the decision in Lewis v. Dunne which related to the title of the act. On the matter of revision, no disagreement with Lewis v. Dunne was stated. Evans v. Superior Court involved the Probate Code, which repealed many former statutory provisions and enacted provisions on the same subject, many identical with, and some different from, those repealed. Of it the court said, "the Probate Code does not expressly attempt either to revise or to amend any act by reference to its title" (215 Cal. 65, 8 P. 2d 470), and for that reason concluded that the constitutional provision now under consideration did not apply to the code, even though it was inconsistent with existing statutes and effected a repeal of them by implication.

[9, 10] We conclude that a proper test of the character of a statute as being a revision of a former act, within the meaning of section 24 of article IV of our Constitution is that above quoted from Beach v. Von Detten, supra, 1903, 139 Cal. 462, at page 464, 73 P. 187, at page 188, "an act consisting of many sections might be

changed in many respects, the subjects treated of differently, the sections differently arranged and differently numbered, and yet retain one or more complete sections of the original act. In such case the act would be a revision." Applying this test to the act of 1937 now under consideration, we have no doubt that it does constitute a revision of the act of 1935. Plaintiff's counsel says that the 1937 act "declares new and different policies and purposes, sets up new and different standards, and establishes entirely different methods of procedure," and this appears to be so. The Supreme Court, in Brock v. Superior Court, 1939, 12 Cal.2d 605, 617, 86 P.2d 805, 810, after pointing out important differences between these two acts, said: "It seems apparent that any license issued under the 1935 act would not conform to the requirements and measure up to the standards fixed by the 1937 act." The question now before us, however, was not presented or considered in that case. Considering the subject in more detail, we find that the 1935 act, as amended in that year, had 26 sections. The 1937 act amended 20 of these, repealed 4, allowed 2 to stand unchanged, and added one new section. The sections not changed were not set forth at all in the 1937 act. Besides changing the name of the act, the amendment eliminated the provision for licenses, and in lieu thereof authorized the Director of Agriculture to issue "marketing orders" to persons engaged in handling "any agricultural commodity" in intrastate commerce. One of the declared purposes of the 1935 act was to "reestablish prices to farmers and growers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities during the period of August, 1909–July, 1914." § 2, subd. (1). This does not appear in the amended act, but the latter, in one of its new provisions, states that one of the ends to be accomplished is, "to supply the requirements of such commodity and to provide an adequate standard of living to the farm operator and his family." § 5, subd. 6. The declared purposes of the two statutes differ in other material respects. The amendments not only changed the substance of the original act in many important respects, a few of which we have stated, but entirely rearranged its provisions, so that when the same or nearly the same provision is in both acts, it appears in a different section in the amended act. Repeating here the words of the Supreme Court in Lewis v. Dunne, supra, 1901, 134 Cal. 291, 292, 66 P. 478, 479, 55 L.R.A. 833, 86 Am.St.Rep. 257, "If this is not a revision, then it would be difficult to state what would constitute a revision." The Constitution therefore required that the whole act, as revised, be reenacted at length. This was not done. The two sections omitted from the revising act do not appear to be of great consequence to the general purpose of the act, but the Constitution states no exceptions to its rule, on this or any other account, and we can make none. The case must therefore be decided on the act of 1935, as amended in that year, without regard to the purported amendments of 1937, which must be held void.

[11-13] The act of 1935 is valid in its general scope and purposes. Brock v. Superior Court, 1937, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127. Section 6a of this act as amended in 1935 authorized the Director of Agriculture to issue licenses to persons engaged intrastate in the producing, marketing etc. "of any agricultural product or commodity or products thereof." It also provided that "No such license shall be so issued unless whenever one such person is licensed the director at the same time shall subject all persons engaged in the same specific and naturally, inherently and intrinsically distinctive agricultural business, trade or industry to the same identical license provisions." Deering's Gen.Laws, 1935 Supp., Act 146; Stats. 1935, p. 1036. The license issued here, which attempts to deal with the growing and handling of both grapefruit and oranges as a single industry, is attacked and the preliminary injunction is defended on the ground that these acts constitute more than one industry. We regard the decision in Brock v. Superior Court, supra, 1939, 12 Cal.2d 605, 612, 86 P.2d 805, 808, as sufficient authority for upholding the injunction appealed from. In that case the identical license now before us was in question. A preliminary injunction against its enforcement had been obtained on a complaint which alleged that the license purporting to regulate the handling of both oranges and grapefruit covered more than one industry and was for that reason void, under the act of 1935, when issued. The court referred to the provisions

we have above quoted from section 6a of that act and said: "This language, as a matter of law, does not authorize the Director of Agriculture to regulate the marketing of all agricultural products by one general license fixing a total quota for them divisible ratably between shippers without regard to the difference in the nature of the crop, cost of production, time of harvest, facilities for shipment, amount of demand, price obtainable or other factors which make the conditions under which one agricultural product is marketed distinctly different from those which are applicable to another. The allegations of the plaintiffs' complaint tender as an issue of fact the question whether the marketing of desert grapefruit is an agricultural trade or industry distinctly different from that of marketing other products, and, also, whether the producers of grapefruit are being discriminated against to the profit and advantage of the orange growers and their property taken without due process of law. The plaintiffs are entitled to the findings of a trial court upon those issues."

[14] The application for the preliminary injunction here was submitted on the verified complaint and a number of affidavits and counter affidavits. The complaint alleges that the license attempts to regulate more than one distinctly different industry, by allegations as apt and adequate for that purpose as those in the Brock case last cited, 12 Cal.2d 605, 612, 86 P.2d 805. The allegations of paragraph XXVIII of the complaint here are: "That oranges, grapefruit, lemons, tangerines, and limes are all citrus fruits, but each of them is a distinct, different, and separate commodity, and they are produced, handled and sold in intrastate commerce in California in competition with one another; that the growing, handling and marketing of each of said commodities is a specific and naturally, inherently and intrinsically distinctive agricultural business, trade or industry, even though two or more of said commodities are sometimes produced and handled by the same grower and shipper, in that distinctly different growing and maturing periods and harvesting seasons, production costs, packing and handling methods, requirements and costs, facilities for shipment, consumer demand, markets, and price structures and price histories exist and apply to each of said commodities, and each of them is subject to distinctly different producing, handling and marketing problems. * * *" There was no answer and we find in the affidavits no substantial contradiction of the allegations of the complaint just quoted. An affidavit by a witness who was not a party to the action stated that the affiant admitted a part of these allegations and as to the rest "affiant denies each and every allegation of fact and controverts each and every conclusion of law contained in said Paragraph XXVIII." Which of the statements in the paragraph referred to were deemed by the affiant to be allegations of fact and which conclusions of law does not appear. The trial court was not required to give any weight to such statements in an affidavit, nor are we.

[15, 16] The last cited Brock case, 12 Cal.2d 605, 86 P.2d 805, differs from this in one respect; that is, it was a proceeding in prohibition and the question was merely one of the power of the trial court to order the preliminary injunction, whereas we have here an appeal from the order, which raises a further question as to the propriety of the order under the circumstances appearing. But the granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and the order may not be interfered with on appeal, except for an abuse of discretion. People v. Black's Food Store, 1940, 16 Cal.2d 59, 61, 105 P.2d 361; Brock v. Superior Court, 1938, 11 Cal.2d 682, 688, 81 P.2d 931. We see no abuse of discretion in the present case.

[17] It appears from affidavits filed by the defendant that since August 14, 1936, there has been no actual regulation of the grapefruit industry under this license and that in some respects there has never been any actual regulation of that industry under it, and considerable stress is laid on these facts in argument by defendants. We cannot see, however, that they have any bearing on the questions presented to us. If the license was invalid because attempting to regulate two distinct industries, as plaintiffs claim, that invalidity inhered in it at and from the time of its issuance and would not be removed by failure of those in authority to enforce it against all whom it purported to regulate. This being so,

present attempts of defendants to act under it may be enjoined.

The order appealed from is affirmed.

SCHAUER, P. J., and SHINN, J., concur.



PEOPLE v. WESTERN FRUIT GROWERS, Inc.*

WESTERN FRUIT GROWERS, Inc., v. PARKER et al.

Civ. 13276.

District Court of Appeal, Second District, Division 3, California.

Sept. 19, 1942.

Hearing Granted Nov. 12, 1942.

1. Constitutional law ⇐43(2)

One who elects to accept benefits of a statute is "estopped" from denying its validity.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Constitutional law ⇐43(2)

Where under statutory scheme defendant became subject to license issued by Director of Agriculture attempting to regulate handling of both oranges and grapefruit in intrastate commerce, and therefore liable for its violation, upon promulgation of license, without any affirmative act on defendant's part, defendant's compliance with license in face of such penalties and under such circumstances did not "estop" defendant from disputing validity of license. Gen.Laws Supp.1935, Act 146, § 8; Gen.Laws 1937, Act 146, § 14.

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the People of the State of California against the Western Fruit Growers, Inc., to enjoin violations of a license regulating the handling of oranges and grapefruit in intrastate commerce issued pursuant to the Agricultural Adjustment Act of 1935, wherein the defendant filed a cross-complaint against W. B. Parker, etc., and others, seeking an injunction to restrain cross-defendants from enforcing the license against it. From orders denying plaintiff's and granting defendant's application for a preliminary injunction, the plaintiff and cross-defendants appeal.

Affirmed.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for appellants.

G. V. Weikert, of Los Angeles, for respondents.

SHAW, Justice pro tem.

This case, like American Fruit Growers, Inc., v. Parker, 129 P.2d 46, this day decided, requires a consideration of "The California Agricultural Adjustment Act of 1935", Stats.1935, pp. 1032 and 1468; Deering's Gen.Laws, 1935 Supp., Act 146, and the act purporting to amend it into "The California Agricultural Products Marketing Act of 1937", Stats.1937, p. 2501; Deering's Gen.Laws, 1937, Act 146. The same license regulating the handling of oranges and grapefruit in intrastate commerce which was considered in that case is before us here. Plaintiff, claiming to act under the statutory authority contained in section 8 of the act of 1935 and a similar provision in section 14 of the act as amended in 1937, brought this action to enjoin violations of the license above mentioned by the defendant, and applied for a preliminary injunction. The defendant filed a cross-complaint, seeking an injunction against the Director of Agriculture and others acting under him, to restrain them from enforcing the same license against it, and applied for a preliminary injunction. Both of these applications for preliminary injunctions came on for hearing together. The application of plaintiff was denied and that of defendant was granted. Plaintiff appeals from the order denying its application and cross-defendants appeal from the order granting defendant's application.

These applications were heard in the lower court with that involved in the appeal in American Fruit Growers, Inc., v. Parker, supra, and the appeals were argued together here. The questions presented in that case also arise here, and as to them our decision in that case rules this.

* Subsequent opinion 140 P.2d 13.

[1, 2] Plaintiff and the cross-defendants contend, further, that defendant here is estopped to dispute the validity of the license, relying upon the statement in Gregory v. Hecke, 1925, 73 Cal.App. 268, 284, 238 P. 787, 794, that "One who elects to accept the benefits of a statute is estopped from denying its validity." But the party at whom this statement was aimed was attempting to prevent the revocation of a license issued to him under a statute by contending that the statute was invalid. The court did not suggest, nor do we think it is the law, that if such party's license had been revoked he could not defend a prosecution for acting without one on the ground of invalidity of the statute. The license here was not an individual license issued to defendant upon its application, but was a general license imposed by the Director of Agriculture upon all persons engaged in the industry described in it, without any specific application from any of them, and was, in effect, an administrative regulation of the business made under authority of the statute. The license required persons desiring to ship the fruits described to apply for and obtain quotas stating the amount of fruit they were permitted to ship, and set up an elaborate scheme for determining these quotas. It appears that over a considerable period of time, before this action was begun, defendant applied for and received such quotas and it is these acts which, its adversaries claim, estop it from objecting to the validity of the license. But in so acting defendant was confronted with section 7 of the 1935 act which made it a misdemeanor, punishable by a minimum fine of $50 or a minimum imprisonment of 10 days, or by both, to violate any provision of a state license, and declared, "Each day any of the violations above referred to shall continue shall constitute a separate offense." The same penalty provision appeared in the 1937 act, § 14. Under the statutory scheme defendant became subject to the license and therefore liable for its violation, upon its promulgation, without any affirmative act on its part. Compliance with the license in the face of such penalties and under such circumstances does not work an estoppel to dispute its validity.

The orders appealed from are affirmed.

SCHAUER, P. J., and SHINN, J., concur.

54 Cal.App.2d 412

PEOPLE v. WILSON.

Cr. 3608.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1942.

1. Criminal law ⇐877

Where two or more persons are jointly charged with the commission of an offense, conspiracy is not necessarily involved, hence acquittal of one is not an acquittal of the other.

2. Criminal law ⇐260(11)

In criminal prosecution tried to the court, the value and effect of evidence was addressed to the judgment of the trial court, and, where record failed to show prejudicial error, conviction would be affirmed as against defendant's contention that certain testimony was highly improbable.

3. Criminal law ⇐1182

In robbery prosecution against defendant and wife, where evidence was sufficient to sustain conviction of both, a conviction of defendant alone would be affirmed.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Robert Joseph Wilson was convicted of robbery, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

It appears from the record that appellant was accused jointly with his wife, Jean Wilson, of robbery. Appellant was adjudged guilty; his wife not guilty.

The sole complaint on appeal in substance and effect is summarized in a single sentence from appellant's seven page brief, as follows: "Had the court found both defendants guilty there could be no question as to the sufficiency of the evidence." Thus it would appear that appellant is as

much aggrieved over the failure of the court to find his wife guilty as he is over his own predicament.

[1] It is argued in effect by appellant that, although the information charged appellant and his wife jointly with the offense of robbery nevertheless, where two or more are jointly charged with the commission of an offense, conspiracy is necessarily involved and hence the acquittal of one is an acquittal of the others. Such is not the law. Nor do the authorities relied upon by appellant so hold.

[2] The further contention that certain testimony is "highly improbable" manifestly is a matter of opinion. The value and effect of evidence was addressed to the judgment of the trial judge, a jury having been waived, and there is nothing in the record to suggest that any conclusions in this regard resulted in prejudicial error.

[3] The evidence is sufficient to support the judgment and, there being no errors, it is affirmed.

YORK, P. J., and WHITE, J., concurred.

20 Cal.2d 826

PARKHURST v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18334.

Supreme Court of California.

Sept. 24, 1942.

1. Workmen's compensation ⇐939

"Serious and wilful misconduct" of employer entitling employee to additional compensation is conduct that the employer knew or should have known was likely to cause serious injury or conduct that evinces a reckless disregard for the safety of others.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Wilful Misconduct".

2. Workmen's compensation ⇐939

The employment of workmen under dangerous conditions that can be guarded against constitutes a "reckless disregard for their safety" amounting to "serious and wilful misconduct" entitling injured employee to additional compensation under the Workmen's Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Disregard of Safety".

3. Workmen's compensation ⇐941

The statute requiring employer to furnish employees with pure drinking water in closed containers and individual drinking cups was designed to safeguard employees against the hazard of transmission of communicable diseases by the use of common drinking cups. Gen.Laws 1937, Acts 4725, and 6259.

4. Evidence ⇐65

Employer is chargeable with knowledge of the statute requiring him to furnish employees with pure drinking water in closed containers and individual drinking cups. Gen.Laws 1937, Acts 4725 and 6259.

5. Workmen's compensation ⇐941

Violation of statute requiring employer to furnish employees with pure drinking water in closed containers and in individual drinking cups was not mere "negligence" but criminal conduct punishable as a misdemeanor. Gen.Laws 1937, Acts 4725, and 6259.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

6. Workmen's compensation ⇐941

Where there is a deliberate breach of a law which is framed in the interests of the working man, such breach amounts to "serious misconduct" entitling injured employee to additional compensation under Workmen's Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious Misconduct".

7. Workmen's compensation ⇐1723, 1939

Whether serious and wilful misconduct of the employer caused employee's injury so as to entitle him to additional compensation is essentially a "question of fact" so that if there is any substantial evidence to support industrial accident commission's findings with respect thereto, commission's award will not be disturbed.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

8. Workmen's compensation ⇐1939

An award of the industrial accident commission will be set aside if there is no evidence to support the board's findings.

9. Workmen's compensation ⇐941

In proceeding for additional compensation because of serious and wilful misconduct of employer in knowingly failing to furnish fresh and pure drinking water to employees, the opinion of public health authorities that water in reservoir was safe for drinking did not relieve employer from liability arising from violation of statutory duty by distributing the water by means of an open bucket and common dipper. Gen.Laws 1937, Acts 4725 and 6259.

10. Workmen's compensation ⇐941

That president, general manager and sole stockholder of employer corporation had drunk water from the common dipper by means of which it was supplied to employees did not relieve employer of liability arising from violation of statutory duty to furnish employees with pure and fresh drinking water in covered containers and in individual drinking cups, since an employer's mistake in judgment does not relieve him from liability for serious and wilful misconduct. Gen.Laws 1937, Acts 4725 and 6259.

11. Workmen's compensation ⇐1674

In employee's proceeding for additional compensation because of serious and wilful

misconduct of employer in knowingly failing to furnish fresh and pure drinking water to employees, evidence that drinking water facilities were installed by general contractor and used by its employees without ill effect did not sustain industrial accident commission's finding that employer was not guilty of "serious and wilful misconduct" despite violation of statute requiring water to be furnished employees in covered containers and individual drinking cups. Gen.Laws 1937, Acts 4725 and 6259.

12. Workmen's compensation ⇐941

Subcontractor's statutory duty to furnish its employees with pure drinking water in closed containers and in individual drinking cups could not be delegated and hence such contractor could not escape liability for additional compensation based on his serious and wilful misconduct in failing to perform statutory duty by accepting the facilities for distribution of water furnished by general contractor under contractual obligation to subcontractor with respect to such facilities. Gen.Laws 1937, Acts 4725 and 6259.

13. Workmen's compensation ⇐1947

Where industrial accident commission found that employer furnished its employees drinking water by means of an open container and common dipper in violation of statutory duty to furnish pure water in closed containers and individual drinking cups and there was no substantial evidence to support commission's conclusion that in spite of such breach of statutory duty, injury to employee who contracted amoebic dysentery from drinking the water was not caused by serious and wilful misconduct of the employer, commission's order denying additional compensation because of "serious and wilful misconduct" would be annulled. Gen.Laws 1937, Acts 4725 and 6259.

In Bank.

Proceeding by William R. Parkhurst, employee, to review an award of the Industrial Accident Commission, denying additional compensation against J. Phillip Murphy Corporation, employer.

Order annulled.

For prior opinion, see 122 P.2d 321.

William J. Currer, Jr., of Los Angeles, for petitioner.

C. Wesley Davis, Everett A. Corten, and J. Gould, all of San Francisco, for respondents.

TRAYNOR, Justice.

Respondent Industrial Accident Commission awarded the petitioner compensation for injuries received in the course of his employment but denied an additional award claimed by reason of the alleged serious and willful misconduct of the employer. The sole issue in this proceeding is whether the commission's order that petitioner's injury was not caused by the serious and willful misconduct of the employer finds support in the record.

Between June 9, 1938, and September 15, 1938, petitioner was employed as a journeyman ironworker by the J. Phillip Murphy Corporation, which was engaged as a subcontractor in the installation of structural iron on a building project at Camarillo, California. In the course of his employment petitioner was exposed to entamoeba histolytica through the drinking water furnished at the project, and contracted amoebic dysentery. The medical testimony disclosed that the disease is usually contracted by drinking contaminated water, that water can be contaminated by contact with fecal matter or contaminated hands, and that a single person who is a carrier of the disease can infect the water supply and cause an epidemic among persons drinking the water. The water line at the project was attached to a pipe connecting an irrigation pump and a neighboring uncovered reservoir. When a certain valve was opened to irrigate adjoining land, water from the reservoir would siphon into the water line and outlets on the job. There was evidence that the reservoir was used as a swimming pool and that tests made by the county health authorities on May 17, 1939, revealed that the water, although still classified by them as good, was contaminated with fecal matter. The water was drawn from faucets used by the men in washing their hands on their way to and from the toilets, which were near some of the faucets. It was supplied to the men by an open bucket and common dipper, in violation of statutes requiring closed containers and individual drinking cups. Stats.1917, p. 1517, Deering's Gen.Laws, Act 6259; Stats. 1915, p. 815, Deering's Gen.Laws, Act 4725. The employer, commencing work as subcontractor after construction

was under way, accepted the facilities furnished by the general contractor. He knew how the water was distributed, but made no inquiry as to its source. At no time did he attempt to furnish his employers with pure, fresh drinking water. Numerous men complained at various times to the employer's superintendent and managing representative that the drinking water had a foul taste and odor, and gave them diarrhea and cramps. The superintendent acknowledged that the water was bad, but said in effect that no other was available. All water available from wells in the district had a somewhat unpleasant taste and odor. The uncontradicted testimony of the health authorities disclosed that they inspected the premises on August 30, 1938, in response to complaints made to their office regarding the method of distributing the water, and that they ordered the contractor to desist from distributing water in open containers and common dippers.

Petitioner relies upon the violation of the statutes and the complaints by the men to support his contention that the employer was guilty of serious and willful misconduct. He contends that there was no evidence to support commission's contrary conclusion and attacks, particularly the commission's finding that "No officer or representative of J. Phillip Murphy Corporation had any knowledge, either actual or constructive, that the drinking water or the facilities for distributing the drinking water furnished to its employees on this job, was capable of producing amoebic dysentery, or was otherwise dangerous to the health of its employees." The commission did find, however, that petitioner was injured in the course and scope of employment and awarded compensation accordingly.

[1,2] Serious and willful misconduct is conduct that the employer knew, or should have known, was likely to cause serious injury, or conduct that evinces a reckless disregard for the safety of others. Hatheway v. Industrial Acc. Comm., 13 Cal.2d 377, 90 P.2d 68; Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Hoffman v. Dept. of Indus. Relations, 209 Cal. 383, 287 P. 974, 68 A.L.R. 294; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 209 Cal. 412, 288 P. 66; Gordon v. Industrial Acc. Comm., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; Blue Diamond Plaster Co. v. Industrial Acc. Comm., 188 Cal. 403, 205 P. 678; E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 193 P. 105, 16 A.L.R. 611; Helmick v. Industrial Acc. Comm., 46 Cal.App.2d 651, 116 P.2d 658; Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510. It has been held repeatedly that the employment of workmen under dangerous conditions that can be guarded against constitutes a reckless disregard for their safety. Hatheway v. Industrial Acc. Comm., supra; Hoffman v. Dept. of Indus. Relations, supra; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., supra; Gordon v. Industrial Acc. Com., supra; Blue Diamond Co. v. Industrial Acc. Comm., supra; Johannsen v. Industrial Acc. Comm., 113 Cal.App. 162, 298 P. 99. The test under these cases is whether the employer knowingly or willfully committed an act that he knew or should have known was likely to cause harm to his employee. In the present case, the employer by knowingly violating its statutory duty to supply its employees with pure drinking water in closed containers and individual cups, set the conditions for the transmission of various communicable diseases and exposed its employees to the hazard of serious injury therefrom.

[3-6] It is true that not every violation of a statute is serious and willful misconduct. Hoffman v. Dept. of Indus. Relations, supra; Helme v. Great Western Milling Co., supra. See, also, Ethel D. Co. v. Industrial Acc. Comm., supra (commission's safety order); Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35; Simpson v. Industrial Acc. Comm., 87 Cal.App. 652, 262 P. 469; 22 Cal.L.Rev. 432. In Hoffman v. Dept. of Indus. Relations, 209 Cal. 383, 390, 287 P. 974, 68 A.L.R. 294, this court stated: "It will be conceded that the violation of one statute may be far more serious than the violation of another statute; and that the violation of the same statute under one set of facts may not be serious, whereas under a different set of facts it will be quite serious indeed." It has long been recognized that communicable diseases are readily transmitted by common drinking cups and the statutes in the present case were designed to safeguard employees against that hazard. Violation of these statutes is particularly serious when hundreds of men are employed on the same project at the same time and do not have access to other drinking water. The employer is charged with knowledge of the statute (Hoffman v. Dept. of Indus. Relations, supra. See, also, 10 Cal.Jur. 760)

and was found by the commission to know that the water was distributed in violation of the statutory requirements. On these issues there is no conflict. Violation of the statutes in question was not mere negligence (See Hoffman v. Dept. of Indus. Relations, supra; Helme v. Great Western Milling Co., supra; In re Burns' Case, 218 Mass. 8, 105 N.E. 601, Ann.Cas. 1916A, 787) but criminal conduct punishable as a misdemeanor. Stats.1917, p. 1517, Deering's Gen.Laws, Act 6259; Stats.1915, p. 815, Deering's Gen.Laws, Act 4725). [3] "* * * Where there is a deliberate breach of a law * * *, which is framed in the interests of the workingman, it will be held that such a breach * * * amounts to serious misconduct." So spoke the court in Fidelity, etc., Co. v. Industrial Acc. Comm., 171 Cal. 728, 154 P. 834, 835, L.R.A.1916D, 903, annulling an award based on a finding that an employee whose injury resulted from a violation of speed laws was not guilty of serious and willful misconduct. The rule must be similarly applied to the conduct of an employer.

[7-13] It remains to determine whether there is any evidence in the record from which the commission could find that there was no serious and willful misconduct by the employer despite the violation of the statutes. It is well settled that the question whether serious and willful misconduct of the employer caused the employee's injury is essentially one of fact, and that if there is any substantial evidence to support the findings of the commission its award will not be disturbed. Its award will be set aside, however, if there is no evidence to support its findings. Hatheway v. Industrial Acc. Comm., supra; Ethel D. Co. v. Industrial Acc. Comm., supra. Respondent places great emphasis on evidence in the record that the county health authorities considered the water safe for drinking. The employer seeks to draw an inference therefrom that it could not be charged with knowledge that the water was unfit for human consumption. Actually, however, the opinion of the health authorities referred only to the water in the reservoir nearly one year after the injury. They made no tests of the water before or at the time of the injury. Their examination did not extend to water in the buckets and dippers, which they had previously ordered discontinued. Even if an inference could be drawn that the employer was not chargeable with knowledge that the water in the reservoir was contaminated, it was nonetheless chargeable with knowledge of the danger incident to distribution by means of an open bucket and common dipper. While there was evidence that J. Phillip Murphy, president, general manager, and sole stockholder of the employer corporation, had drunk the water from the common dipper, the most favorable inference that can be drawn therefrom is that he did not consider the means of distribution dangerous. It has been held, however, that an employer's mistake in judgment does not relieve him from liability for serious and willful misconduct. Blue Diamond Plaster Co. v. Industrial Acc. Comm., supra. The evidence that the drinking facilities were installed by the general contractor and were used by its employees with no ill effects will not support the commission's finding. The commission's finding regarding the numerous complaints registered by the men destroys the pertinence of the alleged effect of the water on previous users. The testimony of the employer that it customarily accepted the facilities furnished by the general contractor and that the latter was under a contractual obligation to it with respect to such facilities indicates a misconception of its duties and liabilities with regard to the safety of its employees. The employer was aware of the general contractor's breach of contract. Its own statutory duty to furnish its employees with pure drinking water in closed containers and in individual drinking cups could not be delegated. In the light of the findings of the commission and in the absence of substantial evidence to support its conclusion that the injury was not caused by the serious and willful misconduct of the employer, the order denying additional compensation is annulled.

SHENK, CURTIS, EDMONDS, CARTER, JJ., and PETERS, J. pro tem., concurred.

GIBSON, C. J., did not participate herein.

54 Cal.App.2d 458

BRAZELL v. BRAZELL.

Civ. 13554.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1942.

1. Divorce ⇐55

If the conduct of both parties has been such as to furnish grounds for divorce, under the doctrine of "recrimination" neither of the parties is entitled to relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Recrimination".

2. Divorce ⇐53

The doctrine of "recrimination" as a defense in divorce action rests on the equitable maxim that he who comes into equity must come with clean hands, and the concept that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed its obligations on his part.

3. Divorce ⇐108

Where answer in divorce action pleaded recrimination, an "issue of fact" was joined. Code Civ.Proc. §§ 588–590.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue of Fact".

4. Divorce ⇐124, 253

In wife's action for divorce wherein husband pleaded recrimination, evidence sustained findings against the husband, including recrimination, and the findings awarding to wife personal property claimed by the husband.

5. Divorce ⇐188, 223

The allowance of counsel fees and costs in a divorce action is confided to the discretion of the trial judge. Civ.Code, § 137.

6. Divorce ⇐188, 223

In action by wife for divorce, trial court did not abuse its discretion in refusing to allow husband counsel fees and court costs. Civ.Code, § 137.

7. Divorce ⇐111

The relevancy and competency of evidence that parties to divorce action lived together before they were married and that wife was frequently intoxicated during that time depended upon the facts under consideration by the court.

8. Divorce ⇐111

In wife's action for divorce, wherein husband pleaded recrimination, court did not err in excluding evidence that parties lived together before they were married, and that wife was frequently intoxicated during that time, since husband was thereby sufficiently apprised of wife's drunkenness to preclude complaint as to drunkenness after marriage.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ruth Brazell against James C. Brazell for a divorce. From an interlocutory judgment of divorce and order denying his motion for a new trial, defendant appeals.

Appeal from order denying a new trial dismissed, and judgment affirmed.

Roy J. Farr, of Los Angeles, for appellant.

Bender & Mayo and Jerome J. Mayo, all of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The parties to this divorce action were married in 1934, and lived together until 1941. Theirs was a tempestuous life, which culminated in the wife filing her complaint for divorce. She accused her husband of beating her up on several different occasions; of failing and refusing to work during the whole time of the marriage; and of being drunk most of the time. In his answer, the husband accused her of drunkenness, and of corresponding with, and having improper relations with other men. After a lengthy trial, in which there was testimony in support of all of the above allegations, the superior court found in favor of the plaintiff and rendered its interlocutory judgment of divorce. From this judgment and the denial of his motion for a new trial the defendant has appealed.

It is first asserted that the trial court erred in not finding recrimination in bar of plaintiff's cause of action.

[1, 2] The defense of recrimination in a divorce suit is nothing new. Recrimination is defined in 27 Corpus Juris Secundum, Divorce, § 67, p. 623 as follows:

"As a general rule, sometimes declared by statute, divorce is a remedy for the innocent against the guilty; hence, if both parties are equally at fault, a divorce will not be granted. If the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief, or, as the rule sometimes is expressed, if both parties have a right to a divorce, neither of the parties has.

"This is known as the doctrine of recrimination, and rests on the equitable maxim that he who comes into equity must come with clean hands, and on the concept that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed the obligations on his part."

[3, 4] However, when the defendant in his answer alleged recrimination an issue of fact was joined. Code of Civ.Proc. §§ 588–590. This issue, together with all the others in the case, was tried by the court; not piecemeal, as defendant apparently contends, but altogether. There is substantial evidence in the record to sustain all of the findings against the defendant, including recrimination, and also including the findings awarding to the plaintiff personal property claimed by the defendant.

[5, 6] Defendant next asserts error because of the refusal of the trial court to allow him counsel fees and court costs. As is set forth in section 137 of the Civil Code, any allowance of counsel fees and costs in a divorce action is confided to the discretion of the trial judge. There appears no abuse of discretion in connection with this ruling.

Finally, the defendant complains because the trial court refused to permit the introduction of evidence that the plaintiff and defendant lived together before they were married, and of her drunkenness during that time. Defendant cites no authority in support of this proposition and plaintiff fails to brief it at all.

[7] Relevancy and competency of such evidence depends upon the facts under consideration by the courts. In Franke v. Franke, 3 Cal.Unrep. 656, 662, 31 P. 571, 573, 18 L.R.A. 375, the Supreme Court states the rule in annulment cases;—a rule which is applicable to the case at bar:—

"* * * Having experienced and participated in her incontinence before marriage he is thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurances that he was the only participant in her illicit intercourse. Reynolds v. Reynolds, 3 Allen [Mass., 605], 609; Foss v. Foss, 12 Allen, [Mass.] 26; Crehore v. Crehore, 97 Mass. 330 [93 Am. Dec. 98]; Scroggins v. Scroggins [14 N. C. 535], 3 Dev. 535; Long v. Long, 77 N. C. [304], 305 [24 Am.Rep. 449]; Carris v. Carris, 24 N.J.Eq. [516], 517; Seilheimer v. Seilheimer, 40 N.J.Eq. 412, 2 A. 376; Varney v. Varney, 52 Wis. 120, 8 N.W. 739, [38 Am.Rep. 726]; Bish.Mar. & Div. § 483 et seq."

Also, see Gondouin v. Gondouin, 14 Cal. App. 285, 288, 111 P. 756; 9 So.Calif. Law Review, 412, and cases and notes there cited.

[8] Therefore, there is no merit in defendant's specification of error in the exclusion of the evidence offered.

The appeal from the order denying motion for new trial is dismissed. The judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concurred.



HUMPHREYS v. SAN FRANCISCO AREA COUNCIL, BOY SCOUTS OF AMERICA et al.*

Civ. 11938.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1942.

Hearing Granted Nov. 12, 1942.

1. Automobiles ⇐181(1)

The automobile guest laws being in derogation of the common law, must be construed strictly. Vehicle Code, § 403, St. 1935, p. 154.

2. Automobiles ⇐181(1)

In construing the automobile guest law, the court should consider not only the language of the statute, but also its purpose and the nature of the evil against which the statute was directed. Vehicle Code, § 403, St.1935, p. 154.

* Subsequent opinion 139 P.2d 941.

3. Automobiles ⇐181(2)

To take a person riding in an automobile out of the "guest" status, it is not necessary that compensation for the ride be a strict contractual consideration or that an enforceable contract relation relative to the ride should exist between the parties. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

4. Automobiles ⇐181(2)

In construing automobile guest statutes, consideration should not only be given to the meaning of the language "without giving compensation for the ride" or its equivalent but also to the meaning of the word "guest" as used therein. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles ⇐181(2)

If the excursion is not purely social, any benefit to the driver of the automobile conferred or anticipated or mutual benefit present or anticipated to the driver and the person carried is sufficient to take the case out of the automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

6. Automobiles ⇐181(2)

In construing the automobile guest statute, the courts take a broad and realistic, and not a narrow or technical legalistic, view of the situation and the relation of the parties in determining whether an injured automobile occupant was a "guest" within the statute at the time of receiving an injury. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles ⇐181(2)

An employee being carried to or from his place of employment in his employer's automobile is not a "guest" within the automobile guest statutes, even though the carriage is a privilege and not a strict contractual right. Vehicle Code, § 403, St. 1935, p. 154.

8. Courts ⇐90(7)

Where District Court of Appeal, Second District, cited no authority for a conclusion, and did not consider similar cases from other jurisdictions, and no petition for hearing by the Supreme Court was filed in the case, District Court of Appeal, First District, was not bound by the prior case.

9. Automobiles ⇐181(2)

The word "guest" as used in the automobile guest law connotes something other than a business transaction. Vehicle Code. § 403, St.1935, p. 154.

10. Automobiles ⇐181(2)

If an employer, as a regular practice, affords transportation to its employees to and from the nearest town and maintains an automobile in part for that purpose, an employee riding to such town on an errand of his own by virtue of the privilege is not within the automobile guest law, although the transportation is a mere revocable privilege.

11. Charities ⇐45(2)

Charitable organizations generally have the same liability for the negligence of their employees as exists in the case of other employers.

12. Automobiles ⇐244(20)

In action for death of plaintiff's son while riding to a nearby town in an automobile maintained by a Boy Scout camp, evidence sustained finding for camp director on issue of negligence alleged to consist of employing the driver and in allowing three boys to ride in the driver's seat.

13. Automobiles ⇐181(2)

Where Boy Scout camp afforded transportation to a nearby town to its junior staff members as a regular practice and maintained an automobile in part for that purpose and the transportation was a business arrangement, and an inducement to employment of the members, a member riding to town on an errand of his own by virtue of the privilege was not a "guest" within the automobile guest law so as to preclude recovery for his death by accident during the trip without proof of wilful misconduct of driver of automobile notwithstanding that the transportation was a revocable privilege. Vehicle Code, § 403, St. 1935, p. 154.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Robert Humphreys against San Francisco Area Council, Boy Scouts of America, and another, for death of plaintiff's son in an automobile accident. From an adverse judgment, plaintiff appeals.

Affirmed in part and reversed in part with directions.

A. E. Bagshaw, of San Rafael, and Harold F. Riede, of San Francisco, for appellant.

Freitas, Duffy & Keating, of San Rafael, and Daniel J. O'Brien, Jr., and John H. Corning, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

The plaintiff appeals from a judgment for defendants in an action for the death of plaintiff's 15 year old son, Robert Humphreys, Jr. Young Humphreys was a member of the Boy Scouts and at the time of his death he was employed as a Junior Staff Member at a Boy Scout Camp known as Camp Lilienthal located in Marin County, California. In consideration of his services at the camp in that capacity he received as a matter of contractual right his board and lodging at the camp. The camp is located about two miles from the city of Fairfax and the defendant San Francisco Area Council, Inc., Boy Scouts of America in connection with the maintenance and operation of Camp Lilienthal operated a Plymouth truck automobile between the camp and the city of Fairfax. The truck was driven by one Francis Kuckein who was also a Boy Scout employed at the camp as a Junior Staff Member. At the time of his death Robert Humphreys, Jr., was being transported in the truck from the camp to Fairfax. The trial court found that at the time of the injuries which resulted in young Humphrey's death Francis Kuckein was driving the truck as the agent, servant and employee of defendant San Francisco Area Council, Inc., Boy Scouts of America; that he was negligent in its operation; and that such negligence proximately caused the injuries and resulting death of Humphreys, Jr. The trial court also made the following findings of fact:

"That it is true that all junior staff members of said Camp, including the said Robert Humphreys, Jr. * * * were privileged to receive, and actually did receive transportation to and from Camp Lilienthal in the said Plymouth truck automobile which was maintained, in part, for said purpose, and that all other members of the said Camp Lilienthal not performing services of some sort, and therefore not having the status of Junior Staff members, did not have said privilege and actually did not receive said transportation; that said privilege was revocable at any time at the will of said defendants or either of them.

"* * * it is true that * * * the said Robert Humphreys, Jr. was riding in the aforementioned Plymouth truck automobile; that at said time the said Robert Humphreys, Jr. was riding in said truck from Camp Lilienthal to the city of Fairfax on a mission personal to himself; that at said time the said Robert Humphreys was riding in said truck by virtue of the privilege afforded him by the defendant San Francisco Area Council, Inc., Boy Scouts of America * * *."

As a conclusion of law the court found:

"That at said time Robert Humphreys, Jr. was a guest in said Plymouth truck automobile and not a passenger therein by virtue of his employment * * * or otherwise."

[1-5] This appeal presents primarily the question whether the facts found by the trial court support the conclusion of law above quoted. In approaching this question certain rules of law which have been worked out by the courts in construing the so-called guest statutes of this and other states should be borne in mind. Among these may be mentioned the following: 1. Being in derogation of the common law the guest laws must be construed strictly. Vehicle Code, § 403, St.1935, p. 154. Rocha v. Hulen, 6 Cal.App.2d 245, 254, 44 P.2d 478; Prager v. Isreal, 15 Cal.2d 89, 93, 98 P.2d 729. 2. In construing the law the courts should consider not only the language of the statute itself, but also the purpose of the enactment and the nature of the evil against which it was directed. McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P. 2d 909; Rocha v. Hulen, supra; Crawford v. Foster, 110 Cal.App. 81, 87, 293 P. 841. 3. That in order to take a person riding in an automobile out of the guest status it is not necessary that the compensation for the ride be a strict contractual consideration or that an enforceable contract relation relative to the ride should exist between the parties. Haney v. Takakura, 2 Cal.App.2d 1, 7, 37 P.2d 170, 38 P.2d 160; Scholz v. Leuer, 7 Wash.2d 76, 109 P. 2d 294, 299; Peronto v. Cootware, 281 Mich. 664, 275 N.W. 724; Russell v. Parlee, 115 Conn. 687, 163 A. 404, 406. 4. That in construing such statutes consideration should not only be given to the meaning of the language "without giving compensation for the ride" or its equivalent in other statutes, but also to the meaning of the word "guest" as used in such statutes. Rocha v. Hulen, supra; Knutson v. Lurie, 217 Iowa 192, 251 N. W. 147, 149; Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455, 458. 5. That where the excursion is not purely social any benefit to

the driver or owner of the automobile conferred or anticipated, or mutual benefit present or anticipated to the driver or owner and the person carried, is sufficient to take the case out of the statute. Crawford v. Foster, supra; Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P. 2d 714; Duclos v. Tashjian, 32 Cal.App.2d 444, 90 P.2d 140; Boyson v. Porter, 10 Cal. App.2d 431, 52 P.2d 582.

Thus, to enlarge somewhat upon the principles above stated, the court said in Crawford v. Foster, supra, 110 Cal.App. at page 87, 293 P. at page 843:

"It has been held that the terms of a statute should be construed with their intent and purpose in view. Evans v. Selma Union High School Dist., 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121. The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. Neither this feeling nor the reasons therefor apply to a situation arising out of an ordinary business transaction, such as the efforts of a dealer to sell an automobile to a customer."

In Rocha v. Hulen, supra, 6 Cal.App.2d at page 254, 44 P.2d at page 483, we find the following language:

"In all the cases having to do with guest statutes, it appears that the various courts have had distinctly in thought the question of whether the circumstances presented bring the case within the intent and purpose to be accomplished, and the evils to be remedied by the enactment of such statutes, as well as whether the plaintiff is within the language appearing in the statutes being considered.

"The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined."

In construing the guest law, Vehicle Code, § 403, St.1935, p. 154, our courts have determined that persons, in the following situations, among many others, were not within the meaning of the statute: A plumber being taken by the owner of land to look at a broken pump, although he had not contracted to repair it (Duclos v. Tashjian, supra); a person engaged with the driver in a joint business venture (Walker v. Adamson, supra); a friend accompanying a patient in an ambulance at the request of the ambulance driver (Carey v. City of Oakland, supra); a person who shared in the driving where the driver otherwise would not have undertaken the trip (Druzanich v. Criley, supra); a supporter of a candidate for public office while riding in an automobile loaned for the purpose of furthering the campaign (Boyson v. Porter, supra); a child riding in a school bus (Smith v. Fall River, etc., School Dist., 118 Cal.App. 673, 5 P.2d 930); a boy riding with another to learn a paper route in the expectation that he might later take it over if a vacancy occurred. Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159.

[6] It may be said of these cases generally that they show a marked tendency on the part of our courts in construing our guest law to take a broad and realistic and not a narrow or technical legalistic view of the situation and relation of the parties in determining whether an injured occupant of an automobile was or was not a guest within the meaning of the statute at the time of receiving an injury.

Turning to cases dealing directly with the transportation of an employee to or from his place of employment, where the carriage of the employee was not a matter of contract right, we have found the following: Kruy v. Smith, 108 Conn. 628, 144 A. 304; Russell v. Parlee, supra; White v. Gregory, 161 Va. 414, 170 S.E. 739; Garrett v. Hammack, 162 Va. 42, 173 S.E. 535; Monison v. McCoy, 266 Mich. 693, 256 N. W. 49; Peronto v. Cootware, supra; Knutson v. Lurie, supra; Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 120 P.2d 672.

In Kruy v. Smith, supra, a laundress was being transported to her employer's home in the employer's automobile when injured, instead of travelling by street railway as

she was accustomed to do. The court reversed a judgment on a directed verdict for defendant. In construing the Connecticut guest law the court said at page 305 of 144 A.:

"The Legislature, when it used the word 'guest,' did not intend to include persons who are being transported for the mutual benefit of both the passenger and the operator or owner of the car, and, in determining whether the transportation was for the mutual benefit of both, not merely the act of transportation must be considered, but also any contract or relationship between the parties to which it was an incident."

In Russell v. Parlee, supra, the defendant owned a farm which was worked by one Grant. Grant employed the plaintiff to help him in the farm work and plaintiff was injured while being conveyed to the farm by defendant in defendant's automobile. The supreme court of errors of Connecticut in affirming a judgment for plaintiff based on simple negligence said at page 406 of 163 A.:

"We are here concerned, not with a relationship growing out of contract, as in the case of a bailment, but with the construction of a statute denying to a certain class of passengers in an automobile a right to recover compensation for injuries resulting from negligence in its operation, to which, prior to its enactment, they were entitled. Its operation should not be extended beyond the correction of the evils and the attainment of the permissible social objects which, it may be assumed, were the inducing reasons for its enactment. Silver v. Silver, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221 [65 A.L.R. 939]. It may well have appeared to the Legislature that there were sound social reasons for denying a recovery for negligence against one who was transporting in his automobile a member of his family or a social guest or casual invitee, in an action brought by the recipient of his hospitality, which would not exist where a mutual benefit growing out of the relationship of the parties was contemplated, even though the benefit to be received was incidental, and not a technical legal benefit which the parties by their contract had bargained for as the consideration for the transportation. * * * The person transported is not a guest within the meaning of the statute if the transportation is for the mutual benefit of both parties, and in determining whether it was for their mutual benefit the relationship between the parties to which it was an incident may be considered. * * *

"The arrangement between the defendant and Grant created an identity of interest between them in the cultivation of the garden, and the transportation of the plaintiff contemplated a benefit to her by expediting the necessary work in her garden, though the actual wages of the plaintiff were to be paid by Grant instead of herself."

In Monison v. McCoy, the supreme court of Michigan held by a divided court that a woman being driven to her home by defendant after having spent a week in defendant's home nursing his wife was entitled to recover for injuries received through simple negligence under the guest statute of that state. The majority opinion quoted from and relied on the case of Kruy v. Smith, supra.

In the later case of Peronto v. Cootware, supra [281 Mich. 664, 275 N.W. 725], the supreme court of Michigan was called upon to apply its guest statute to the following facts, quoting from the opinion of the court:

"On December 15, 1935, Clarence's wife was sick. Clarence asked Leslie to go to Hardwood, get their mother, and bring her back to take care of his wife, authorizing Leslie to tell the mother that Clarence would pay her what it was worth. Leslie drove to Hardwood and told plaintiff what Clarence wanted and agreed to do. Plaintiff acquiesced in the request, and the next day, on the return trip, the car struck an icy spot in the road, ran over an embankment, and plaintiff was injured. She sued Leslie.

"The court held plaintiff not a guest passenger, submitted the case to the jury upon the issue of ordinary negligence, and plaintiff had verdict and judgment of $2,000 damages.

"No arrangement was made nor suggested that Leslie be paid for making the trip or for transporting plaintiff. His act was wholly gratuitous and as a favor to Clarence. The sole question upon liability is whether plaintiff was a guest passenger.

"Plaintiff made the trip, not for her own pleasure or on her own business, but in order to render a requested service for Clarence. Her presence in the car had no social aspect; nor did Leslie extend the invitation to ride as a matter of hospitality. The

transportation was a business proposition. If Clarence had been in the place of Leslie, the case would be clear that plaintiff was not a guest [Citing Monison v. McCoy, supra * * *]. The fact that Leslie was an uncompensated volunteer can make no difference in his relations to plaintiff."

In White v. Gregory, 161 Va. 414, 170 S.E. 739, 740, the plaintiff was an employee of defendant Gregory. Gregory was an undertaker and plaintiff was at Gregory's funeral home to help care for the body of a woman. There being some delay Gregory said to plaintiff: "How about you going and getting something to eat?" He then instructed another employee, the defendant Miller, to "drive Mrs. White home." The accident occurred on the way to plaintiff's home. The supreme court of appeals of Virginia said: "The court is of opinion that these facts are sufficient to support a finding that the plaintiff was not a mere guest of either Miller or Gregory."

In Garrett v. Hammack [162 Va. 42, 173 S.E. 536], supra, the plaintiff was employed by defendant both in his home and his store. While defendant was driving her from home to store plaintiff was injured. The court said: "The jury were warranted in finding that plaintiff was a passenger in the automobile of Garrett, and this court is unanimously of opinion that her right, if any, to recover against Garrett, should be based upon proof of ordinary negligence."

In Knutson v. Lurie, supra, plaintiff was a domestic servant in the home of defendant. She was injured through defendant's negligence while defendant was taking her to get a pair of shoes which plaintiff had left at a shop to be repaired. The supreme court of Iowa affirmed a judgment for plaintiff. While the court laid some emphasis on the fact that plaintiff took care of defendant's baby during the ride the court cited and quoted from Kruy v. Smith, supra, and Russell v. Parlee, supra, and commented:

"After reading the foregoing cases, it becomes apparent that one may be an occupant of an automobile without being a guest or a mere invitee, and yet not be a passenger for hire. * * * Furthermore, it is manifest that in determining the benefit, it is proper to take into consideration 'not merely the act of transportation * * * but also any contract or relationship between the parties to which it was an incident.'" [217 Iowa 192, 251 N.W. 150.]

[7] We have discussed and quoted from these cases at length because in a variety of circumstances, and for somewhat divergent reasons, as is natural in the construction of a new type of legislation, these decisions have all shown a trend of judicial thought in one direction, that a servant or employee being carried to or from his place of employment in his employer's automobile is not a guest within the meaning of the guest statutes even though the carriage is a matter of privilege or accommodation and not of strict contractual right.

Directly opposed to this trend of judicial thought is Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 120 P.2d 672, 673. In that case an employee of the defendant after a change of the opening time of the laundry from 7 a. m. to 6 a. m. was informed by defendant's foreman that he would thereafter pick her up and bring her to work. This he did thereafter with one or two exceptions when he had another employee, Taylor, pick her up. On the date of the injury Taylor, at the foreman's request, picked up plaintiff in a truck of the defendant and by his ordinary negligence she was injured on the way to the laundry. The trial court gave plaintiff judgment which was reversed by the District Court of Appeal. The court said:

"Plaintiff testified that she had made no arrangement with the defendant to be furnished transportation to her work and there was no other evidence of compensation. Therefore, from the evidence which was received defendant was merely extending a courtesy to plaintiff in providing transportation, for which she was not furnishing compensation."

[8] The District Court of Appeal cited no authority for this conclusion, and did not consider or discuss any of the cases involving the master-servant relationship from other jurisdictions which we have enlarged upon above. No petition for hearing by our Supreme Court was filed in that case. Much as we hesitate to disagree with the conclusion of another court of equal jurisdiction, in the circumstances here present we feel that we should examine the proposition presented by this appeal in the light of the cited cases from other jurisdictions and the purpose and spirit of our

guest law without feeling bound by the Bummer case as a controlling precedent.

In assaying the factors pro and con in the case before us it is to be observed that the court found that one of the purposes for which the Plymouth truck was operated was to transport Junior Staff Members between the camp and Fairfax, that Junior Staff Members were privileged to receive and actually did receive such transportation to the exclusion of members of the camp not performing some sort of services, and that Humphreys, Jr., was riding in the truck by virtue of such privilege at the time that he received his fatal injuries. On the other side are the factors that Humphreys, Jr., was riding on a mission personal to himself, and that the privilege of riding was a revocable one and not a matter of contractual right.

[9] In weighing these factors one conclusion seems to us too clear for argument, that the ordinary boy accepting employment as a Junior Staff Member in the camp, in weighing the advantages, would take into consideration the fact that as an incident to his employment he would be furnished transportation in the camp truck to and from the town two miles distant and would not be apt to consider nor be at all concerned with the question whether such transportation was afforded him as a mere revocable privilege or as a matter of strict contractual right. The transportation, if not a consideration for, was at least an inducement to the employment. It must also be remembered as pointed out in Crawford v. Foster, supra, 110 Cal.App. at page 86, 293 P. at page 843:

"While there are exceptions, notably in the case of persons staying at a hotel, in its ordinary use the word 'guest' connotes something other than a business transaction."

Here as a part of the business of operating the camp the truck was maintained, according to the findings, partly for the very purpose of transporting Junior Staff Members to and from the town. The analogy of the hotel bus seems not inapt. The operation of such busses between hotel and station, as an accommodation to patrons but not as a matter of contract right, is not uncommon. Assume a patron who has paid his bill and checked out of the hotel injured by the negligence of the bus driver on the way to the station. Would any court countenance the defense that he had accepted a ride as a guest without giving compensation for such ride?

[10] Without going further than the facts of this case we are satisfied that where, as here, an employer not as an isolated or spontaneous single act of courtesy, but as a regular practice, affords transportation to its employees to and from the nearest town, and maintains an automobile in part for that very purpose, an employee riding to such town on an errand of his own by virtue of the privilege so afforded him is not within the spirit or the letter of our guest law, although the transportation is not a matter of contract right but a mere revocable privilege. The established and continuous character of the transportation so furnished to the employees indicates that it was regarded by the employer not as a mere social courtesy but as a business arrangement incident to the employment and of mutual benefit both to employer and employee.

[11] Respondent San Francisco Bay Area Council, Inc., Boy Scouts of America urges in support of the judgment that it is a charitable non-profit corporation and should as such be exempt from liability for the torts of its employees. A careful reading of Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798, and England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813, satisfies us that, while the precise question before the court in those cases was the liability of a charitable hospital to a paying patient, the effect of those decisions is to impose on charitable organizations in general the same liability for the negligence of employees as exists in the case of other employers.

[12] Appellant claims that as to defendant Dickieson, the camp director, the judgment should be reversed because, 1. the evidence shows that he was negligent in the employment of Kuckein to drive the truck, and 2. he was negligent in allowing three boys to ride in the driver's seat on the fatal trip. The trial court found against appellant on both grounds and we are satisfied that the evidence supports the findings.

As to point one the evidence shows that Kuckein had a driver's license, that respondent Dickieson inquired of Kuckein's father and was told by the father that the boy was a good driver, that the boy drove

over the road with his father in their family car to familiarize himself with it before undertaking to drive the truck, and that respondent Dickieson went over the road with Kuckein driving the truck before the fatal accident and from his observation believed him a careful driver. These facts were ample to support the finding that there was no negligence in the employment of Kuckein.

Point two is concluded by evidence that if the boy riding in the middle crossed his legs he would not interfere with the driver's operation of the truck and of the boy who rode in that position that his legs were crossed at the time of the accident.

[13] The judgment is affirmed as to respondent Dickieson, and reversed as to respondent San Francisco Bay Area, Inc., Boy Scouts of America with directions to the trial court to try the issue of damages and enter judgment against such respondent for the damages found.

NOURSE, P. J., and SPENCE, J., concurred.



54 Cal.App.2d 410

BRODERICK v. MAJESTIC ICE CREAM CO., Ltd., et al.

Civ. 2882.

District Court of Appeal, Fourth District, California.

Sept. 14, 1942.

1. Appeal and error ⇐787

Where appellant had not had a reporter's transcript prepared or filed and had not made arrangements therefor, and no bill of exceptions was settled or filed, and no proceeding for settlement thereof was pending, and after lapse of almost two years from filing of notice of appeal and request to clerk to prepare transcript trial court, on respondent's motion, ordered proceedings instituted by appellant terminated, and time within which to perfect appeal had expired, there was no compliance by appellant with statute relating to preparation of record on appeal and appeal was dismissed. Code Civ.Proc. § 953a.

2. Appeal and error ⇐635(1)

In the absence of a proper record, the appeal must be dismissed.

Appeal from Superior Court, San Diego County; Chas. C. Haines, Judge.

Action by Linda Broderick against the Majestic Ice Cream Company, Ltd., and others. From an adverse judgment, plaintiff appeals. On motion to dismiss.

Appeal dismissed.

Linda Broderick in pro. per., for appellant.

Stickney & Stickney and Edward Strop, all of San Diego, for respondents.

PER CURIAM.

A motion of respondents to dismiss the appeal came on regularly for hearing after notice to appellant. The motion was based upon the grounds that the appellant abandoned her appeal and did not prepare or cause to be prepared a transcript on appeal.

[1] On August 5, 1942, upon respondents' motion, the trial court ordered the proceedings instituted by appellant terminated. The certificate of the county clerk of San Diego County filed herein shows that on September 18, 1940, appellant filed her notice of appeal and request to the clerk to prepare a transcript; that no transcript under section 953a of the Code of Civil Procedure has been prepared or filed and no bill of exceptions has been settled or filed and that no such proceedings are pending in the trial court. By the affidavit of the official court reporter it appears that at no time "did the plaintiff, Linda Broderick, nor anyone on her behalf tender to affiant the sum of $200.00 in cash, or any other sum, as a deposit for the preparation of the transcript on appeal in this action, and that no arrangements were ever made with affiant by the said plaintiff or anyone acting for her or on her behalf, for the preparation of the transcript on appeal." Appellant has not presented any counter-affidavits to the contrary. From the showing made appellant has not complied with the provisions of section 953a of the Code of Civil Procedure and the time within which to perfect the appeal has expired.

[2] In the absence of the proper record, the appeal must be and is dismissed. H. & J. Maybury Co. v. Bryant, 8 Cal.2d 704, 68 P.2d 359; Peter v. Fullen, 35 Cal.App.2d 115, 94 P.2d 1019.

54 Cal.App.2d 451

BATES et al. v. ZAMPELLI et al.

Civ. 13524.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1942.

1. Appeal and error ⇐930(4)

On appeal from judgment for defendants, where a finding of contributory negligence in driving plaintiffs' automobile away from the curb and into a traffic lane, where automobile was struck by defendants' truck, at a time when such movement could not be made with reasonable safety, would have been warranted upon plaintiffs' version of the accident, appellate court would assume that verdict was based upon a finding of contributory negligence by plaintiffs, and that such finding was made on the basis of plaintiffs' evidence.

2. Appeal and error ⇐1003

Where a finding of contributory negligence in driving plaintiffs' automobile away from the curb and into a traffic lane, where automobile was struck by defendants' truck, at a time when such movement could not be made with reasonable safety was assumed, judgment for defendants was not erroneous on ground that testimony of truck driver as to manner in which accident had occurred was physically and logically impossible when considered in the light of known and agreed facts.

3. Appeal and error ⇐1042(1)

Where assumed finding of plaintiffs' contributory negligence in driving their automobile away from the curb and into a traffic lane, where automobile was struck by defendants' truck, at a time when such movement could not be made with reasonable safety, did not depend upon a stricken answer, trial court's striking the answer was not prejudicial.

4. Appeal and error ⇐1046(5)

Where finding of contributory negligence in driving plaintiffs' automobile away from the curb and into a traffic lane, where it was struck by defendants' truck, at a time when such movement could not be made with reasonable safety, was assumed, trial court's statements and criticism of witness' testimony were not prejudicial, if improper.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Isla G. Bates and another against Phillip Zampelli and another for injuries sustained in an automobile collision. From a judgment for defendants, plaintiffs appeal.

Affirmed.

George D. Higgins, of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for respondents.

DORAN, Justice.

In an action for damages as the result of an automobile accident the plaintiffs appeal from a judgment for defendants after the verdict of a jury in defendants' favor. The record reveals that a truck driven by one of the respondents collided with appellants' car at or about the time appellants' car was pulling away from the curb and entering the right hand lane of traffic on a city street. Respondents' answers to the complaint herein set up the affirmative defense of contributory negligence on the part of appellants. Appellants' only contentions on this appeal are that, first, the testimony of the respondent driver of the truck as to the manner in which the accident occurred was "physically and logically impossible, when considered in the light of known and agreed facts"; and, second, that the trial judge committed prejudicial error in sustaining a motion to strike a certain answer of one of appellants, given in testifying at the trial herein.

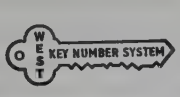
[1, 2] The weakness of both of appellants' contentions lies in the fact that upon appellants' own version of the accident a finding of contributory negligence would have been warranted. Regardless of which view is taken of the evidence presented it would be proper to conclude that appellants' car was driven away from the curb and into the traffic lane at a time when such movement could not be made with reasonable safety. Under such circumstances it may be assumed that the verdict of the jury was based upon a finding of contributory negligence upon the part of appellants and that such a finding was made on the basis of appellants' own evidence. That being the case, the contention as to the physical impossibility of the existence of facts as pre-

sented by the testimony of the driver of the truck becomes immaterial.

[3, 4] The stricken answer, of which appellants complain, concerned the portion of the truck which struck the rear of appellants' car. The answer was stricken because the witness had previously testified she did not see the front part of the truck bed strike the rear part of the car. In the light of the record herein presented, a finding of contributory negligence did not depend upon the matter contained in the stricken answer. Therefore, the action of the court in striking the particular answer likewise becomes immaterial and the ruling of the court on the motion to strike could not be held prejudicial. Nor may appellants complain, under the circumstances, of certain statements and criticisms of the witness's testimony, made by the trial judge in this connection. Since a finding of contributory negligence was proper in any event, such statements of the court could not be held prejudicial to appellants' case, even if the statements themselves might be classed as improper, which circumstance, however, does not readily appear from a reading of the record.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.



54 Cal.App.2d 486

AZEVEDO et al. v. AZEVEDO et al.

Civ. 6622.

District Court of Appeal, Third District, California.

Sept. 23, 1942.

Hearing Denied Nov. 12, 1942.

1. Limitation of actions ⇐24(4)

Where defendants bought livestock, farming machinery, etc., under written conditional sales contract which was to be performed within three years and agreed to credit amount received from any sales of the property by them on the contract, an action to compel an accounting under the contract was founded upon a written instrument, and, when brought more than four years after date when contract was required to be performed, was barred by four-year statute of limitations. Code Civ. Proc. § 337, subd. 1.

2. Limitation of actions ⇐166

Where conditional seller could not have recovered possession of property in buyers' hands for any part of purchase price after suit on contract was barred by limitations, no recovery could be had for anything that buyers received for sales of the property, where payment of proceeds of sales of property was to be made only as payment on purchase price under the contract; it being immaterial whether any trust relationship existed between parties. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Howard Azevedo, as administrator, etc., and another, against Antone Azevedo, Jr., and another, for an accounting for an amount allegedly due pursuant to provisions of contract of sale. From a judgment of nonsuit, the plaintiffs appeal.

Affirmed.

For prior opinion, see 122 P.2d 311.

Hearing denied; TRAYNOR, J., dissenting.

Cross & Brandt, of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for respondents.

PER CURIAM.

This is an appeal from a judgment granting a nonsuit in an action seeking to compel an accounting under a written contract of sale.

The contract was entered into on February 8, 1926, between Antone V. Azevedo, party of the first part, and his two sons, defendants herein, as parties of the second part. Thereby Antone V. Azevedo agreed to sell and the sons agreed to buy certain farming and dairy machinery and equipment and certain cattle, horses, hogs, etc., situated on the ranches and premises occupied by the Azevedo family, together with an interest in leaseholds appertaining to certain of the premises. The contract provided:

"That the party of the first part hereby agrees to sell, and the parties of the second part hereby agree to buy all that certain

personal property, farming and dairying equipment, * * * at and for the sum of Eighty Four hundred ($8400.00) dollars, lawful money of the United States of America, which said sum said parties of the second part *agree to pay on or before three (3) years after date,* it being particularly understood and agreed that said parties of the second part are to farm and dairy said ranches in a good and husbandlike manner, *and that all net profits made and received from the operation and conducting of the same are to be paid annually and on or before the first day of November of each year to said party of the first part and be applied on account of the purchase price of said personal property.* * * *

"It is further understood and agreed that the parties of the second part may and shall have immediate possession of said personal property and business, *but time is of the essence of this agreement in each and every particular,* and that this agreement shall bind and inure the heirs, executors, administrators, and assigns of the respective parties hereto.

"It is further understood and agreed that title to all of said personal property shall remain in the party of the first part until he has been paid the full purchase price thereof, and that should it be to the interest of the parties hereto that some of said personal property, such as cattle and hogs, should be sold that the same may be sold, *but that the entire sale price thereof shall be paid to the party of the first part and apply on account of the balance due under this agreement.*" (Emphasis ours.)

The complaint was filed on March 31, 1938, and is based upon the contract. It is alleged therein that after the making of the agreement Antone V. Azevedo assigned to his wife Anna Azevedo all of his right, title and interest in and to said agreement, and the personal property therein described, together with all moneys due or to become due by virtue of said agreement; that on July 4, 1937, Anna Azevedo died; that plaintiffs are the duly appointed, qualified and acting administrator and administratrix respectively of Anna Azevedo's estate; that in pursuance of the agreement the property mentioned therein was delivered to and accepted by the defendants on or about the date of the agreement, and that ever since they have been and now are in possession of the same except what they have sold; that defendants have realized net profits, and that they have sold various articles of property mentioned in the agreement and that they have received as net profits and for sales approximately $8,400; that out of this sum they have paid only $2,765 on account of the contract; that a demand has been made on them for an accounting, which they have refused to make. It is prayed that defendants be ordered to account to plaintiffs for net profits and receipts from sales and pay over to plaintiffs sufficient to pay the balance due on the purchase price, together with interest. No recovery of any of the property is sought.

Defendants in their answer admitted the execution of the agreement, the death of Anna Azevedo and the appointment and qualification of plaintiffs as administrator and administratrix respectively of her estate, the delivery to defendants by Antone V. Azevedo of the property mentioned in the agreement, the demand for the accounting, and that they had refused to render the same. The remaining allegations of the complaint were denied and defendants set up the statute of limitations as a special defense, alleging that the action was barred by subdivision 1 of section 337, by subdivision 4 of section 338, by subdivision 1 of section 339 and by the provisions of section 343, of the Code of Civil Procedure. In addition, laches was also pleaded.

At the trial, plaintiffs produced evidence which disclosed that defendants had, commencing in February of 1926, and from time to time thereafter made sales of livestock and farm equipment; that moneys received by defendants as the result of such sales approximated something over $6,000, and that no accounting was ever rendered. There was some showing that within four years prior to the commencement of this action defendants had made sales of livestock and equipment and that the sum of $2,866.58 was received by them as the result of these latter sales. No records of any kind appear to have been kept by the defendants and it did not appear definitely that all sales made by them were of livestock and equipment received under the agreement.

At the close of plaintiffs' case, the trial court granted the motion for nonsuit upon the ground that plaintiffs had failed to prove sufficient facts to entitle them to a judgment, that the action was barred by the sections of the Code of Civil Procedure pleaded in the answer, and also by laches.

[1] It is our opinion that the trial court did not err in granting the motion for a nonsuit. Plaintiffs' action was founded upon a written instrument. According to the terms thereof payment for the property sold was to be made on or before three years from the date thereof and time was agreed to be of the essence in every particular. Section 337, subdivision 1, supra, provides that an action upon any contract, obligation or liability founded upon an instrument in writing (with exceptions not pertinent here) must be commenced within four years. The contract in this case is dated February 8, 1926. It was to be performed within three years. Action upon it was therefore barred on and after February 8, 1933, over five years before the present action was begun. No circumstances are alleged in the complaint, nor have plaintiffs contended that anything existed between the parties to the agreement, which might be deemed to have tolled the statute prior to the running of the four-year period or to have revived the debt by any appropriate writing signed by the defendants. It is quite clear, therefore, that the provisions of the aforementioned section apply to bar any cause of action brought upon the written agreement, or any obligation or liability founded upon it.

[2] In accordance with the provisions of the contract, net profits realized by defendants, if any, were to be paid each year to Antone V. Azevedo to be applied by him upon the principal debt; also, any amounts received from the sale of any of the property were to be paid to the vendor and also applied on account of the purchase price. While it is true that the vendor retained title to the property described in the agreement, nevertheless the vendees were authorized to dispose of same. The vendor could not have recovered possession of the property in the hands of the vendees nor any part of the purchase price, after suit on the contract was barred, and it follows, therefore, that after 1933 no recovery could be had for anything that the defendants received for sales of the chattels for the reason that payment of such proceeds was to be made only as payment on the purchase price under the contract. Net profits and the amounts received from sales of personal property were not due to the vendor except as payments on said contract price. Fraud is not alleged.

Appellants rely upon Allsopp v. Joshua Hendy Machine Works, 5 Cal.App. 228, 90 P. 39, but in that case the agreement between the parties was not a contract of sale, but one of agency—an agreement that goods should be turned over to defendant to be sold for plaintiff's account, accounting for the sales to be made to plaintiff as they were made by defendant. Defendant took possession of the property for that purpose only; it was the agent of plaintiff for the purpose of selling the property. No date was fixed by the agreement within which plaintiff was to be paid for the goods or the contract performed. The court there said that the statute would not begin to run until there was brought home to plaintiff knowledge of the repudiation of the trust or the violation of its terms on the part of defendant—that there was nothing to set the statute of limitations in motion until repudiation.

Such is not the case here where the contract was one of sale and payment of the amounts received for stock or equipment sold was to be made on account of the purchase price, all of which was to be paid within three years. There was something to set the statute of limitations in motion.

Appellants argue that there were two separate promises made by defendants in the contract, one to pay the purchase price within three years and the other to pay to the vendor the proceeds of sales made by them. This, again, ignores the fact that defendants were vendees under a contract of sale and not the agents of the vendor, and that the proceeds of sales were payable to the vendor as installments of the purchase price. When action on the debt was barred recovery of installments was likewise barred.

It is also contended by appellants that their action is brought to enforce a voluntary trust, and that it is not barred because the statute of limitations would not begin to run until there had been a repudiation of that trust; but, contrary to the contention of plaintiffs, it is our opinion that whether any trust relationship did or did not exist between the parties before action on the contract was barred, nevertheless, after the statute of limitations had run and the vendor was by reason thereof barred from action to recover either the purchase price or the possession of the property, it ceased to be of any im-

portance whether or not a trust relationship had existed between the parties, or the nature of such trust.

In view of the foregoing we deem it unnecessary to discuss the question of laches.

The judgment is affirmed.



54 Cal.App.2d 461

In re RAPP'S GUARDIANSHIP. RAPP v. PENDERGRAFT.

Civ. 12165.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1942.

1. Guardian and ward ⇐13(3), 18

In proceeding for guardianship of a minor, failure to give reasonable notice to the person having the care of the minor before making an order appointing a guardian is jurisdictional and renders the order of appointment subject to a motion to vacate made within a reasonable time. Probate Code, § 1441.

2. Guardian and ward ⇐13(1)

Proceeding for appointment of guardian for person and estate of minor is not the proper place to litigate title to fund alleged to constitute minor's estate.

3. Guardian and ward ⇐18

Evidence that minor's alleged foster mother, who had secured interlocutory decree of divorce from minor's father, partially defrayed minor's expenses in boarding school, the rest of which expenses were defrayed by father, did not establish as a matter of law that minor continued in foster mother's care and custody so as to entitle her to notice of proceedings for appointment of guardian for minor. Probate Code, § 1441.

4. Guardian and ward ⇐18

In proceeding to vacate order appointing guardian for minor for failure to give moving party notice required to be given persons having care of minor, evidence warranted trial court in disbelieving moving party's various affidavits, and in believing that she was no longer entitled to the care and custody of the child. Probate Code, § 1441.

5. Guardian and ward ⇐18

On a hearing of a motion to vacate an order appointing guardian for minor for failure to give moving party notice required to be given persons having care of minor, burden was upon moving party to make a clear and convincing showing that the order sought to be vacated had been improperly entered. Probate Code, § 1441.

6. Guardian and ward ⇐18

Person who was neither related to nor entitled to care and custody of minor had no legal interest in guardianship proceedings for minor, and therefore could not secure the vacation of any order entered in such proceedings no matter how erroneous it might be.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the guardianship of the person and estate of David Stanford Rapp, a minor, on motion of Janis Rapp to vacate an order appointing Ann Pendergraft, guardian of the minor, and to vacate letters of guardianship issued on such order, opposed by Ann Pendergraft. From an order refusing to vacate the appointment and letters of guardianship, Janis Rapp appeals.

Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

Joseph F. O'Malley, of San Francisco, for respondent.

PETERS, Presiding Justice.

Janis Rapp appeals from an order refusing to vacate an order appointing Ann Pendergraft guardian of a minor and refusing to vacate the letters of guardianship issued on such order.

[1] On November 24, 1941, Ann Pendergraft was appointed guardian of the minor, David, aged 12, upon her petition and testimony, and the testimony of Louis Rapp, the boy's father, that Ann was the aunt of the minor; that the mother was dead; that the father had no objection to the appointment, and that the minor had

a trust fund of $5,000. Thereafter, on December 29, 1941, appellant Janis Rapp, filed a petition to vacate, alleging that she was the mother of the child; that no notice had been given to her of the application for letters of guardianship; that the order was based on perjured testimony. These charges were supported by her affidavit filed with the motion. The motion came on for hearing on January 5, 1942, on which date appellant filed an amended affidavit, in which she averred she was the "foster mother" of the minor, and that, since his birth and until the time of the guardianship, she had and was entitled to his care and custody. She urged, therefore, that under the provisions of section 1441 of the Probate Code she was entitled to notice of the guardianship proceeding, and that since such notice had not been given, the proceedings were void. That section requires that before making the order appointing the guardian reasonable notice must be given "to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper." There can be no doubt that if appellant was, in fact, the person "having the care" of the minor, she was entitled to notice under this section, and that the failure to give such notice where required is jurisdictional, rendering the order of appointment subject to a motion to vacate made within a reasonable time. In re Dahnke Estate & Guardianship, 64 Cal.App. 555, 222 P. 381. The trial court having denied the motion to vacate, the question presented is whether the evidence adduced at the hearing of the motion to vacate, together with the affidavits, show, as a matter of law, that appellant was, at the time of the guardianship proceeding, the person actually having the care of the minor. If the evidence does not show that fact, or if the evidence is conflicting on the issue, the order of the trial court refusing to vacate must, and should, be affirmed.

The child was born August 10, 1929. Louis Rapp testified at the guardianship proceedings, and on the hearing of the motion to vacate, that he was the father of the child and that his then wife, Helena Peterson Rapp, to whom he had been married in 1924, was the mother. The child's mother died three months after the child was born. In November of 1934, Louis Rapp married appellant, Janis Rapp. Appellant secured an interlocutory decree of divorce from Louis in October of 1941. The guardianship petition was filed November 18, 1941.

As already indicated, in her notice of motion and supporting affidavit appellant averred that she was the mother of the child. In her amended affidavit filed the morning of the hearing, she alleged that she is the "foster mother" of the minor. Appellant does not now urge that she was entitled to notice because of any blood relationship to the child. Her only complaint is that she was entitled to notice because she was the person having the care of the minor at the time of the guardianship proceeding.

[2] In her petition for appointment as guardian Ann Pendergraft averred that she was the sister of Louis Rapp and aunt of the minor; that the minor has an estate of $5,000, consisting of a bank account in the name of Ann Pendergraft as trustee; that the minor is "temporarily domiciled" in a designated boarding school in San Mateo County "where said minor is boarding and receiving his education"; that the relatives of the minor are his father and herself. Based on this petition, notice was duly given to the father, to Ann Pendergraft, and to the administrative head of the boarding school. At the hearing of the guardianship petition the above facts were testified to by Ann Pendergraft and by Louis Rapp, and, in addition, Ann Pendergraft testified that the $5,000 was given to her by the minor's father and mother to constitute a trust fund for the child's education. In her affidavits in support of the motion to vacate appellant averred that the $5,000 was given to Ann Pendergraft by appellant for the use and benefit of appellant, and that said sum constitutes no part of the estate of the minor. These allegations present no issue that could be litigated in this proceeding. The guardianship proceeding is not the proper place to determine title to that fund. In re Ochoa, 50 Cal.App.2d 457, 123 P.2d 106.

As already indicated, by amended affidavit filed on the morning of the hearing of her motion to vacate appellant alleged she was the "foster mother" of the minor and entitled to his care and custody. Louis Rapp had filed a counter-affidavit to the original affidavit filed by appellant, in which she had alleged she was the mother of the minor, in which he alleged she was not the mother, and that the child was in

charge of a designated boarding school where he was receiving his education and being boarded and lodged. No counter-affidavits were filed to the amended affidavit of appellant, apparently because it was not filed until the hearing of the motion to vacate, so that no opportunity existed to file such counter-affidavit, inasmuch as the court denied the motion at the conclusion of the hearing.

[3, 4] On the hearing of the motion to vacate appellant called Louis Rapp as her sole witness. He testified that from the death of the child's mother in 1929 and until 1932 appellant took care of the child; that "after about 1932 she had no further interest in the child at all, it has always been taken care of by me, or my family since, she has hardly gone near the child in all these years"; that he had sent the child to the boarding school because of appellant's lack of moral standards, and that he and appellant had paid the child's expenses at school. Appellant's argument is that, although she was not related to the child, since his expenses were partially defrayed by her, he must be deemed, as a matter of law, to have continued in her care and custody. While this is an argument that could and undoubtedly was addressed to the trial court, we do not think that the evidence compels that conclusion as a matter of law. Appellant is seeking to vacate an order. It was up to her to make a clear and convincing showing that she was entitled to the child's custody at the time of the guardianship hearing, and therefore entitled to notice. The trial court knew that she had filed at least one false affidavit; that she had secured an interlocutory decree of divorce from the father of the minor; that she was not related to the child; that the affidavit of Louis Rapp contradicted hers in material respects, and that at the hearing of the motion to vacate she had refrained from taking the stand as a witness. Under such circumstances, the trial court was justified in disbelieving her various affidavits, and in believing that appellant no longer was entitled to the care and custody of the child.

[5] In apparent recognition of the fact that there is a conflict in the evidence on the sole issue presented to the trial court, appellant argues that on this motion to vacate where she "has made a prima facie showing that she is entitled to notice, a mere conflict in the evidence should not deprive her of the right to participate in the hearing that will result in the appointment of a proper guardian." That is and should not be the law. On such a hearing the burden was upon the moving party to make a clear and convincing showing that the order sought to be vacated had been improperly entered. This she failed to do. Under such circumstances, the order of the trial court cannot, and should not, be disturbed.

[6] Appellant devotes a major portion of her brief to the contention that the bond posted by the guardian did not comply with either the requirements of the law or with the provisions of the order of the trial court appointing Ann Pendergraft guardian. Obviously, unless appellant was entitled to the care and custody of the minor, and we have already held that the finding that she was not is supported, she is in no position to raise this point. She has no legal interest in the controversy, and, therefore, may not secure the vacation of any order no matter how erroneous it may be.

The orders appealed from are affirmed.

WARD, J., and WAGLER, Justice pro tem., concurred.



54 Cal.App.2d 454

GLICKMAN v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 13617.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1942.

Street railroads ⇐99(7), 102(2)

Motorist traveling ten miles per hour who at a point about 20 feet from railroad crossing saw an approaching interurban street car less than 200 feet from the crossing, and attempted to pass in front of the car, was guilty of negligence as a matter of law which was the "proximate cause" of the resulting collision.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Henry I. Glickman against Pacific Electric Railway Company, a corporation, and others, to recover for personal injuries and property damage and damages for the wrongful death of plaintiff's wife resulting from a collision between plaintiff's automobile and one of defendant's interurban street cars. From a judgment for defendant entered pursuant to a directed verdict, and from an order denying a motion for new trial plaintiff appeals.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

A. P. Coviello and J. F. Wilson, both of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal is prosecuted by the plaintiff Glickman from a judgment which was entered pursuant to a directed verdict in favor of defendants.

The instant action was instituted by said plaintiff to recover damages for personal injuries and property damage sustained by him and for damages for the wrongful death of his wife resulting from a collision between an automobile which he was driving and one of respondent corporation's interurban street cars which was being operated by respondent Alexander.

The accident occurred at 1:30 p. m. on August 14, 1940, a bright, sunny day, at the intersection of Bay Street and Trolleyway in the city of Santa Monica. Bay Street is 40 feet wide, runs east and west, is paved with dry concrete or asphalt, its grade not exceeding one per cent, and intersects Trolleyway at a right angle. Trolleyway is 95 feet wide, runs north and south, and is a private right-of-way upon which respondent corporation maintains two sets of car tracks located 20½ feet apart.

Appellant was familiar with the particular locality, having lived for three years prior to the accident on Bay Street about three-quarters of a block east of Main Street, which is the first street east of and running parallel to Trolleyway. On the day of the accident appellant, accompanied by his wife, was driving a 1925 Reo automobile westerly on Bay Street on his way to the Pacific Ocean where he and his wife intended to bathe and swim. He brought his car to a stop at Main Street, proceeded across said intersection and drove at a speed of 10 miles per hour a distance of 150 feet to the easterly line of Trolleyway. He continued to travel across Trolleyway at this speed until the moment of impact of his automobile with respondent's street car which was moving southerly on Trolleyway on the westerly set of car tracks.

At the northeast corner of the intersection of Bay and Trolleyway, the view to the north along the tracks is obscured by an apartment house and a hedge maintained on the property line thereof, said property line being about 18 feet from the easterly or northbound tracks and about 44 feet easterly from the east rail of the westerly or southbound tracks. It was developed at the trial that when a person driving west on Bay Street 10 feet south of the north curb thereof reached a point 40 feet from the east rail of the southbound tracks, he could see north along the tracks on Trolleyway for at least half a mile.

From the time appellant crossed Main Street he looked in all directions. When he first saw the street car he estimated it was 200 to 250 feet north of Bay Street, at which time the front end of his automobile was on the easterly or northbound tracks. Appellant testified that his automobile was between the two sets of tracks or about 10 feet east of the southbound tracks (upon which respondent's interurban car was traveling) when he first discovered his danger, indicating that his automobile traveled 12½ feet from the time he first saw the street car to the point where he became aware of the existing danger.

The motorman, Alexander, testified he stopped his street car at Pico Street, which is approximately 700 feet north of Bay Street, and was coasting along Trolleyway at a speed of 15 miles as he approached the intersection of Trolleyway and Bay Street; that he did not see appellant's automobile until he was within 30 or 35 feet from it, at which time he applied the emergency brake. The street car struck the automobile in the middle between the two doors and pushed it ahead until the street car came to a stop a car length and a half from the point of impact, a distance of approximately 123 feet. Appellant's wife was killed in the accident and appellant was severely injured.

At the conclusion of the trial, respondents moved the trial court to direct a verdict in their favor and against appellant.

This motion was based upon the grounds (1) that there was no evidence of negligence in the operation of the train, and (2) that the evidence conclusively showed that appellant's own negligence proximately caused the accident. The trial court granted said motion and directed the jury in the following language: "You will recall, Ladies and Gentlemen, that Mr. Glickman testified that he drove on to the right-of-way and as he drove on he looked to the north and saw this interurban car approaching some 200 to 250 feet away. That is approximately four or five—50-foot residential lots. Now under those circumstances he says that he traveled at the rate of 10 miles per hour and expected that he had time enough to get across; that it seemed to him that the interurban started up, or speeded up, after he had looked, and the first thing he knew he didn't get across and was struck. We all appreciate the injuries and the situation that he has, but the law is very definite on the proposition that where you are on an interurban—where you are crossing an interurban railway which has its own right-of-way you must yield your right-of-way to that interurban car, and if you don't get across, then you are contributorily negligent. For that reason, it has been necessary for me to direct the jury to return a verdict for the defendants in this case."

It is contended by appellant that the court erred in directing a verdict for the defendants, because "under the facts presented by the evidence in this case, the plaintiff was justified to proceed across the track when he observed the street car approximately 250 feet to the north of the intersection. That he was not compelled as a matter of law to stop and wait for the car to pass."

As a matter of fact, the record discloses that appellant miscalculated the distance between Bay Street and the curve in Trolleyway south of Pico Street where he first saw the street car, and that actually it was something less than 200 feet; also, when he made such observation his automobile "was on the easterly (northbound) line of tracks" on Trolleyway. He testified on direct examination that when he reached the 20½-foot strip of land lying between the northbound and the southbound tracks, he "first discovered the danger. * * * In between the two tracks I noticed the street car speeding up in place of slackening down. I thought he would slacken down. Instead of that he did the opposite. I had such a little distance to cross here I was under the impression I could get across. In approximately another second I would have been out of danger." On cross-examination he testified: "My automobile was in between the two tracks—the first and second tracks. * * * In between the two tracks right in here. That is when I became aware of the danger. I was right in here in between the two tracks. * * * I simply speeded up. That is, I continued to cross there and tried to clear myself from the approach of the train." A photostatic copy of the map used at the trial is included in the record herein. This map indicates that appellant's automobile was 10 feet east of the southbound tracks upon which the street car was traveling when appellant first discovered the danger.

Respondent Alexander's testimony that he was operating the street car at a speed of 15 miles per hour is uncontradicted, as well as his testimony that he applied the emergency brake when he first saw appellant's automobile.

It appears from an examination of the evidence adduced at the trial of the instant litigation that appellant's negligence in continuing across the intersection after he became aware of the existing danger was the proximate cause of the accident.

In the case of McHugh v. Market St. R. Co., 29 Cal.App.2d 737, 741, 85 P.2d 467, 469, the facts of which present a similar situation, the court stated: "As held in substance in the cases hereinafter cited, where a pedestrian or the driver of a motor vehicle, after being aware of the approach of an oncoming electric car which is within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, closes his eyes to the dangers necessarily involved and blindly attempts to cross in front of it, thus placing himself in the pathway of the oncoming car, he is guilty of negligence as a matter of law. New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798; Urbano v. Market Street R. Co., 8 Cal.App.2d 22, 46 P.2d 817; Gore v. Market St. R. Co., 4 Cal.2d 154, 48 P.2d 2."

For the reasons stated, the judgment appealed from is affirmed. The appeal from the order denying motion for new trial is dismissed.

DORAN and WHITE, JJ., concurred.

54 Cal.App.2d 497

EBERT et al. v. TIDE WATER ASSOCIATED OIL CO. et al.

Civ. 2934.

District Court of Appeal, Fourth District, California.

Sept. 23, 1942.

1. Appeal and error ⇐931(1), 1010(1)

On appeal from judgment for plaintiffs, appellate court was required to consider the evidence supporting the judgment and to resolve all conflicts in the evidence in support of judgment and findings, and, where substantial evidence supported the findings, the judgment would not be disturbed.

2. Automobiles ⇐244(11)

In action for damages sustained in collision between an automobile and truck at intersecting streets which were not through highways, evidence supported finding that plaintiffs had entered the intersection first, giving them the right of way, and that truck driver had driven negligently into the intersection.

3. Automobiles ⇐206

Where one automobile has actually entered an intersection before another automobile approaches it, the driver of the first automobile may assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision.

4. Automobiles ⇐245(80)

Whether motorist, upon entering intersection of streets which were not through highways, was justified in proceeding across the intersection in advance of truck after he had observed truck approaching upon street to his right, was a "question of fact" and not a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by Warren S. Ebert and another against Tide Water Associated Oil Company, a corporation, and another, for damages sustained in an automobile collision. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ray H. Overacker, of Huntington Beach, and Head, Wellington & Jacobs, of Santa Ana, for appellants.

Drumm, Tucker & Drumm, of Santa Ana, for respondents.

GRIFFIN, Justice.

Sitting without a jury, the trial court rendered a judgment against appellants as the result of an automobile accident in Huntington Beach. Olive Street, in that city, is a public highway running in an easterly and westerly direction. Second Street runs in a northerly and southerly direction. Each street is 40 feet wide. This is a blind intersection to cars traveling southerly on Second Street and to cars traveling westerly on Olive Street, by reason of the obstructed view on the northeast corner due to a house and palm tree located thereon. At about 4:30 p. m. on May 24, 1940, respondents were riding in a bantam Austin station wagon driven by respondent Warren S. Ebert. It was proceeding westerly on Olive Street at an approximate speed of 15 to 20 miles per hour. Appellant Beaudreaux, employee of appellant Tide Water Associated Oil Company, a corporation, was driving a Sterling truck in a southerly direction on Second Street at a speed estimated by respondents at from 25 to 30 miles per hour. Appellants' truck was 21 feet long.

The testimony of witnesses for respondents was that respondents' car had reached the imaginary easterly curb line of Second Street when he (Ebert) saw appellants' truck approaching in a southerly direction approximately 35 feet north of the northerly curb line of the intersection; that he (Ebert) continued across Second Street at 15 to 20 miles per hour and that the truck collided with the Ebert car in the southwest corner of the intersection after it had traversed nearly the entire intersection.

The evidence shows that the collision occurred about two feet east of the prolonged westerly curb line of Second Street and in the southwest corner of the intersection. In this respect the trial judge made the following statement in his oral decision: "* * * where the collision occurred was at a point where Mr. Ebert was pretty well through the intersection. Of

course, they were traveling at approximately the same rate of speed I think where the collision occurred, and there isn't any question but what the truck hit the station wagon. I think from that and the fact that they were both going at pretty much the same rate of speed that we have the broad inference that that would be the car (Eberts') that would be entering the intersection first, and this being an ordinary highway and not a through highway, the Code provides that the vehicle entering the intersection first has the right-of-way. So I think that the plaintiff entered the intersection first and had the right-of-way."

Appellants on this appeal raise two contentions: (1) That there is no evidence to sustain the court's finding of negligence on the part of the appellants, which negligence was the sole proximate cause of the accident. (2) That respondents are guilty of contributory negligence as a matter of law.

[1,2] As to the first contention it is argued that the evidence does not justify the court's conclusion that appellants' truck ran into the side of respondents' car and that respondents' car was first in the intersection. The testimony of Beaudreaux, of course, would not authorize such a conclusion, but we, on appeal, must consider the evidence supporting the judgment and all conflicts in the evidence must be resolved on appeal in support of the judgment and findings of the trial court, and where there is substantial evidence directly or indirectly tending to support the findings the judgment will not be disturbed. Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 104 P.2d 1069. Upon examination, in the light of this rule, the evidence supports the trial court's conclusion.

The testimony of both Mr. and Mrs. Ebert in this respect is alone sufficient. It reads in part:

"Q. Mr. Ebert, what portion of your car was damaged? A. The rear end.

"Q. Was anything damaged on the front end? A. Nothing but the headlight, the lamp was broken. The windshield, hood and front fenders were all intact.

"Q. Was the right front fender damaged? A. No."

Mrs. Ebert in this regard testified:

"Q. Could you judge how fast the truck was coming? A. No, I couldn't. That didn't enter my mind. I knew the truck was coming, but it wasn't so close that I was frightened. I wasn't a bit frightened until I realized he wasn't slackening speed. He didn't seem to be coming fast, and I tensed and I listened for the squeak of the tires. I looked down this way (indicating) and saw his bumper coming right at our rear corner, here (indicating).

"Q. And his (appellant's) front bumper hit your right rear corner, is that correct? A. Yes, I was looking down this way (indicating). He was coming right at this rear corner here (indicating). That is why this side of my face got it."

In addition to their testimony the evidence shows that the front bumper of the truck was painted red. The foreman of the garage who repaired the Bantam station wagon testified:

"Q. And were there any marks on the right side of the (Bantam) car that may have been from the collision? * * * A. There were red paint marks on the right-hand side of the station wagon from just in front of the center back across the right rear fender.

"Q. And those marks ran in which direction? A. They were horizontal."

There was other testimony which the trial court could have taken into consideration in finding that the respondents entered the intersection first, and also in finding that the appellant Beaudreaux drove his truck negligently into the intersection. The evidence is clear that Beaudreaux did not apply his brakes until he was well into the intersection. The skid marks indicate that the application of brakes began at the intersection and these skid marks were made with the rear wheels of the 20-foot truck. This being the case, the front of the truck was in the center of the intersection before the brakes were applied. The attention of Mr. Beaudreaux may have been distracted shortly before or just at the time of the collision, as indicated by his testimony on cross-examination. In referring to his actions before approaching the intersection here involved, he testified in answer to the question, "When did you begin to slow down? A. Well, this block here is all in the clear. When I turned this corner and went into it up here, I remember there were two little children playing here with a dog and the dog had a ball in its mouth, and as I came up into the center of the street they were running this way, and I took my foot off the throttle and had my foot on the brake, watching the children right over here (indicating). That I remember, and when I looked back the dog

was across the street here (indicating), and the children were playing there, and so I proceeded across the intersection."

[3, 4] The established rule of law here applicable is that where one car has actually entered an intersection before another car approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without the danger of collision. He has the right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Page v. Mazzei, 213 Cal. 644, 3 P.2d 11. Whether or not the respondent driver of the station wagon, after observing the approach of the truck, its position, the rate of speed it was traveling and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of the truck, presented a question of fact upon which reasonable minds might differ and not one of law. Page v. Mazzei, supra; Couchman v. Snelling, 111 Cal. App. 192, 295 P. 845.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.



FRAZURE v. FITZPATRICK.*

Civ. 13573.

District Court of Appeal, Second District, Division 2, California.

Sept. 17, 1942.

Hearing Granted Nov. 12, 1942.

1. Trusts ⇐89(1)

Evidence supported finding that defendant held note and trust deed in trust for benefit of his uncle, since deceased, so as to warrant requiring defendant to turn note and trust deed over to administrator of uncle's estate. Civ.Code, § 853.

2. Appeal and error ⇐1071(6)

In action by administrator of estate of a decedent to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, nephew could not complain of trial court's failure to find upon question as to whether note and trust deed were community property of decedent and his surviving widow.

3. Parties ⇐80(5)

Even if surviving widow should have been made a party to an action by administrator of estate of a decedent to recover for estate and to quiet title of estate to a note and trust deed held by decedent's nephew in his own name, the misjoinder was apparent upon face of the complaint, and nephew by not demurring "waived" his objections. Code Civ.Proc. § 434.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Limitation of actions ⇐201

In action by administrator of estate of decedent to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, where trial court found that nephew held such property as trustee for decedent and faithfully performed his duties as such trustee up to death of deceased, there was no necessity for findings upon special defense of statute of limitations.

5. Evidence ⇐271(16), 276

Declarations made by deceased, in his own interest, or of those claiming under him, are commonly inadmissible, but may be admitted as an exception to general rule where failure to assert a claim or right may be construed against deceased as an implied negation. Code Civ.Proc. § 1946.

6. Evidence ⇐276

In action by administrator of an estate of a decedent to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, where nephew maintained that under oral contract with decedent, the decedent was to make will in favor of nephew, two writings by decedent which were unsuccessful attempts to make testamentary disposition of his property were admissible as part of whole transaction and contract asserted by nephew. Code Civ.Proc. § 1850.

7. Appeal and error ⇐1050(1)

In action by administrator of estate of a decedent to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name,

 * Subsequent opinion 136 P.2d 566.

even if admission in evidence of two writings by decedent was improper, error, if any, was not prejudicial to nephew where there was ample evidence to sustain judgment without the writings in question.

8. Executors and administrators ⇐153

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, where nephew maintained that, under his oral contract with decedent, decedent was to make will in favor of nephew, letter received by nephew from decedent expressing decedent's attitude toward his wife and other members of his family, which letter was dated two years prior to alleged oral contract, was properly refused admission as irrelevant.

9. Appeal and error ⇐1056(1)

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, refusal to admit four letters with reference to collections by nephew of payments upon the trust deed note did not prejudice nephew, where other evidence, including checks in payment of the collections, established fact that nephew had paid money to decedent, and letters could have had no further value to nephew than to establish such fact.

10. Executors and administrators ⇐153

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, finding that decedent was in actual, continuous, open and notorious possession of property for which the note and trust deed was given from date of its purchase in 1923 to date of its sale in 1937, was proper in establishing that decedent was equitable owner of such realty although nephew held fee title in his name.

11. Pleading ⇐147

A cross complaint is permissible only when a defendant seeks affirmative relief against any party relating to or dependent upon contract or transaction upon which the action is brought or affecting the property to which the action relates. Code Civ. Proc. § 442.

12. Pleading ⇐147

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, nephew's cross complaint based upon an alleged oral contract with decedent that decedent was to make will in favor of nephew in return for personal services to be performed by nephew alleged a cause of action distinct from transaction under consideration in complaint itself and was properly dismissed, even though parties in two controversies were the same and although much of the testimony might be identical.

13. Jury ⇐25(2)

Where trial court proceeded to hear testimony relative to complaint and answer thereto, after which there was a discussion as to the cross complaint, terminating in a dismissal of such pleading by court, and thereupon court announced that it was ready to receive evidence on defendant's counterclaim, and defendant's attorney then proceeded without objection to put on his evidence relating thereto without making a demand for a jury with respect thereto, defendant "waived" his right to a jury to hear counterclaim.

14. Appeal and error ⇐1046(5)

Record failed to establish any conduct on part of trial judge prejudicial to defendant's rights.

15. New trial ⇐114

Where trial judge who tried case was outside county upon vacation at time motion for new trial was presented, a judge other than the one who tried the case was authorized under statute to hear the motion. Code Civ.Proc. § 661.

16. Appeal and error ⇐110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963, subd. 2.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Forman A. Frazure, as administrator of the estate of Alexander M. Frazure, deceased, against Harold P. Fitzpatrick, to recover for the estate and to quiet title of the estate in and to a promissory note and deed of trust held in his own name by defendant, wherein the defendant filed a cross-complaint and counterclaim. From an adverse judgment, the defendant appeals.

Affirmed.

E. Llewellyn Overholt, of Los Angeles, for appellant.

Nixon A. Lange, of Huntington Park, for respondent.

GOULD, Justice pro tem.

In this action Forman A. Frazure, as administrator of the estate of Alexander M. Frazure, his deceased father, seeks to recover for the estate and to quiet title of the estate in and to a promissory note and deed of trust held in his own name by defendant Harold P. Fitzpatrick, nephew of said deceased. Plaintiff prevailed, the trial court decreeing that the heirs and devisees of deceased were the beneficial and equitable owners of the note and trust deed, subject to the administration of decedent's estate; that plaintiff as administrator was entitled to the possession thereof and that defendant Fitzpatrick held the same in trust for said estate and, ordering defendant to assign the same and deliver possession thereof to said administrator and to account for the installments upon the trust deed note collected by him since the death of Forman A. Frazure.

Defendant Fitzpatrick's counterclaim for $9,600 "on account of work and labor performed and for necessaries of life furnished by defendant to said decedent" was disallowed by the court in toto, and a cross-complaint upon a rejected creditor's claim asking the same amount for services rendered deceased in his lifetime was dismissed on the court's own motion.

Defendant Fitzpatrick appeals. Of the other defendants named in the action, California Trust Company, trustee under the deed of trust, defaulted, and Monroe C. Frazure, another son of decedent, filed only a formal written appearance in the case and took no steps therein after pronouncement of judgment.

Decedent Alexander M. Frazure came to Los Angeles in the year 1920. His wife and children remained at the family home in Gary, Indiana, and although his son Forman, respondent herein, followed him to California a few months later, decedent's wife refused to change her place of abode. For a few months decedent lived at the home of his wife's sister, mother of appellant, in Los Angeles, where he paid for his room and board. Later he stopped at rooming houses or hotels with his son.

In June, 1923, decedent decided to purchase a house and lot in Los Angeles for $7,500, of which $2,500 was to be a cash payment out of funds then in the possession of decedent and the balance of $5,000 was to be represented by two promissory notes secured by mortgages upon the property purchased. An escrow was opened for the purchase of the property in the name of decedent. However, when the notes and mortgages were prepared and sent to decedent's wife in Indiana for her to join her husband in their signing and execution, she refused to do so.

At this juncture appellant became connected with the title to the property. According to appellant's own testimony as given at the trial, decedent, when his wife refused to sign the papers, said to appellant: "Alice [wife of decedent] has refused to sign the escrow papers, and refused to come out here, and refused to live with me, and I could not stand those cold winters back east * * *; and I have got to have a home to live in, and that is a nice place out there, and because you have done so much for me, and you got me this fine position with the school board, and it helped me out, so I will help you make the payments on it and it is your property * * * and if you let me collect the rent and stay there and have a place to live, and if you promise to take care of me and help me out the best you can the rest of my life, I will leave whatever I have to you, and whatever I have in my estate to you." Appellant, according to his narrative, protested that he was already deeply in debt and did not care to assume any further obligation. Nevertheless, so he testified, he yielded to his uncle's importunities and consented to take the property in his name and to assume liability for the indebtedness by signing the notes. Accordingly the name of the purchaser in the escrow was changed from decedent to appellant and title to the property was taken in the latter's name.

This is the transaction, the oral contract, upon which appellant bases his right to the property. He had theretofore, he claims, rendered certain services to decedent in the matter of companionship and care, and at the time the house and lot were acquired he promised to allow the property to remain in his name, to look after it and be responsible for it, and to continue the personal services to his uncle. His testimony as to such an oral contract was corroborated by his mother, who stated she was present at the time of the colloquy in 1923. There is no other corroboration in the record.

As to the services theretofore rendered by appellant to his uncle, they consisted of the merest perfunctory courtesies which

might be shown by one friend to another, even without the obligation of close relationship such as existed between appellant and decedent. The same may be said of so-called services rendered by appellant after the realty transaction. He at times took decedent riding in his automobile, visited him at the hospital, took him to a physician and occasionally entertained him at his home. The court was thoroughly justified in concluding that the "services" for which compensation and reward is here claimed were simply the courtesies which are commonly rendered by one human being to another without any promise or hope of payment, and are of no pecuniary value. They do not sufficiently bolster up appellant's claim that they constituted consideration for decedent's surrendering to appellant his property.

In March, 1937, the property was sold for $5,000, payable $800 in cash and $4,200 represented by a promissory note and trust deed payable in installments of $40 per month. The note and trust deed were made payable to appellant and remained at all times in his possession.

Alexander M. Frazure died in February, 1940, at the age of eighty years. His son was appointed administrator of his estate and as such brought the within action to recover the note and trust deed for the estate.

In spite of the fact that title to the property in question stood in the name of appellant, and the note and trust deed upon sale thereof were made payable to appellant and were retained in his possession, it is significant that decedent actually exercised complete control over the property from the time of its purchase in 1923 until his death in 1940. He paid the initial cash purchase payment as well as subsequent payments as they fell due; he lived in the house a portion of the time, and when it was rented he selected the tenants and collected the rentals; he reimbursed appellant for all taxes and assessments paid, and all payments on the note given on the sale of the property were turned over to decedent by appellant. In fact, appellant had difficulty in showing any item of disbursement from his own funds with reference to the property, and the court was justified in concluding, as it did, that decedent paid the entire purchase price and all expenses for upkeep out of his own money solely, and that appellant at no time contributed any part of the purchase money or expenses for upkeep out of his own funds. Such testimony as was given regarding appellant's expenditure for the benefit of the property at most created a conflict in the evidence, and with the court's determination upon that conflict it is not the province of this court to interfere.

[1] With the record in this condition it is apparent that the trial court's determination of the case, disallowing appellant's claims and restoring the property to decedent's estate to which it rightfully belonged, accomplished the only fair, just and equitable solution possible in the premises. The same considerations dispose of appellant's main contention that the evidence was insufficient to sustain the judgment. Not only was the evidence sufficient, but it was compelling, and the court's conclusion is fortified by the presumption, codified in section 853 of the Civil Code, that "when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Case law is legion in support of this elementary principle.

[2] Aside from the principal contention as to the insufficiency of the evidence, appellant's argument concerns itself with a number of minor items. It is urged that the court failed to find upon the question as to whether the property in question was the community property of decedent and his surviving widow. Such matter, it is claimed, was placed in direct issue by the answer. But it is wholly immaterial to appellant whether or not the property is community or separate, and he may not complain if he is not injured by the failure of the court to make a finding thereon.

[3] Appellant also complains that the surviving widow should have been made a party to the action. If such be the case the misjoinder was apparent upon the face of the complaint, and appellant by not demurring waived his objection. Code Civ.Proc. § 434.

[4] As to the claimed necessity for findings upon the special defense of the statute of limitations, this point is disposed of by the court's finding that appellant held such property as trustee for decedent and faithfully performed his duties as such trustee up to the death of decedent, February 16, 1940. Inasmuch as there was no repudiation of the trust, the statute of limi-

tations could not be set in motion, and therefore no separate finding on that point was necessary.

[5, 6] The trial court admitted in evidence in behalf of respondent two writings, one unsigned and one signed "A. M. Frazure," identified as being in the handwriting of decedent, in which mention is made of the trust deed in controversy here as belonging to the writer of the documents, which, apparently, were unsuccessful attempts to make testamentary disposition of this and other property. These documents were found in decedent's tool chest. It may be conceded that commonly declarations of a person, since deceased, may be received under such circumstances as here obtain only when the declarations are against the interest of the person making them or those claiming under him, and not when such declarations are in favor of those who claim rights which would be upheld and sustained by the declarations, oral or written, which are sought to be introduced. Code Civ.Proc. § 1946. However, as noted in the case of Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745, 753, there are exceptions to this general rule, as where "failure to assert a claim or right may be construed against the party as an implied negation." In the case under review here, appellant maintained that under his oral contract with decedent the latter as the final act upon his part was to make a will in favor of appellant. This testamentary act being a part of the transaction alleged by appellant, evidence concerning such act or the omission thereof was admissible as part of the whole transaction and contract asserted by appellant. Code Civ.Proc. § 1850; Young v. Benton, 21 Cal.App. 382, 131 P. 1051; Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530.

[7] Furthermore, appellant himself at a later point in the case on direct testimony testified concerning a conversation with decedent in which reference was had to a "will in my tool chest." Even conceding for the purpose of argument that the two writings were improperly admitted in evidence, the error, if any, may be disregarded in considering the case as a whole and was not prejudicial to appellant. Quite evidently the court rejected as unworthy of belief appellant's entire testimony, and there was ample evidence in the record to substantiate the findings and to sustain the judgment of the court without the writings in question.

[8] Error is likewise asserted by appellant because certain letters received by him from decedent were excluded by the court. One of these, dated two years prior to the alleged contract of 1923, expresses decedent's attitude toward his wife and other members of his family. This letter has no apparent relevance to any matter at issue in the present case and was written two years before decedent had his first transaction about the property in question. Obviously it was properly rejected by the court.

[9] Also, the court's action in refusing four letters with reference to collections by appellant of payments upon the trust deed note must be sustained. Other evidence, including the checks themselves, in payment of the collections established the fact that appellant had paid the money to decedent, and the letters could have had no further value to appellant than to establish that fact.

[10] Appellant contends that the court improperly injected the issue of adverse possession into the case by finding that decedent held the property adversely to appellant. As a matter of fact there was no issue of adverse possession presented by the pleadings. The suit was upon a resulting trust, and while the court found that decedent was in actual, continuous, open and notorious possession of the property from the date of its purchase in 1923 to the date of its sale in 1937, this finding is not addressed to any issue of adverse possession but, coupled with the finding that during said period appellant held title to said property in trust for decedent, is pertinent and proper in establishing that decedent was the equitable and beneficial owner of said realty although appellant held the fee title in his name.

In addition to the complaint and answer thereto, there was on file a cross-complaint and a counterclaim. The cross-complaint was before the court on written stipulation of counsel that it might be filed and tried at the same time as the issues joined in the complaint. The trial court, however, on its own motion dismissed the cross-complaint, and this action of the court is cited by appellant as error. The complaint itself sought to establish a resulting trust and to quiet title of the estate in the note and trust deed. The cross-complaint was brought upon a rejected claim theretofore filed by appellant against the estate of decedent, in which appellant asked judgment

for $9,600 and interest for services rendered to decedent from December 15, 1920, to February 15, 1940, a total of 232 months, at the rate of $40 per month for 228 months, and $100 per month for 4 months. The services alleged in the cross-complaint were for care, board, room and for acting as "companion, counsellor and benefactor to said decedent," said services having been rendered, it is alleged, at the special instance and request of decedent.

[11, 12] We are of the opinion that the court was justified in its ruling. The cross-complaint was based upon a cause of action dating back to December, 1920; the complaint itself related to matters having to do with the purchase of the house and lot in 1923, and appellant's defense upon that phase of the litigation was an alleged oral contract as of the date of the purchase of the property. Even if the parties in the two controversies are the same, and although much of the testimony might be identical upon the causes of action stated in the complaint and cross-complaint, those facts alone do not compel the court to entertain the cross-complaint. Here the contract for services alleged in the cross-complaint was entirely separate and distinct from the contract under consideration in the complaint itself; and a cross-complaint is permissible only when a defendant seeks affirmative relief against any party relating to or dependent upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates. Code Civ.Proc. § 442; Mahan v. Millar, 56 Cal.App. 280, 205 P. 67.

As to the counterclaim, appellant asked for the sum of $9,600 for work and labor for decedent "within two years last past." The allegations of the counterclaim were specifically and generally denied in a separate "answer to counterclaim." Appellant had deposited jury fees and made written request for a jury trial in advance of the trial date and in due form. When the case was called for trial the following proceedings were had:

"The Court: The procedure, I think, to follow then is to try the issues framed by the complaint and the answer, that is, the equitable suit, and of course that is not a matter for a jury. And if the matter of the cross-complaint is decided favorable to the contentions of the defendant, then that matter, of course, can be tried as a separate jury case. So, at this time I am going to excuse the jury. * * *

"Mr. Overholt: At this time, on behalf of the defendant, I ask that the jury be allowed to try the issues of fact.

"The Court: Well, that question is purely within the discretion of the court, and the court is going to use that discretion contrary to the contention of counsel."

[13] The court then proceeded to hear the testimony relative to the complaint and answer thereto, after which there was a lengthy discussion as to the cross-complaint, terminating in a dismissal of that pleading by the court, and thereupon the court announced that it was ready to receive evidence on the counterclaim. Appellant's attorney then proceeded without objection to put on his evidence relating thereto. No demand was made for a jury with respect thereto, and in fact there is no suggestion in the record that the jury question was mentioned respecting the counterclaim. Under the circumstances it must be held that appellant waived his right, if any he had, to a jury to hear that phase of the case, and he cannot now complain.

[14] Appellant also claims that the trial judge was biased and prejudiced; that he "literally screamed and savagely shouted" at appellant while the latter was upon the witness stand. Nothing in the record, however, discloses any conduct on the part of the court which was prejudicial to appellant's rights; and insofar as it is possible to judge from the cold record appellant and his witnesses were afforded every opportunity to give their testimony untrammelled by interference or intimidation in any degree by the court. Such a remark as the observation of the court which appellant complains of, that his counsel "ought to be penalized for reading law books instead of playing poker," while not to be commended as contributing to the decorum of a courtroom, nevertheless was obviously uttered in a spirit of jocularity, and was in the same breath followed by a legal ruling respecting the admission of evidence favorable to appellant.

[15, 16] Lastly, objection is made to the fact that the motion for a new trial was heard and denied by a judge other than the one who tried the case. It is admitted that the trial judge was outside the county of Los Angeles upon vacation at the time, and therefore the exact situation contemplated by section 661 of the Code of Civil Procedure, authorizing another judge to hear the motion, was presented. Further-

more, the order denying a motion for new trial is not an appealable order, Code Civ. Proc., § 963, subd. 2, and the action of the court upon such motion is not reviewable here.

We are satisfied from an examination of the entire record that appellant received a fair trial, that justice was accomplished by the lower court's determination of the case and that any other conclusion than the one reached would have been repugnant to equity and justice.

Judgment affirmed.

MOORE, P., concurred.

W. J. WOOD, J., concurred in the judgment.



54 Cal.App.2d 802

COMMERCIAL CREDIT CO. v. REGAN et al.

Civ. 13835.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1942.

Appeal and error ⇐619

Where appellee's motion to dismiss appeal on the ground that no record on appeal had been prepared or filed was supported by certificate of clerk of superior court setting forth the facts required by rule of the District Courts of Appeal, appeal would be dismissed. Rules of the District Courts of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by the Commercial Credit Company against William C. Regan and others. From an adverse judgment, defendants appeal and plaintiff moves to dismiss the appeal.

Appeal dismissed.

Gerald P. Rosen, of Los Angeles, for appellants.

Otto A. Gerth, of Los Angeles, for respondent.

PER CURIAM.

The respondent having served and filed its motion to dismiss the appeal in the above entitled action on the ground that no record on appeal has been prepared or filed, supported by a certificate of the clerk of the Superior Court setting forth the facts required by rule VI of this court, and it appearing that all the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that the appeal from the judgment of the Superior Court of Los Angeles County be, and it hereby is, dismissed.



54 Cal.App.2d 476

ALLEN v. McGEE et al.

Civ. 13547.

District Court of Appeal, Second District, Division 3, California.

Sept. 23, 1942.

Hearing Denied Nov. 12, 1942.

1. Judgment ⇐720

Where plaintiff and defendant were adverse parties in prior action involving same tract of land, facts found in prior action were binding on them in present action.

2. Fraudulent conveyances ⇐230

Where deed executed by debtor before execution sale was determined in a prior action to have been void as in fraud of creditors, a creditor who thereafter purchased debtor's interest in property at execution sale acquired legal title.

3. Fraudulent conveyances ⇐226, 230

A deed in fraud of creditors is absolutely void as against them, and an execution sale of debtor's interest carries legal title, and not an equitable interest only.

4. Execution ⇐266

Legal title of debtor's interest in property is acquired at execution sale, and not by virtue of sheriff's deed which is not issued until period of redemption has passed. Code Civ.Proc. § 702.

5. Execution ⇐319

Where property is sold at execution sale, sheriff's deed adds no title, but only serves as evidence that there has been no redemption. Code Civ.Proc. § 702.

6. Execution ⇐268, 293

A creditor upon purchasing debtor's interest in property at execution sale acquires all of debtor's interest and in so doing wipes out junior liens, but the junior liens still survive for purpose of determining who is a redemptioner. Code Civ. Proc. §§ 700–702.

7. Execution ⇐283

A creditor who purchased debtor's interest in property at execution sale did not surrender title acquired thereby by bringing an action before period for redemption had expired, praying a judgment recognizing that debtor had an interest in property and recognizing existence of certain judgment liens, where it appeared that purposes of creditor's action were not inconsistent with creditor's retention of all that he had acquired as purchaser at execution sale. Code Civ.Proc. §§ 700–702.

8. Appeal and error ⇐877(4)

Plaintiff, in quiet title action, was not aggrieved by affirmative relief decreed certain defendants, even though such determination was erroneous as being without foundation, since such determination was "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeal from Superior Court, Santa Barbara County; A. F. Bray, Judge.

Action by L. J. Allen against T. D. McGee and others to quiet plaintiff's title to certain tract of land, for a judgment in declaratory relief, and to compel several of the defendants to account for value of use and occupancy of the property. From an adverse judgment, the plaintiff appeals.

Affirmed.

Lucian J. Clarke, of Los Angeles, for appellant.

Heaney, Price, Postel & Parma and Clarence A. Rogers, all of Santa Barbara, for respondents.

BISHOP, Justice pro tem.

The plaintiff appeals from a judgment denying him any relief, claiming that the trial court failed to take into account that the effect of a judgment in a previous action had been to establish the title to certain real property in him subject only to a number of liens. We have reached the conclusion that the prior judgment did not have the effect claimed for it by the plaintiff, and that he was rightly denied any relief.

Plaintiff framed his complaint in four counts, each having reference to a piece of real property in Santa Barbara county. In the first count it is alleged that on November 23, 1932, the defendant T. D. Webster executed his grant deed conveying this property in fee to the plaintiff, and that the plaintiff is its owner subject only to certain liens. The judgment in the action which we are going to know as the McGee action was set forth in full, the same judgment that appears in part in the seventh paragraph of this opinion. Each of the succeeding counts incorporates by reference the allegations respecting the deed of November 23, and the contents of the judgment. The second count differs from the first in that it seeks a judgment in declaratory relief rather than one quieting plaintiff's title. In the third count the plaintiff complains that several of the defendants took possession of the property without plaintiff's consent and alleges that the value of the use and occupancy of the property is $250 per month. That the defendants have derived income and profit from their occupancy and should account to plaintiff is the burden of his fourth count.

The problem presented by this appeal is not complicated, but its setting may be said to be, and must be known properly to appraise appellant's position. One La Torre Webster died in August, 1928, possessed, among other assets, of some sixty acres of land in Santa Barbara county. By his will La Torre Webster provided that of the residue of his estate his daughter, Mary Beckstead, should receive a three-quarters interest, the remaining one-quarter to go to his son, T. Dean Webster. In April of 1930, while the estate was in the course of administration in the probate court, Los Angeles County, Mary Beckstead and Dean Webster agreed in writing between themselves that they should inherit equally,

and that upon the distribution of the estate the former should receive the westerly half, Webster should receive the easterly half, of the real property to be distributed. Two other documents were executed during the period of the probate proceedings. The first was one which, if effective, would have served to transfer to Allen, the appellant-plaintiff, all of Webster's interest in the estate of his father. The second was a grant deed executed by Webster, designed to convey to Allen the real property referred to in the four counts of the complaint. This deed was dated November 23, 1932, recorded December 2, 1932, and the real property described in it by metes and bounds comprises a portion of the property distributed in the estate proceedings.

On December 19, 1932, an order of distribution was made in the Webster estate, decreeing that all the residue of the real property of the estate, consisting of two separate parcels totalling about twenty-six acres (and for convenience' sake we shall hereafter refer to it as the twenty-six acres), should be distributed, three-quarters interest to Mary Beckstead and one-quarter interest to appellant-plaintiff. By explicit provisions, however, the decree left open for future determination the rights of Dean Webster's creditors, express reference being made to their right to question the assignment by which the one-quarter interest that was to be Webster's was distributed to Allen, and their right to insist that by virtue of his agreement with his sister Webster's interest in the estate amounted to a half interest.

Meanwhile another series of events was taking place which impinged upon those we have just related. On or before September 10, 1930, T. D. McGee had commenced an action against Webster, numbered 308600 in the superior court, Los Angeles County, for on that day the sheriff of Santa Barbara County attached all of Webster's interest in the real property of which the twenty-six acres was at least a part. In October, 1930, McGee recovered a judgment against Webster in action No. 308600 for over $3,500; an abstract of the judgment was immediately recorded in Santa Barbara County. In February, 1932, the sheriff of Santa Barbara County, under a writ of execution issued in action No. 308600, levied upon all the interest of Webster in the twenty-six acres, which had already been attached, and a little over a year later, in March, 1933, sold that interest to McGee, the judgment creditor. Between the levy and the sale Webster had made the deed of November 23, 1932, already mentioned.

Just when the record before us does not disclose and it does not matter, McGee brought an action in Santa Barbara County, which we shall hereafter call the McGee action. The first pleading we have is the Amended and Supplemental Complaint for Declaratory Relief, filed sometime between June 19 and July 17, 1933, we infer, which would be before the expiration of the twelve months' period during which there might have been a redemption from the execution sale. Code Civ.Proc. secs. 701, 702. As parties defendant in the amended and supplemental complaint we find Webster, Allen, Mary Beckstead, Southwestern Creditors Association, Burt Moore and some fictitiously named persons. In his complaint McGee set forth the facts we have stated in the three preceding paragraphs and he added facts revealing several more judgment liens existing against any real property interests Webster might have in Santa Barbara County. He also attacked by appropriate allegations the assignment by Webster to Allen of Webster's interest in the estate, and the deed of November 23, 1932, by which Webster purportedly conveyed to Allen a part of the twenty-six acres, claiming them to be void because in fraud of creditors. The amended and supplemental complaint ended with a prayer upon some of whose terms the plaintiff in the present case places reliance. McGee asked first that the court determine his interest in the land described in the decree of distribution. (McGee was, perhaps we should note, not only the execution purchaser of whatever interest Webster had in the twenty-six acres, but he also had three judgment liens subsequent to the one which had been foreclosed.) Secondly, he prayed that the assignment and the deed from Webster to Allen, both be declared fraudulent and ineffective. Then he asked that Webster "be adjudged and decreed by this Court to have been possessed and entitled to the possession of the Easterly one half of the La Torre Webster Ranch, that is, the Easterly one half of the real property distributed in its Decree of Distribution by the Superior Court of the State of California, in and for the County of Los Angeles, at all times since the 19th day of

December, 1932, subject, however, to: * * * To (sic) the rights of Plaintiff herein as a judgment creditor in said Action No. 308600 of the Superior Court of the State of California, in and for the County of Los Angeles, and as purchaser at execution sale thereunder on the 6th day of March, 1933.

"To the rights of Plaintiff herein as attaching creditor in Actions No. 296096, No. 296222, and Action No. 296380, respectively, in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California.

"To the rights of the Southwestern Creditors Association, a corporation, as holders of a judgment lien in said complaint particularly set forth and referred to.

"To all other claims by way of judgment lien or attachment which may be presented to this Court." There followed a further prayer that Mary Beckstead be declared the owner, since December 19, 1932, of the westerly half of the real property of the estate.

The McGee case came on to trial on February 27, 1934 (just before the expiration of the period of redemption in action 308600), and during its course it was stipulated between Allen, McGee, Webster and Mary Beckstead, among others, that the interest of Mary Beckstead and of Webster in the twenty-six acres should each be deemed that of an undivided one-half interest, and that the westerly half of the twenty-six acres "should be set over" to Mary Beckstead, "free and clear of all liens and claims of this plaintiff and free and clear of all liens of other creditors of T. Dean Webster * * * and that the easterly one-half thereof be set apart to the defendant T. Dean Webster or his successors in interest whoever they might be held to be." Findings were then filed and a judgment entered April 23, 1934, in which it was decreed: That the deed of November 23, 1932, and the assignment, were fraudulent and that they be cancelled; that Allen did not have and never had had any interest in the twenty-six acres; that the interest of Mary Beckstead in and to the twenty-six acres "is that of an undivided half interest; that the interest of T. Dean Webster, or his successors in interest, is that of an undivided half interest;" that "there be set apart unto Mary Alice Beckstead the Westerly one-half [of the twenty-six acres] and unto T. Dean Webster, or his successors in interest the Easterly one-half thereof." Then appeared this subdivision:

"That the order and priority of the several liens referred to in Plaintiff's Amended and Supplemental Complaint against the interest of T. Dean Webster in and to the real property particularly described in said paragraph sixteen of the Findings of Fact is as follows:

"(a) That of Joseph Archambeault, accruing on the 21st day of August, 1929.

"(b) That of T. D. McGee, in action #308600 in the Superior Court of Los Angeles County, accruing on Sept. 10th, 1930.

"(c) That of T. D. McGee, in action #296096 in the Municipal Court of the City of Los Angeles, accruing on the 15th day of December, 1932.

"(d) That of the Southwestern Creditors Association, a corporation, in action #195924 and later renewed in #352889 in the Superior Court of Los Angeles County, accruing on the 16th day of December, 1932.

"(e) That of T. D. McGee in action #296380 in the Municipal Court of the City of Los Angeles, accruing on the 17th day of December, 1932.

"(f) That of T. D. McGee in action #296222 in the Municipal Court of the City of Los Angeles, accruing on the 4th day of February, 1933.

"(g) That of Burt Moore in action entitled 'Moore vs. Webster, et al.,' in the Second Judicial Township Justice's Court of Santa Barbara County, accruing on the 6th day of February, 1933."

From this judgment an appeal was taken by Allen and it was affirmed in McGee v. Allen, 1936, 7 Cal.2d 468, 60 P.2d 1026.

We now have a background against which plaintiff Allen's claim to have a cause of action may be examined. The first peg on which he hangs his right to recover is the explanation given by the Supreme Court of the judgment in the McGee case, contained in these words of the opinion's concluding paragraph (7 Cal. 2d at page 476, 60 P.2d at page 1030): "The findings and judgment that the transfer was void, and that Allen had no right, title, or interest, in the light of the findings as a whole, must be interpreted as an adjudication that the transfer was void as to respondents who are creditors of Webster. The transfer was good between the

parties, * * *." This means, Allen now contends, that he was adjudged to be the owner of the premises described in his complaint, subject to the several liens set forth in the McGee judgment. To the question which immediately presents itself —what happened to Allen's title, void as to Webster's creditors, when the foreclosure sale was held to satisfy a judgment of one of those creditors? Allen has a ready answer, and his case succeeds or fails depending on the validity of this answer. His answer is that McGee, who bought the premises at the execution sale, by bringing his action surrendered the title thus acquired, and that he emerged from his action with no title, but only four judgment liens, the title, subject to the liens of McGee and others being in Allen.

[1] This theory of his case the plaintiff presented to the court at the outset of the trial. The outcome was not a judgment of nonsuit on the opening statement, as at one time seemed imminent, but the case went to trial on its merits. Plaintiff introduced into evidence "the entire file" of the McGee action, which included of course the findings of fact, from whose extensive recitals we gathered most of the facts which we narrated in the early part of this opinion. As Allen and McGee were adverse parties in the McGee action, the facts found in that action are binding on them in this one. Sutphin v. Speik, 1940, 15 Cal.2d 195, 201, 99 P.2d 652, 101 P.2d 497. The few facts we narrated, which we did not discover in the findings of the McGee action, came from admissions in the pleadings in the present action.

After the trial, which, but for statements and counterstatements of counsel, could not have occupied over fifteen minutes, although the record on appeal consists of almost five hundred typewritten pages, findings of fact were filed. Again it was found that the deed of November 23, 1932, was without consideration, made and accepted with the intent to defraud creditors. Reference was made to the finding in the McGee action that McGee, on March 6, 1933, purchased, at execution sale, the premises described in the complaint in the present action. It was concluded "that the plaintiff Allen has no right, title or interest in and to the property described in the complaint."

[2-5] We are of the opinion that this conclusion of law was correct, and that the judgment which followed it, also declaring "that plaintiff has no right, title or interest whatsoever in or to the land or premises described in the complaint," and "that plaintiff is entitled to no relief herein" was in these particulars correct. When McGee purchased the property at the execution sale of March 6, 1933, he acquired the legal title of the premises Allen now claims. As stated in the headnote to Judson v. Lyford, 1890, 84 Cal. 505, 24 P. 286, and quoted in Wangenheim v. Garner, 1919, 42 Cal.App. 332, 334, 183 P. 670, 671: "A deed in fraud of creditors is absolutely void as against them, and an execution sale of the debtor's interest carries the legal title, and not an equitable interest only." This legal title is acquired at the sale and not by virtue of the sheriff's deed which is not issued until the period of redemption has passed. Bateman v. Kellogg, 1922, 59 Cal.App. 464, 472, 211 P. 46; Truelsen v. Nelson, 1941, 42 Cal.App. 2d 750, 755, 109 P.2d 996, 998. The title so acquired might have been lost to McGee during the twelve months which followed March 5, 1933, by the redemption of the property from the execution sale of that date. Code Civ.Proc. sec. 702. Allen brought the present action on the 9th day of October, 1937, and he did not allege, nor is there any evidence or claim, that McGee's title was lost by redemption. The absence of competent evidence that the sheriff ever issued a deed to McGee after the expiration of a year (the repeated statements of Allen's counsel at the trial that such a deed had been issued not constituting competent evidence) does not affect the situation (Leaver v. Smith, 1920, 47 Cal.App. 474, 477, 190 P. 1050); the sheriff's deed adds no title, but only serves as evidence that there has been no redemption. See Bateman v. Kellogg and Truelsen v. Nelson, supra, in this paragraph.

How, then, has McGee's interest slipped back from being a non-defeasible title to a mere judgment lien? Because, Allen argues, McGee brought his action in which he prayed for a judgment which would, and he obtained a judgment which did, recognize that Webster had an interest in the property, and which recognized the existence of judgment liens, and this after Webster's interest had all passed to McGee, and after all the judgment liens had been extinguished by the foreclosure sale to McGee. The effect of McGee's action, Allen argues, was to bring his title into a

court of equity, and lay it on the chancellor's bench.

[6] The fundamental weakness of appellant's position arises from the fact that while the words he uses correctly express one truth, they do not encompass all truth. At this phenomenon the plaintiff should not be surprised; the deed on which he relies was adjudged to be null and void, but yet to be good. Similarly, it is true that McGee acquired all of Webster's interest in the twenty-six acres (Code Civ.Proc. sec. 700) and in so doing wiped out junior liens (Mitchell v. Alpha Hardware, etc., Co., 1935, 7 Cal.App.2d 52, 57, 45 P.2d 442; Bank of America Nat. Trust & Savings Ass'n v. Hill, 1937, 9 Cal.2d 495, 502, 71 P.2d 258), yet the junior liens survive. They survive because section 701, Code of Civil Procedure, provides: "Property sold subject to redemption * * * may be redeemed * * * by the following persons * * *: 2. A creditor having a lien by judgment or mortgage on the property sold * * * subsequent to that on which the property was sold." For the purpose of determining who is a redemptioner, therefore, a lien which has been wiped out still survives. Moreover, section 702, Code of Civil Procedure, in making provision for the possibility that Southwestern Creditors Association or Burt Moore (see judgment in McGee case) might redeem from the sale to McGee, takes into account that McGee not only had the title he secured as purchaser, but also might have "a prior lien to that of the redemptioner, other than the judgment under which said purchase was made." But these liens that still exist, for some purposes, although they have been wiped out, were against Webster's interest in the property; no one had a judgment lien against McGee. So, it may be said, Webster still had an interest, although McGee had acquired it.

[7] It follows that McGee did not surrender his title by bringing the action. He had at least three purposes in view, no one of them inconsistent with his retention of all that he had as purchaser at execution sale before the expiration of the period of redemption. (It must be remembered that the trial took place on the 27th and 28th days of February, 1934, and the judgment speaks as of no later a date. Segarini v. Bargagliotti, 1926, 79 Cal.App. 347, 249 P. 545.) First of all, he desired to eliminate Allen from the picture by having his fraudulent assignment and deed characterized as such. Then he wished it adjudicated that he had purchased not an undivided one-quarter interest in the twenty-six acres, but the easterly half of them. Lastly, he desired to have the order of the parade of liens fixed, doubtless to avoid any uncertainty as to which of his liens would have to be taken care of if one of those holding a junior lien desired to redeem. To accomplish the last mentioned purpose it was but to conform to the terminology of the code sections to recognize the continued existence of Webster's interest to which the several junior judgment liens clung for life. McGee did not lay his title in the chancellor's lap, nor, by the judgment which was entered, did the chancellor take McGee's title away from him. As to McGee, Allen never had a title; as to Allen, McGee had a good title, and the judgment appealed from correctly declared that Allen was entitled to no relief. Its failure to adjudicate in words that McGee was Webster's successor in interest is not to be interpreted as an adjudication that he was not.

[8] It is true that the finding, repeated in the judgment, that the Butterfields were the owners of the easterly half of the twenty-six acres, has no support in the evidence, and no prayer for such an adjudication was made in their answer, but under the authorities it seems that the plaintiff is not aggrieved by this determination, without foundation though it is, for it is surplusage. California Pub. Imp. Securities v. Porter, 1932, 121 Cal.App. 670, 674, 9 P.2d 877; Warden v. Stoll, 1930, 210 Cal. 374, 376, 29 P. 835; Risso v. Crooks, 1933, 217 Cal. 219, 221, 17 P.2d 1001.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.

54 Cal.App.2d 434

PEOPLE v. WILSON.

Cr. 1801.

District Court of Appeal, Third District, California.

Sept. 18, 1942.

1. Homicide ⇐218, 331

The sufficiency of foundation proof which will authorize admission of dying statements is for the trial judge and unless there is apparent abuse of discretion in that regard, trial court's ruling will not be disturbed on appeal.

2. Homicide ⇐218

In determining frame of mind of declarant regarding his belief with respect to impending death as respects admissibility of dying statements, the court may consider his physical condition, the nature and seriousness of his wounds, his knowledge of his grave condition, his conduct, language and statements.

3. Homicide ⇐203(7)

To establish foundation proof authorizing admission of dying statements, it is not necessary that declarant shall believe he will die immediately provided he assumes that he will not recover from his injuries and that death is impending.

4. Homicide ⇐200

As respects admissibility of dying declarations, duration of time which elapses between the declaration and actual death furnishes no criterion for admission or rejection of the evidence.

5. Homicide ⇐217

The sense of impending death necessary for the admission of dying declaration need not be proved by express statements of declarant to that effect but may be determined from surrounding circumstances.

6. Homicide ⇐203(3)

Evidence that deceased, upon whom illegal abortion had been performed, had been told by three physicians that she could not recover, that she consented to the administering of the last rites of the Church, was fully conscious at the time a dying statement was made, and that she died within a few hours after making the statement that defendant had performed the abortion, was sufficient to show that the "dying declaration" was made under a sense of impending death so as to be admissible.

See Words and Phrases, Permanent Edition, for all other definitions of "Dying Declaration".

7. Criminal law ⇐404(1)

In prosecution for homicide resulting from abortion, where deceased's father testified that in a conversation with defendant in defendant's home, defendant offered to give $50 or $75 to help with funeral expenses of decedent and upon returning two days later to recover his hat which he had left there, a lady residing in the house handed him his hat containing an envelope and $50 in currency, the admission of the envelope and currency was not error.

8. Criminal law ⇐780(3)

In prosecution for homicide resulting from abortion, jury was properly instructed as to the law relating to accomplices and the necessity and extent of corroboration required to sustain a conviction. Pen.Code, §§ 1108, 1111.

9. Criminal law ⇐780(1)

In prosecution for homicide resulting from abortion, trial court did not err in refusing to instruct that a person who talked with defendant relative to the operation and who took decedent to defendant's home where abortion was performed was an "accomplice", where there was no evidence that such person had anything to do with the actual abortion. Pen.Code, §§ 1108, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

10. Criminal law ⇐780(1)

In prosecution for homicide resulting from abortion allegedly performed on deceased by defendant, trial court was not required to instruct that deceased was an "accomplice". Pen.Code, §§ 274, 1108, 1111.

11. Homicide ⇐235

In prosecution for homicide resulting from illegal abortion, evidence was sufficient to show that the abortion was committed and that death resulted therefrom. Pen. Code, § 274.

The term "abortion" usually implies criminality in producing a "miscarriage", the latter term denoting any premature birth, irrespective of cause.

See Words and Phrases, Permanent Edition, for all other definitions of "Abortion" and "Miscarriage".

12. Homicide ⇐235

In prosecution for homicide resulting from illegal abortion, degree of proof was not the same as in a prosecution for committing an abortion by means of certain instruments or by certain means, specifically indicating them. Pen.Code, § 274.

13. Homicide ⇐234(7)

In prosecution for homicide resulting from illegal abortion, evidence that a witness talked with defendant over the telephone relative to the operation, that he took decedent to defendant's house, that defendant admitted, following decedent's death, that it "might have been one of her cases" and that "she worked outside the law" and that she offered to help with funeral expenses was sufficient to connect defendant with the abortion. Pen.Code, § 274.

14. Criminal law ⇐1159(2)

On appeal from conviction, the court will not attempt to determine weight of the evidence but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

15. Criminal law ⇐741(1), 1160

It is the function of the jury in the first instance and of trial court after verdict to determine what facts are established by the evidence, and before the verdict of the jury which has been approved by the trial court can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in the court below.

16. Criminal law ⇐562

The determination of the charge in criminal case requires proof that offense charged was committed and that offense was perpetrated by person or persons accused thereof.

17. Criminal law ⇐1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict, the existence of every fact which jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict.

18. Criminal law ⇐1159(2)

If circumstances reasonably justify verdict of the jury, opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with determination of the jury.

19. Criminal law ⇐939(1)

In prosecution for homicide resulting from illegal abortion, where defendant filed motion for new trial supported by affidavits stating that on the date of the alleged abortion, affiants were in defendant's home and present during the time the alleged abortion was to have been performed and that no abortion was performed, trial court did not abuse its discretion in denying the motion where there was no showing that defendant could not with reasonable diligence have discovered and produced the new evidence at the trial. Pen.Code, §§ 274, 1181, subd. 7.

20. Criminal law ⇐938(1)

A wise discretion is vested in the trial court in determining weight to be given to statements contained in affidavits upon motion for new trial and this discretion is to be exercised in determining the diligence shown, the truth of the matter stated and the materiality and probability of the effect of them, if believed to be true. Pen.Code, § 1181.

21. Criminal law ⇐939(1)

The claim of newly discovered evidence warranting a new trial is looked upon by the courts with disfavor and requires the very strictest showing of diligence. Pen.Code, § 1181.

22. Criminal law ⇐939(1)

Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge. Affirmed.

Geraldine Wilson was convicted of murder in the second degree, and she appeals.

Affirmed.

Ralph H. Lewis, Sherman C. Wilke, and John L. Brannely, all of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

The appellant, Geraldine Wilson, was indicted by the Grand Jury of Sacramento

County for the crime of murder, the indictment charging in the usual language that she "did then and there wilfully and unlawfully and feloniously, and with premeditation and malice aforethought, kill and murder one Madeline Rosa, a human being; * * *." After trial by jury she was found guilty of murder in the second degree, the death of Madeline Rosa having occurred on the 4th day of January, 1942, at Sacramento, as a result of peritonitis caused by an incomplete abortion performed upon the decedent on December 22nd, 1941.

It is necessary to a proper understanding of the points hereinafter discussed that we give a brief summary of the evidence as shown by the record. It should be noted at the outset that appellant was charged with the crime of murder occurring on January 4th, 1942, and not with an abortion which, from the evidence, took place on December 22nd, 1941.

Madeline Rosa, the decedent, was a young woman about 24 years of age, and in good health. Prior to December 22nd, 1941, she became pregnant. She had been keeping company with a young man by the name of James G. Matthews, who was a shipyard worker, and whom she had known for about one year. Several days prior to December 22nd, Matthews, who testified he had heard the appellant's voice twice over the telephone that week, talked to appellant on the telephone, another party having placed the call, and asked her if she took care of girls in trouble. Appellant answered, "Yes, that she did". On December 22nd, Matthews took Madeline to the Bank of America, at 8th and J Streets, and then took her out to appellant's residence, which is located at 1062-58th Street in Sacramento. He remained outside in his automobile, and according to his testimony, Madeline went into the residence and remained there about fifteen minutes, and that then he took her to her home in Sacramento. The next day Matthews talked on the telephone to appellant, and we quote from his testimony as follows:

"Q. And what was the conversation with Mrs. Wilson about? State the conversation as near as you can that you had with Mrs. Wilson on that day. A. I called this woman on the phone—I don't remember just now what it was.

"Q. Where did you get the number? A. From the telephone directory. *And asked for Mrs. Wilson. The lady on the other end of the line verified the fact that it was Mrs. Wilson speaking, and I asked her at that time if Miss Rosa, the girl who was there yesterday between 1:30 and 2:00 o'clock, could take some sedative to alleviate pain.*

"Q. Go right ahead. What did she say? A. And *she replied that that could be done without any harm. I asked her about how long the girl would be in pain and she—and she told me that the time for such things as that was different in individual cases.* I asked her if the girl could eat and she said she could if she felt like it.

"Q. What else was said, Mr. Matthews? A. *So she asked me if the girl was flowing and I answered that she was and she asked me if she had removed the*—as I recall it—*packing and I replied no* because she had had instructions to leave it for twenty-four hours. * * *

"Q. *All right, what did Mrs. Wilson say in response to that?* A. *She verified the fact that it should stay there for twenty-four hours.*

"Q. *That's what she told you?* A. *Yes.*"

Prior to going to the home of appellant, the decedent had talked with Dr. Frank B. Reardan, of Sacramento, and had been advised by him that she was pregnant. On December 30th, about a week after the visit of decedent to appellant's residence, Dr. Reardan saw decedent, who was very ill with peritonitis, having a temperature of one hundred and a pulse rate of one hundred and three. The Doctor ordered her at once to the Mercy Hospital at Sacramento. Dr. Reardan testified as follows:

"Q. Did you, between the time of December 30th and the time of her death on January 4th, yourself, in consultation with Dr. Henderson, come to any conclusion as to the cause of her illness? A. Yes, sir.

"Q. What was that, please? A. That she had been aborted and had an infection following abortion.

"Q. Now, Doctor, on the evening of January 4th shortly before she passed away, did you see her that evening? A. I did.

"Q. Do you recall about what time it was? A. About 6:00 o'clock in the evening.

"Q. And did you have any conversation with her at that time? A. I did.

"Q. Did you inform her of her condition? A. I did. *I told her that she was desperately ill and was not going to live; she was going to die.* I told her because of that

fact I wished her to make a statement to the District Attorney's office or a member of the staff, and then I called Mr. O'Shea on the phone and asked him to come to the Mercy Hospital.

"Q. You did inform her that she was desperately ill and that she was going to die? A. Yes, sir.

"Q. And that you wanted her to make a statement as to her condition to somebody from the District Attorney's office? A. I did.

"Q. Did she give any indication that she wanted to do that? A. Gave no indication to the contrary. * * *

"Q. Now, will you tell us the exact words, as near as you can remember, Doctor, just what you told Madeline Rosa at that time? A. I told her that—*I told her: 'Madeline, you are very ill and you are going to die. You are not going to get well and I* want you to make a statement to somebody in the District Attorney's office.'

"Q. Now, isn't it true, Doctor, that at that time you told her that she was gravely ill and that you didn't expect that she would live? A. No, I told her she was going to die.

"Q. Are you positive that that is what you told her, Doctor? A. That's what—what I told her, yes.

"Q. You are positive that you didn't tell Madeline Rosa that you didn't expect her to get well? A. Well, I didn't expect her to get well and I told her that. And I also told her she was going to die.

"Q. Did she make any response to that statement, Doctor? A. No response. She looked at me.

"Q. She was conscious at the time, was she? A. Yes, sir.

"Q. *Do you know that she understood what you were saying?* A. *I do.*

"Q. She gave no indication at that time as to whether she believed your statement or not? A. I guess it shocked her. She didn't make any statement to the contrary to me.

"Q. You are positive, are you, Doctor, that Madeline Rosa gave no indication whatever that she expected that she was going to die? A. *I accepted it as an indication that she knew she was going to die because she didn't dispute me.*"

Dr. A. M. Henderson, Jr., of Sacramento, a specialist in obstetrics, was called as a consultant in the case of decedent, and worked with Dr. Reardan. He testified that the deceased had been pregnant and had been aborted—an incomplete abortion, and subsequently developed a generalized peritonitis and died because of that. He also told the patient that she was going to die, his testimony on that point being as follows:

"Q. Did you advise her on the evening of January 4th as to her chances of recovery or not? A. I told the patient that she was going to die."

Father Thomas Morgan, chaplain of the Mercy Hospital and priest of the Catholic Church, testified:

"Q. Now, I will ask you to relate any conversation you had with her with reference to her physical condition, excluding, however, any confession she may have made to you in your capacity as a priest. A. *Well, the only thing I told her that she was in a very serious condition and in danger of death and I thought it was the correct thing to prepare by receiving the last rites of the Church.*

"*Q. Did she consent to have the last rites administered? A. Yes, she did.*

"*Q. And did you do that? A. Yes, I did.* * * *

"Q. What was her condition at that particular time, Father? A. Well, how do you mean?

"Q. With reference to her physical and mental condition. A. Her mental condition was quite all right.

"Q. She was conscious at the time? A. Absolutely, yes."

Dr. Henderson testified further:

"Q. What did you—withdraw that. What did she say as to the responsibility of any one for her then condition? A. Well, you asked her the question.

"Q. Do you recall what that question was? A. *You asked her if Mrs. Geraldine Wilson was responsible for her condition.*

"Mr. Brannely: Well, we will object to that as being leading and suggestive, your Honor.

"The Court: Overruled.

"Mr. O'Shea: Q. And what was her reply, if any, to that? A. *Her reply was 'Yes'.*

"Q. Was she conscious at that time, Doctor? A. Yes, she was conscious.

"Q. And do you know about how long after that it was that Madeline Rosa passed

away? A. Well, I believe it was around 10:30".

On January 9th, 1942, five days after decedent's death, Mrs. Edith Rosa, sister-in-law of decedent, went to appellant's home with her sister-in-law, Ann. Mrs. Rosa testified that the appellant stated at that time, after she had shown appellant a picture of decedent, that "she might have been one of her cases, but she never took last names or remembered faces". Appellant admitted at that time that she was "working outside of the law". Mrs. Rosa testified, further, as follows:

"A. She also made me promise that I wouldn't come to the District Attorney's office. *She said that she would try to make things right for us.*

"Q. Said she would try to make things right with you? What did she say? Did she ask you to come back again? * * *

"Q. And did she ask you to come—A. *And for me to come by myself and not let anyone know I was coming out there".*

Mrs. Rosa further testified that on the day following, she and her husband, John Rosa, went out to appellant's place, and that they were admitted by a Mrs. Cook, who also resided there; that she introduced her husband to Mrs. Wilson, and that Mrs. Wilson stated that she did not want to deal any more with Mrs. Rosa because she was hysterical, and asked Mrs. Rosa to go outside, which Mrs. Rosa did.

John Rosa testified that he then talked alone with appellant, and that appellant said she would give $50 or $75 to help out with the funeral of decedent. Rosa testified that he left his hat at the residence of appellant, and on the following Monday he returned and received the hat from Mrs. Cook, and that when the hat was handed to him, it contained an envelope in which was enclosed $50 in currency, the envelope being opened in the presence of the officers of the law, and the currency being taken therefrom.

Dr. Michael J. Lipp testified that he was the Autopsy Surgeon, and that the deceased had died of an incomplete abortion or failure to completely empty the uterus. On cross examination he testified that he knew it was an abortion. We quote:

"And that led you to believe that this was an incomplete abortion. A. Didn't lead me to believe. *I actually knew it was.*

"Q. You felt that it was? A. Yes, because it was run up in the laboratory and that showed that it was placental tissue, too, which means that it was an incomplete pregnancy."

Dr. Lipp testified further that it was too long after the actual abortion for the instrument-marks to remain.

We will now quote the salient portions of the actual dying statement which was taken at the Mercy Hospital by the District Attorney in the presence of Dr. Henderson:

"Mr. O'Shea: Q. Can you tell me who it was? Do you know her name? Was it Genevieve Wilson?

"Dr. Henderson: I think Geraldine, the name is.

"Mr. O'Shea: Was it a woman by the name of Geraldine Wilson, Madeline? A. He was the one that performed.

"Q. He, or she? A. She.

"Q. Do you feel that you are in a position now you might not get well? Are you telling me that with the idea in mind you might not get well, Madeline? (No response). Are you telling me it was Geraldine Wilson, with the idea in mind you might not get well? I want to know that—I want to know that what you tell me is absolutely true—do you feel that way? (No response). Let me put it this way—*did you know her name?* A. *Yes.*

"Q. I am your friend, but I don't want to do any injustice of any kind to anybody—you know, as I know, if you thought you were going to die tomorrow, you wouldn't lie on anybody, would you, is that right? A. Yes.

"Q. You wouldn't, and I wouldn't, either—we have to find this out in the event you might not die. When you tell me it was Geraldine Wilson, do you tell it to me with the idea in mind that even if you died tomorrow, that would be the truth, would it? Would it, Madeline, when you say Geraldine Wilson, would you tell me that? A. Yes, I will.

"Q. So you feel, even if you died tomorrow, you would still say that was true, is that true, Madeline? A. Yes, that is true.

"Q. Was there anybody else there with her when she did the operation on you, was there anybody else there? (No response).

"Dr. Henderson: Madeline, do you remember if there was anyone else there when Mrs. Wilson did this job, when she operated on you, was there any one else with her? (No response).

"Mr. O'Shea: Q. Did anybody help her do it, Madeline? (Witness shakes head negatively)."

Appellant took the witness stand in her own behalf. She admitted that Mrs. Edith Rosa and John Rosa had come to her place of residence at 1062-58th Street, and admitted that John Rosa had left his hat there. The remainder of her testimony was a categorical denial of the entire transaction. She did admit, however, that she had first told the District Attorney that she had never seen the Rosas before, and had finally stated that such statement was untrue.

[1-5] Appellant contends that the court erred in admitting the dying declaration of Madeline Rosa because, according to appellant's contention, it was not made under a sense of impending death.

In People v. Pollock, 31 Cal.App.2d 747, 749, 89 P.2d 128, 131, this court said: "It is the province of the trial judge to determine the sufficiency of the foundation proof which will entitle dying statements to be admitted in evidence. Unless there is an apparent abuse of discretion in that regard, the ruling of the court will not be disturbed on appeal. 1 Wharton's Crim. Ev. 527, sec. 275b; People v. Ybarra, 17 Cal. 166. * * * In determining the frame of mind of the declarant regarding his belief with respect to impending death, the court may consider his physical condition, the nature and seriousness of his wounds, his knowledge of his grave condition, his conduct, language and statements. 1 Wharton's Crim. Ev., 10th ed., 535, sec. 275c. It is not necessary that the injured person shall believe he will die immediately, provided he assumes he will not recover from his injuries and that death is impending. The duration of time which elapses between the declaration and the actual death of the person furnishes no criterion for the admission or the rejecting of the evidence. People v. Ybarra, supra. Numerous cases have sustained the admission of dying declarations under circumstances no more serious than those which appear in this cause. People v. Shortridge, 179 Cal. 507, 177 P. 458; People v. Lee Sare Bo, 72 Cal. 623, 14 P. 310; People v. Ybarra, supra. In the case of People v. Gray, 61 Cal. 164, 44 Am.Rep. 549, it is said that proof of a sense of impending death need not be proved by express statements to that effect, but may be determined from the * * * circumstances which are disclosed in the preliminary showing."

Appellant's particular argument upon this point seems to be that the so-called dying declaration does not meet the legal requirements because Madeline Rosa did not state or admit that she believed she was going to die.

In Underhill on Criminal Evidence, 4th Ed., it is stated at pages 393, 394, 395: "As in all other cases where a person's mental condition is relevant, this condition may, and from nature of things very often must be shown by circumstances and not proved by the express declarations of the deceased. The consciousness of approaching death may be inferred from the circumstances surrounding the dying man. He need not state expressly that he thinks or believes his end is near, or that he is at peace with his God, while making his statement, if the nature of his wounds, or his general physical condition, and his actions and language are such that the court is reasonably satisfied that he realized that he was about to die and had abandoned all hope of recovery. A physician may testify to declarant's physical condition."

In People v. Gray, supra, 61 Cal. at page 175, 44 Am.Rep. 549, the court said: "As to the proof of the existence of the sense of impending death, it may be gathered from any circumstance or from all the circumstances of the case. It need not be proved by the express statement of the declarant that such belief exists. 'It is enough,' says Mr. Greenleaf on the subject of the admissibility of such declarations, 'if it satisfactorily appears in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind.' (1 Greenl. Ev. § 158; People v. Taylor, supra [59 Cal. 640].)"

[6] Applying these well settled principles to the instant case it is clear that the court did not err in admitting evidence as to the dying declarations of deceased. Before she made the statement, deceased had been told by three physicians that she could not recover; she had consented to the administering of the last rites of the Catholic Church; she was fully conscious and competent at the time the statement was made; she died within a few hours after making the statement; and while she did not assert or

proclaim that she was going to die, it is apparent from the statement itself and the surrounding circumstances that it was made under a sense of impending death. It cannot be held that the trial court abused its discretion in determining that the foundation proof was sufficient to entitle the dying declaration to be admitted in evidence. It is proper to add that the jury was instructed that if they were not convinced beyond a reasonable doubt that Madeline Rosa believed she would not recover, they must disregard such declaration.

[7] Appellant next contends that the court erred in admitting in evidence the envelope and the $50 in currency, and the testimony of John Rosa with reference thereto. Appellant argues that since she was not personally present at the house when Mrs. Cook handed John Rosa his hat containing the envelope and the $50 in currency, it could not be used as evidence against her. There is no merit in this contention. As already pointed out, John Rosa testified that in his conversation with appellant at her house two days before, as hereinbefore pointed out, appellant had stated that she would give $50 or $75 to help with the funeral expenses of decedent, and that he had left his hat there, and that when he returned Monday, Mrs. Cook handed him his hat, containing the envelope and currency. The evidence in question was of course circumstantial, but it was certainly admissible, its weight being a matter for the jury to consider.

"Appellant's third contention is that the court erred in refusing to instruct the jury that Madeline Rosa and James Matthews were accomplices. Appellant offered an instruction which told the jury flatly that James Matthews was an accomplice, and also offered the following instruction:

"The court instructs the jury that Madeline Rosa, the decedent, was an accomplice to the commission of the crime, if any crime was committed in this case—the court neither assuming or intimating that any crime has been so committed; that any supposed dying statement given by her must be corroborated by other testimony before it can be accepted or considered by you in establishing the guilt of this defendant, if any; it is not enough that her testimony be corroborated by that of the witness *James Matthews* whom the court has previously advised was likewise an accomplice; the mere fact that one accomplice may corroborate or tend to corroborate another does not make, or tend to make the testimony of both accomplices, or any part thereof, of sufficient weight to be considered as evidence. The testimony of all accomplices must be corroborated by evidence other than their testimony, and that corroborating evidence must relate to the very matters and things about which such accomplices gave testimony; in the absence of any such corroboration you are hereby instructed to disregard all the testimony of all the accomplices, including the supposed dying declaration of the decedent."

In refusing the instruction just quoted, the trial court endorsed thereon the following:

"Whether Matthews is an accomplice is a question of fact; merely driving the deceased to the scene of the crime would not constitute him an accomplice. The dying declaration disputes this, which would leave only his uncontradicted testimony that he phoned the defendant, made no appointment with her, talked with the deceased, and counseled her against the abortion."

The court gave the following instructions dealing with the question of accomplices:

"Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon whom, or with whom the offense was committed unless she is corroborated by other evidence."

* * * * *

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged upon the defendant on trial in the cause in which the testimony of the accomplice is given."

* * * * *

"In determining whether the testimony of an accomplice has or has not been corroborated, you cannot consider the testimony of another accomplice because the testimony of one accomplice cannot corroborate the testimony of another accomplice under the provisions of Section 1111 of the Penal Code just read to you."

* * * * *

"You are instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such

other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"You are further instructed that the evidence necessary to corroborate the testimony of an accomplice must of itself and without the aid of the testimony of the accomplice, tend to connect the defendant with the commission of the offense charged. It must do so of its own force independently of the testimony of the accomplices. If, after the evidence of the accomplices is eliminated from the case, the evidence of the other witnesses has no essential connection with any crime and is as consistent with innocence as with guilt, or if it raises only a suspicion of guilt, the testimony of the accomplice is not corroborated within the meaning of the Code."

* * * * *

"While it is true that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect the defendant with the commission of the offense, yet I charge you that such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence, standing alone, tends to connect the defendant with the commission of the crime charged."

* * * * *

"In order to render a person an accomplice, he or she must in some manner knowingly and with criminal intent, aid, abet, assist or participate in the criminal act, and whether or not one is an accomplice as defined in these instructions, is for the jury to determine from all the testimony and circumstances in proof in the case."

* * * * *

"For one person to abet another person in the commission of a criminal offense, simply means, to knowingly and with criminal intent, aid, promote, encourage or instigate, by act or counsel, or by both act and counsel the commission of such criminal offense."

* * * * *

[8, 9] It thus appears that the jury was thoroughly instructed as to the law relating to accomplices, and the necessity and extent of corroboration required to sustain a conviction. We do not believe that the trial court was required to go further. Whether or not James Matthews was an accomplice was a question for the jury to determine from the evidence, and under the instructions of the court. People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. Compton, 123 Cal. 403, 407, 56 P. 44. The court would not have been justified, upon the record here, in instructing the jury, as a matter of law, that Matthews was an accomplice. An accomplice is defined by section 1111 of the Penal Code as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." There is no evidence in the record showing that Matthews had anything to do with the actual abortion. Even though he did talk with appellant on the telephone, and took decedent over to appellant's house, and then later asked appellant what to do regarding treatment, he certainly did not assist in the abortion itself, since he sat outside the house during the time Madeline Rosa was within, and there is no evidence he ever went into the Wilson house. Furthermore, he testified that he counseled Madeline against the abortion.

[10] The trial court read sections 1108 and 1111 of the Penal Code to the jury. We do not believe the court was required to go further and instruct the jury in so many words that Madeline Rosa was an accomplice in her own murder. Whether or not Madeline Rosa was an accomplice is a question which has not been definitely determined by our Supreme Court. In People v. Gibson, 33 Cal.App. 459, at page 461, 166 P. 585, at page 586, a case in which defendant was also convicted of murder in the second degree, the death of deceased resulting from an attempted abortion, the court said:

"Defendant also insists that the dying declaration of the deceased was not corroborated, and that therefore the judgment should be reversed. This position is based upon the provisions of section 1108 and section 1111 of the Penal Code. The former section provides that upon a prosecution for procuring an abortion the defendant cannot be convicted upon the testimony of the woman on whom the offense was committed unless she is corroborated by other evidence. Section 1111 provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. As to the first of these sections, it would seem to be a sufficient answer to

the defendant's contention to say that this is not a prosecution for procuring an abortion: the defendant is charged with murder. As to section 1111, perhaps, suffice it to say that it is inapplicable to this case for the reason that the deceased could not well be regarded as an accomplice in her own death, but should rather be considered a victim of the offense."

In denying a hearing, the Supreme Court said, at page 463 of 33 Cal.App., at page 586 of 166 P.: "Our order denying a hearing in this court is not to be taken as an intimation of our approval of that portion of the opinion which intimates that the deceased could not be regarded as an accomplice whose testimony required corroboration under the provisions of section 1111, Penal Code. Nor is our denial to be taken as intimating an opinion one way or the other on the question of the application of section 1108, Penal Code."

We have been unable to discover any decision dealing with this precise question, but in view of the fact that section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial," it would seem to us that in this case, where appellant was charged with the murder of Madeline Rosa, it would not be reasonable to hold as a matter of law that Madeline Rosa was an accomplice in her own murder.

We therefore conclude that the trial court did not err in refusing to give the instructions offered by appellant.

[11] Appellant's fourth contention is that the evidence is insufficient to sustain the verdict of the jury. Appellant asserts that "1. There is an utter lack of any evidence whatever, as to how, or by what means, if any, the alleged abortion was performed upon Madeline Rosa"; and "2. The evidence is wholly insufficient to connect defendant with the abortion which caused the death of Madeline Rosa". Section 274 of the Penal Code reads as follows:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

Appellant argues that this statute means that it must be shown that the accused either administered a drug, or used an instrument, and that since none of the doctors who testified made the direct statement that some drug or instrument had been used, there was a failure of proof in this respect. However, the record shows that three doctors testified that the decedent died by reason of an *incomplete abortion*. We think it may fairly be stated that the term "abortion" usually implies criminality in producing a miscarriage, the latter term denoting any premature birth, irrespective of cause. Dr. Reardan testified that in consultation with Dr. Henderson he had reached the conclusion that Madeline Rosa had been aborted, and had an infection following abortion. There is also the testimony of Matthews that on the day following the day he had driven Madeline Rosa to appellant's house, he had a conversation with appellant on the telephone, and appellant had asked him if decedent was flowing, and if the packing had been removed from the uterus. This is sufficient evidence to justify the jury in inferring that some foreign substance was injected into the interior cavity of the decedent by appellant, and certainly is within the term "other means whatever", employed in said section 274, supra.

[12] Appellant lays great stress upon the point that none of the doctors testified to the presence of any instrument marks on the uterus of decedent, but the testimony of Dr. Lipp, who performed the autopsy, was to the effect that no instrument marks would be in evidence after the length of time from the date of the abortion to the day of the autopsy. It must be borne in mind that, as hereinbefore stated, appellant was charged with the crime of murder, not with the crime of abortion, and the degree of proof required was not the same as in a number of the cases cited by appellant, where the defendant was charged with committing an abortion by means of certain instruments, or by certain means, specifically indicating them. We conclude that the evidence is sufficient to show that an illegal abortion was committed upon decedent, and that her death resulted therefrom.

[13] As to the contention of appellant that the evidence is insufficient to connect her with the abortion which caused the death of decedent, we do not think it is sustained by the record. There is the evidence of Matthews that he talked with appellant over the telephone; that he took the decedent to 1062-58th Street in Sacramento, which was the house of appellant. There

are the further conversations of the Rosas with appellant, in which appellant stated that "this might have been one of her cases", and that "she worked outside of the law", which are clearly damaging admissions by appellant. There is also the testimony of John Rosa that appellant stated to him that she would give $50 or $75 to help with funeral expenses, and that when he returned to the house on Monday, two days following, he was handed his hat by Mrs. Cook, who lived at the house, and the hat contained an envelope in which was enclosed $50 in currency.

As hereinbefore stated, the question as to whether Matthews was an accomplice was one for the jury to decide, and it must be held, in support of the verdict, that the jury did not consider Matthews to be an accomplice. And even if it should be considered that the decedent was an accomplice, which, however, we do not hold, there was sufficient evidence to prove the offense and to connect appellant therewith, independent of the dying declaration of decedent, and certainly the dying declaration of decedent was amply "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense". As was said by our Supreme Court in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779:

[14-18] "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, 635; People v. Tom Woo, 181 Cal. 315, 184 P. 389; also, People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Bresh, 33 Cal.App.2d 161, 91 P. 2d 193; People v. Wilson, 33 Cal.App.2d 194, 91 P.2d 207."

[19] Appellant's final contention is that the court erred in denying the motion for a new trial. In support of the motion for a new trial, appellant filed affidavits by herself, one of her counsel, and two other persons. The affidavits of appellant and her counsel were to the effect that they were not aware until the testimony was produced at the trial, that the prosecution would attempt to fix December 22, 1941, as the date upon which the alleged abortion was committed; and that during the trial appellant was unable to recall, and is now unable to recall, where she was, or what she did on the afternoon of December 22nd; and that it was not until after the trial that they became aware of the facts set forth in the affidavits of Charles T. Carter and Dr. W. H. Jordan. The affidavits of Carter and Dr. Jordan recited that on the afternoon of December 22nd, 1941, they both called at the residence of appellant and remained there from about 1 o'clock p. m. until sundown, and that during that entire time appellant was in their presence, and that no person or persons called at said premises, and that appellant performed no abortion upon any person during said time. In People v. Weber, 149 Cal. 325, at page 350, 86 P. 671, at page 681, the court said:

"It is to be remembered that a wise discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true. Moreover, it is to be remembered that a trial court is

justified in regarding with distrust affidavits of newly discovered evidence on motions for new trial. [Citing cases] Potent as this affidavit might have been, if believed, it may not be said that the trial court did not exercise a sound discretion in discrediting it, and so in denying the motion in support of which it was brought forward."

The following language of our Supreme Court in People v. Yeager, 194 Cal. 452, 491, 229 P. 40, 56, is quite applicable to the instant case:

"There is no showing that appellant could not, with reasonable diligence, have discovered and produced the supplemental showing at the trial (subdivision 7, § 1181, Pen.Code), and have it determined on its merits. 'The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence.' 8 Cal.Jur. p. 427."

We are convinced that the trial court did not abuse the wise discretion vested in it in denying appellant's motion for a new trial.

In view of the foregoing, the judgment of conviction and the order denying the motion for a new trial are, and each of them is, affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



54 Cal.App.2d 466

KEE v. BECKER et al.
BECKER et al. v. KEE.

Civ. 12901.

District Court of Appeal, Second District, Division 3, California.

Sept. 23, 1942.

Hearing Denied Nov. 12, 1942.

1. Courts ⇐486

Where plaintiff sought a foreclosure judgment in the municipal court of the city of Long Beach of less than $2,000 based on a note of defendants, but defendants by answer and counterclaim sought to have note and chattel mortgage declared void and to recover a judgment for $4,960, the municipal court no longer had jurisdiction, and it properly transferred the case to the superior court. Code Civ.Proc. § 89, 396.

2. Chattel mortgages ⇐176(4)

Chattel mortgagors had the burden to prove claim that the mortgagee had converted the mortgaged property. Code Civ. Proc. § 1981.

3. Trover and conversion ⇐4

"Conversion" is any act of dominion wrongfully exerted over another's personalty in denial of or inconsistent with his rights therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

4. Trover and conversion ⇐4

"Conversion" consists in the unwarranted interference by defendant with the "dominion" over the property of plaintiff, from which injury to the plaintiff results.

"Dominion" is perfect or complete property or ownership in a thing; complete ownership; absolute property; and ownership or right to property.

See Words and Phrases, Permanent Edition, for all other definitions of "Dominion".

5. Chattel mortgages ⇐136, 169, 287

Where a chattel mortgagee takes possession of the mortgaged goods and sells them to a third person, but fails to conduct the sale either according to statute or the terms of the mortgage, there is a "conversion" and mortgagee forfeits not only his lien but his right to a deficiency judgment.

6. Execution ⇐455

One can acquire no authority from a judgment void for want of jurisdiction, and hence a levy and sale based on such a judgment renders those participating liable in damages.

7. Trover and conversion ⇐3

The fact that acts constituting a conversion were done in good faith does not serve to save those acts from having

their legal consequence, and they still constitute a "conversion".

8. Trover and conversion ⇐5

In order to constitute a "conversion", it is not necessary that there should be a manual taking of the thing in question by the defendant.

9. Trover and conversion ⇐3, 4

Neither a mere claim of dominion, nor an intention intimated to interfere with goods under a pretense of right, without more, constitutes a "conversion".

10. Trover and conversion ⇐1

Acts, verbal or otherwise, which do not affect the dominion of the owner of property, do not constitute "conversion".

11. Courts ⇐189(15)

A marshal's return stating that he had levied on mortgaged property allegedly converted was insufficient to show a "conversion" by the mortgagee, since the statement in the return did not show that the marshal had taken the various statutory steps required to effectuate a levy. Pol.Code, § 4159; Gen.Laws 1937, Act 5238, § 25a; Code Civ.Proc. §§ 542, 688.

12. Chattel mortgages ⇐286

At conclusion of the sale of mortgaged personalty and receipt of payment, it was marshal's duty to deliver to the buyer all personalty capable of manual delivery, and a certificate of sale, if buyer desired it, and to give him a certificate of sale covering the property which could not be handed over. Code Civ.Proc. §§ 698, 699.

13. Trover and conversion ⇐9(1)

A refusal to comply with a demand for possession of personalty does not amount to a "conversion" thereof, where, at the time of the demand, it is impossible to comply therewith.

14. Appeal and error ⇐1033(1)

Appellant could not complain of an error in her favor.

15. Appeal and error ⇐1056(1)

Where no question was asked which could have been calculated to draw an answer that fraudulent representations were made defendant could not complain on appeal that trial court refused to permit witness to testify that he relied on some unidentified representations, or that statements that had no apparent connection with the matters set up in counterclaim were made.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by O. B. Kee against A. L. Becker, Harry Becker, and A. L. Becker, doing business under the fictitious firm name of Standard Dehydrating Company, to foreclose a chattel mortgage given to secure a note, wherein the defendants filed a counterclaim to have the note and mortgage declared void and for a money judgment against the plaintiff. After the filing of the counterclaim, the case was transferred from the municipal court to the superior court. Thereafter an action was begun in the superior court by A. L. Becker and A. L. Becker, doing business under the firm name and style of Standard Dehydrating Company, against O. B. Kee, alleging that defendant became indebted to the plaintiff in a certain sum because of conversion of property covered by the chattel mortgage, and on account of money had and received, wherein the defendant by counterclaim set up the balance due under the note. The two cases were consolidated. From an adverse judgment, A. L. Becker, Harry Becker, and A. L. Becker, doing business under the fictitious firm name of Standard Dehydrating Company, appeal.

Judgment affirmed.

William H. Brawner and Caryl Warner, both of Los Angeles, for appellants.

Newton M. Todd, of Long Beach, and Fred A. Watkins, of San Francisco, for respondent.

BISHOP, Justice pro tem.

A. L. and Harry Becker being over $1,400 in default on a promissory note executed by them in favor of O. B. Kee, the latter obtained a judgment against them foreclosing the chattel mortgage which they had given to secure the note. From this judgment A. L. Becker appeals, contending (a) that the plaintiff had forfeited his right to foreclose his chattel mortgage, and indeed his right to recover the balance admittedly due on the note it secured, because he had converted to his own use the property covered by the mortgage and (b) that evidence was erroneously refused

admission which would have supported the affirmative defense of fraud. We have reached the conclusion that the evidence supports the trial court's finding that none of the mortgaged property was converted and that there was no error prejudicial to appellant in sustaining the objection to the proffered evidence.

Kee began the litigation we have before us by filing a complaint in the Municipal Court of the City of Long Beach, by which he sought a foreclosure judgment of less than $2,000 based on the note of the Beckers. The Beckers answered the complaint and then by way of "a further, separate, and affirmative defense and counterclaim," alleged that there had been fraud on Kee's part in persuading them (the Beckers) to execute the note and mortgage and that they had rescinded the deal and demanded that Kee repay all moneys paid him. The amount of moneys paid was not alleged in this counterclaim, but it appeared unchallenged in the complaint that over $2,000 had been paid. As a part of the same document but in a "further distinct and affirmative cause of action and counterclaim," it was alleged that Kee had become indebted to the Beckers in the sum of $4,960. The pleading concluded with the prayer that the note and mortgage be declared void and that the Beckers have judgment for $4,960.

[1] The case was tried in the municipal court and a decree of foreclosure and order of sale was entered, in which it was provided that the property covered by the mortgage "be sold at public auction in the manner prescribed by law by the marshal of the Municipal Court of Long Beach." In December, 1938, the marshal took steps calculated to sell a portion of the mortgaged property, the plaintiff being the purchaser. Early in March, 1939, on motion of the Beckers, the municipal court set aside its judgment for lack of jurisdiction and ordered the case transferred to the superior court. This order was proper, for after the filing of the counterclaim seeking more than $2,000 the municipal court no longer had jurisdiction to try the action and its judgment was void. Code Civ.Proc. secs. 89 and 396; Stratton v. Superior Court, 1935, 2 Cal.2d 693, 696, 43 P.2d 539. In the superior court the pleadings were augmented by a supplemental answer in which the Beckers averred that Kee had converted to his own use the property covered by his chattel mortgage.

Shortly after the transfer of Kee's mortgage foreclosure suit to the superior court, an action in that court was commenced by A. L. Becker against Kee. Two counts were set up, one alleging that Kee became indebted to A. L. Becker in the sum of $9,750 on account of certain equipment which Kee had converted, the other claiming that he had become indebted in a like sum on account of money had and received. The goods allegedly converted were those covered by the chattel mortgage and in addition a McCormick-Deering Power Unit, two pulleys and six belts. To this complaint Kee filed an answer, which he afterward amended to contain the allegations that he claimed a lien on the property described and that any possession of said property taken by him was taken under his mortgage. By way of counterclaim he set up the balance due under the Becker note.

The two cases were consolidated, tried, and a new judgment of foreclosure entered. In the findings of fact, upon which the judgment was based, it was found that there was no conversion of the equipment covered by the chattel mortgage, but that Kee did convert one gas engine, two tanks and a gas trap, owned by A. L. Becker, of the value of $350, which sum was offset against the principal found due under the note.

[2] The burden was of course on the Beckers to prove that Kee had converted their mortgaged equipment, for that it had been converted was their affirmative defense and their cause of action. Code Civ.Proc. sec. 1981. Their position on appeal is that the conclusion that there was a conversion is required by the proved fact that the mortgaged equipment was sold under an execution based on a judgment that was void for want of jurisdiction, and is further required by the facts that a demand was made by them on Kee to return the equipment and that the demand was not complied with.

[3, 4] The jealous regard of the common law for the right of a person to have his property kept free from unauthorized interference has given rise to "a class of cases in which the tort consists in the breach of what may be called an absolute duty * * *," to borrow from Byer v. Canadian Bank of Commerce, 1937, 8 Cal. 2d 297, 300, 65 P.2d 67, 68, a part of its quotation from earlier authorities. In

Gruber v. Pacific States Sav. & Loan Co., 1939, 13 Cal.2d 144, 148, 88 P.2d 137, 139, we find these definitions of "conversion," the second being quoted from Hull v. Laugharn, 1934, 3 Cal.App.2d 310, 315, 39 P.2d 478:

"It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."

"'Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. * * * Dominion is defined in law lexicons as "perfect or complete property or ownership in a thing" (Bouvier's Law Dict.); "complete ownership; absolute property" (Anderson's Dict. of Law); and "ownership or right to property" (Black's Law Dict.)'"

[5-7] Measured by these standards, in a large measure the arguments made by the Beckers in support of their position on this appeal are sound. A mortgagee who takes possession of the mortgaged goods and sells them to a third party, but who fails to conduct the sale either according to the statute or the terms of the chattel mortgage, converts the goods and forfeits not only his lien but his right to a deficiency judgment. Metheny v. Davis, 1930, 107 Cal.App. 137, 290 P. 91. One can acquire no authority from a judgment void for want of jurisdiction (Cook v. Winklepleck, 1936, 16 Cal. App.2d Supp. 759, 768, 59 P.2d 463, 467), so that a levy and sale based on such a judgment renders those participating liable in damages. Inos v. Winspear, 1861, 18 Cal. 397; Bilby v. Jones, 1913, 39 Okl. 613, 136 P. 414, 416. The fact that the acts constituting conversion were done in good faith does not serve to save those acts from having their legal consequence; they still constitute a conversion. Byer v. Canadian Bank of Commerce, supra, 8 Cal.2d 297, 300, 65 P.2d 67.

[8] It is also true that "It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant." These words quoted from Dodge v. Meyer, 1882, 61 Cal. 405, 420, in Gruber v. Pacific States Sav. & Loan Co., 1939, 13 Cal.2d 144, 149, 88 P.2d 137, are apt under situations where the owner's dominion over his property has been interfered with although the one held liable had laid no hands on the property itself. In Dodge v. Meyer, supra, plaintiff's property was pledged in violation of the terms of its bailment to a third party, the defendant participating in the conversion by his misuse of bills of lading. In the Gruber case the property converted remained at all times in the possession of its owner, but the defendant unlawfully refused to permit the owner to remove his property from defendant's premises and by so doing interfered with the owner's "dominion." In McCaffey Canning Co. v. Bank of America, 1930, 109 Cal.App. 415, 294 P. 45, also referred to in the Gruber case, the act constituting a conversion was the filing of a groundless third party claim, the effect of filing the claim being to cause the plaintiff's attachment lien to be lost because the sheriff withdrew his keeper.

Still a further statement concerning conversion should be considered, one originally appearing in Dodge v. Meyer, supra, 61 Cal. 405, 420, quoted in part in Lowe v. Ozmun, 1906, 3 Cal.App. 387, 394, 86 P. 729, and quoted in full in Gruber v. Pacific States Sav. & Loan Co., supra, 13 Cal.2d 144, 149, 88 P.2d 137, 144. It is this: "A mere claim of dominion, an intention intimated to interfere with goods under a pretense of right or authority, amounts to a constructive trespass, and no demand is necessary before bringing an action of trover." No case of which we are aware warrants so broad a statement of what amounts to conversion, and we are of the opinion that it is not to be taken literally. In the Dodge case wheat, which had been received for shipment, was pledged without authority of the owner, an act amounting to more than a mere claim of dominion or an intimated intention. In the Lowe case the defendant, who had actual possession of the property as a pledgee, renounced the pledge, asserted that he owned the property and proceeded to sell it. Even if the conversion took place when the defendant notified the owner of the property that he (the defendant) claimed it as his own, there was more than a "mere claim;" there was also possession to make the claim good. Likewise in the Gruber case there was more than a mere claim and more than an intention intimated to interfere. There was, as the Supreme Court pointed out, at page 147 of 13 Cal.2d, at page 139 of 88 P.2d: "not only a written threat to convert plaintiff's property but also repeated

refusals of the agents of the defendant lessor, in the immediate proximity of the equipment and elsewhere, to permit the plaintiff to remove his equipment from the premises."

[9] It would not be seriously contended, surely, that a conversion of a city fire truck had taken place because a person asserted that he was the owner, undertook to sell it to a stranger and gave him a bill of sale describing it, if neither party had possession of the truck nor attempted in any way to interfere with the city's complete freedom of action respecting it. Nor would the purchaser of the truck become liable to the city should he say: "I have a bill of sale to that pretty automobile; tomorrow I am going to drive it awhile," so long as he neither attempted to drive it nor interfered with the city's dominion over it. Neither a "mere claim of dominion," nor an "intention intimated to interfere with goods under a pretense of right," without more, constitutes a conversion. Neither comes within the definitions of "conversion" quoted from the Gruber case, which require that the owner's dominion be affected in some manner, not merely that a rival dominion be claimed or threatened.

[10] An early case recognizing that acts, verbal or otherwise, which do not affect the dominion of the owner do not constitute conversion, is Herron v. Hughes, 1864, 25 Cal. 555. After reviewing some of the facts the Supreme Court summed up the situation in these words at page 559 of 25 Cal.: "We have nothing here but a series of mere appearances, commencing with a judgment alleged to be void upon its face and ending with a sale of goods not in the custody of the official who made it, and who neither delivered, nor attempted to deliver, the goods to the purchaser (Drake on Attachment, Sec. 261), and who made no return of the sale on the execution. The whole proceeding was vox et preterea nihil. In substance it amounted to nothing more than a verbal agreement between three persons to take and convert the property of another. Such an agreement would not affect the right of property, nor would it amount to an intermeddling with it, nor to an exercise of dominion over it subversive of the dominion of the owner. [Kinder v. Shaw], 2 Mass. 398; [Bristol v. Burt, 7 Johns. 254, 5 Am.Dec. 264]; [Rand v. Sargent, 23 Me. 326, 10 Shep. 326, 39 Am.Dec. 625]."

With the light of these principles illuminating our search, what evidence is there which warrants the conclusion that the trial court was mistaken in finding that there had been no conversion? The appellant's answer is that the evidence shows that there was a sale of the mortgaged property. This answer we find quite inconclusive for there is no evidence of what happened at the sale; it may well have been as substanceless as the sale by the constable in the case referred to in the preceding paragraph.

We gain no information of value from the return of the marshal which, so far as of interest, reads:

"I * * * hereby certify * * * that I levied upon the following property belonging to the defendant (describing a part only of that covered by the chattel mortgage).

"That * * * I advertised said property for sale, posting notices as required by law, at Public Auction, on the 12th day of December, 1938, * * *. That * * * all of said property was by me sold at the place and in the manner specified in said Notice for Sale. That in such sale all of said property was sold in one Lot to O. B. Kee for the sum of $800.00 Dollars in United States Gold Coin * * * and I have given such purchaser herein named a certificate of said sale. * * *

[11] "* * * The sale above referred to was made at the Becker Well near 37th and Locust. * * *" By section 4159 of the Political Code, made applicable to the return of the marshal by section 25a of the act establishing municipal courts (Act 5238, Deering's Gen.Laws, 1937), it is provided that: "The return of the sheriff upon process or notices is prima facie evidence of the facts in such return stated." One who has the burden of proving a conversion fails in his purpose if he establishes no more facts than appear by the return we have in this case. Whatever may have been the rule prior to Brusie v. Gates, 1889, 80 Cal. 462, 22 P. 284 (see Ruskin v. Cheney, 1937, 25 Cal.App.2d Supp. 753, 756, 70 P.2d 278), since that decision it would seem to be settled that the statement in the return that the marshal had levied on the property is not evidence proving that he had taken the various steps required by the code (Code Civ.Proc. sec. 688, referring back to sec. 542) to effectuate a levy. The

Brusie case dealt with a return after an attachment, but we see no reason not to follow it because of this distinction. Not in the return, therefore, and nowhere in the evidence received at the trial is there proof that the marshal had taken any step in conflict with the defendants' complete dominion over their property, by levying upon it.

[12] As the notice of sale was not admitted in evidence, so far as the record before us discloses, we do not learn from the marshal's return in what manner the sale was actually conducted. At the conclusion of the sale (after the receipt of the gold coin) it was the marshal's duty to deliver to Kee, the purchaser, all of the property capable of manual delivery and a certificate of sale, if he desired it (Code Civ. Proc. sec. 698), and to give him a certificate of sale covering that property which could not be handed over (Code Civ.Proc. sec. 699). The trial court was warranted in concluding that the marshal never delivered any of the property to Kee, and that the certificate was never made use of, for Kee denied that he ever had taken possession of the property or used it in any way, but asserted that one Ivey, who according to Becker was in physical possession of the property on the day of the sale, continued in possession until the day of the trial in the present action. Ivey, for some two years prior to the "sale," was in possession of the property in the operation of a well under a sublease from the Beckers. Kee at no time had a lease of any kind on the property.

[13] The evidence supported the trial court's conclusion, to be presumed in support of its finding of no conversion, that Kee never in any way interfered with Becker's dominion over the mortgaged property, either personally or by agent, in connection with or as a result of the foreclosure sale. Nor was there any evidence that he had obtained possession through some other source so that he could respond to the demand made in April, 1939, for the return of the property. "A refusal to comply with a demand for possession of personal property does not amount to a conversion thereof where at the time of the demand it is impossible to comply therewith." Thomsen v. Culver City Motor Co., 1935, 4 Cal.App.2d 639, 646, 41 P.2d 597, 600.

[14] It will be recalled that in the conversion action some property in addition to the mortgaged property was alleged to have been converted and that the trial court found that one gas engine, two tanks and a gas trap had been converted. Appellant argues that the finding that the mortgaged property had not been converted was inconsistent with the finding that these pieces of equipment had been, and therefore the judgment should be reversed. In making her argument appellant relies upon Southern Pacific Co. v. City of Los Angeles, 1936, 5 Cal.2d 545, 55 P.2d 847, 849, where "diametrically opposite conclusions as to the legal effect of the same occurrence" caused the Supreme Court to substitute its own findings for those of the trial court. We do not consider the doctrine of that case applicable here, for there is no evidence to support the finding that Kee converted the two tanks, and but the slightest upon which to base the finding that he converted the gas engine and trap, and that slight evidence was lacking respecting the mortgaged property. So if we were to apply the doctrine of Southern Pacific Co. v. City of Los Angeles, supra, it would be to modify the judgment adversely to appellant by eliminating at least a part of the offset that she was allowed. Of an error in her favor the appellant may not complain.

[15] Almost forgotten, except for the incidental effect it had of ousting the municipal court of jurisdiction, is the counterclaim of the Beckers' based on the allegation that Kee made certain fraudulent representations whereby the Beckers were induced to execute the note and chattel mortgage sued upon. At the trial no question was asked which could have been calculated to draw an answer that any of the representations alleged were ever made. Appellant is in no position to complain, then, as she does on appeal, that her husband, Harry Becker, was not allowed to testify that he relied upon some unidentified representations which were made, or that Kee made some statements that had no apparent connection with the matters set up in the counterclaim. As a matter of fact, from the context of the examination during which the questions, objected to, were asked, the trial court was justified in understanding that the questions had nothing whatever to do with the counterclaim

but dealt only with the matter of the value of the mortgaged property.

There appearing no reason why the judgment, which under the evidence is just, should be reversed, it is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.



54 Cal.App.2d 413

VILARDO v. SACRAMENTO COUNTY.

Civ. 6682.

District Court of Appeal, Third District, California.

Sept. 17, 1942.

1. Pleading ⇐236(1), 416

The granting or denying of leave to amend complaint rests in discretion of trial court, and plaintiff "waives" a charge of abuse of discretion sustaining demurrer without leave to amend when he fails to ask such leave.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Pleading ⇐416

A statement by plaintiff in his points and authorities filed in the trial court that if complaint did not conform to a stated rule, plaintiff had no objection to sustaining a demurrer and allowing plaintiff a reasonable time to amend, etc., did not constitute a request for leave to amend so as to preclude plaintiff from waiving a charge of abuse of discretion in sustaining a demurrer to the complaint without leave to amend, where no amendment or amended complaint was tendered.

3. Appeal and error ⇐959(1)

The ruling of trial court in granting or refusing an amendment to complaint is subject to review only when it is apparent that there has been an abuse of discretion.

4. Pleading ⇐193(5), 225(1)

A complaint seeking annulment of judgment in prior action between same parties adjudging that county was owner of public easement for road purposes over a strip of land on ground that trial judge in former action was disqualified by relationship to county executive and purchasing agent, and that plaintiff did not sign a written stipulation waiving the disqualification, failed to state a cause of action, and trial court did not abuse its discretion in sustaining a demurrer to complaint without leave to amend. Code Civ.Proc. § 170, subd. 3.

5. Pleading ⇐34(4)

A plaintiff is presumed to have stated his case as strongly as it can be stated in his complaint.

6. Judges ⇐45

A county is a "subdivision of the state", charged with governmental powers, and is not a "corporation", within statute disqualifying a judge from hearing a cause because of relationship. Code Civ.Proc. § 170, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation" and "Subdivision of the State".

7. Pleading ⇐8(1), 214(4)

A pleading must allege facts and not conclusions, and conclusions of law are not admitted by demurrer.

8. Pleading ⇐17

Material facts must be alleged directly and not by way of recital.

9. Judges ⇐45

A disqualification of a judge to hear a case does not exist where one related to a judge within prohibited degree is involved in an action but has no interest in success of either party. Code Civ.Proc. § 170, subd. 3.

10. Judges ⇐45

Mere fact that an officer of a county may be designated also as a purchasing agent does not bring officer within meaning of word "agent", as used in statute disqualifying a judge from hearing a cause because of relationship. Code Civ.Proc. § 170, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

11. Judges ⇐45

An allegation that a judge was related to the "county executive and purchas-

ing agent, an officer and/or agent of such defendant" within a prohibited degree did not state a valid ground of disqualification of such judge to sit in the case in which county was a party, especially a case involving only ownership of an easement for a public road with which the purchasing agent would have nothing to do. St.1933, §§ 16 et seq., 34, 45, pp. 3095, 3101, 3104, 3105; Pol.Code, § 4041.22; Code Civ. Proc. § 170, subd. 3.

12. Statutes ⇐193

Under the rule of "noscitur a sociis", the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.

See Words and Phrases, Permanent Edition, for all other definitions of "Noscitur A Sociis".

13. Judges ⇐45, 46

The word "agent", as used in statute disqualifying a judge from hearing a cause when he is related to an attorney, counsel or agent of either party, by certain relationship should be construed in connection with the words "attorney" and "counsel" with which it is associated, and should be applied with same limitations applicable to them. Code Civ.Proc. § 170, subd. 3.

14. Judges ⇐47(1)

A judge who has himself been an attorney or counsel for a party in proceedings involving different issues is not disqualified under statute if he has not been attorney or counsel in the action or proceeding before the court, nor given advice to any party upon the matter involved therein, nor been employed as attorney or counsel for any party within two years prior to commencement of the action. Code Civ.Proc. § 170, subd. 4.

15. Judges ⇐45

Fact that one might be an agent for a county in regard to certain matters would not disqualify a judge to whom he was related from sitting in every case to which such county might be a party. Code Civ. Proc. § 170, subd. 3.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Action by Crispino Vilardo against County of Sacramento to annul a judgment in another action between the same parties. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Affirmed.

McAllister & Johnson, of Sacramento, for appellant.

Otis D. Babcock, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Sacramento County, sustaining a demurrer to the complaint without leave to amend, in an action to annul a judgment in another action between the same parties.

The complaint in the case before us, filed April 20, 1939, alleges that an action brought by Vilardo against the county of Sacramento, in the superior court of the state of California, in and for the county of Sacramento, was tried before Honorable Peter J. Shields, Judge of said superior court, and that on January 10, 1939, a judgment was entered therein in favor of the county adjudging that it was the owner of a public easement for road purposes over a strip of land therein described, and that plaintiff's claim that said defendant, county of Sacramento, had no estate, right, title, or interest therein was not true.

Said complaint further alleges that at the time of the trial of the aforesaid cause and the rendering of judgment therein "without any knowledge on the part of this plaintiff, said Honorable Peter J. Shields, Judge of said Court, presiding and acting as such upon said trial, was related by consanguinity within the third degree, computed according to the rules of law, to Charles W. Deterding, Jr., County Executive and Purchasing Agent of the County of Sacramento, an officer and/or agent of said defendant, County of Sacramento"; also, "that plaintiff in said action, nor the attorney for plaintiff, never signed and filed in said action, a stipulation in writing, waiving the disqualification mentioned in subdivision 3 of section 170 of the Code of Civil Procedure of the State of California"; that said Judge Shields, at all of said times, was disqualified to sit or act as such Judge in said section, and that plaintiff had no knowledge or information whatsoever prior to February 16, 1939, of the fact that said Judge "was related within the third degree of consanguinity, computed according to the rules of law, to an officer and/or

agent of defendant"; that on a motion for a new trial the objection "hereby made to the power or right of said Peter J. Shields, to hear and determine said action," was submitted to the court, and thereafter on February 17, 1939, said motion for a new trial was denied; and that the judgment in said action was and is void "because of the said disqualification of the said trial judge to sit or act in said action." Judgment vacating and holding void the judgment in the former action was prayed.

To said complaint defendant county of Sacramento filed a general demurrer together with a memorandum of points and authorities; plaintiff filed his points and authorities, the cause was argued, and thereafter the court made an order sustaining defendant's demurrer without leave to amend. Judgment for defendant followed and plaintiff has appealed.

Appellant here contends that the complaint states a cause of action and that, in any event, the trial court erred in sustaining defendant's demurrer without leave to amend. We shall consider the latter contention first.

[1, 2] The granting or denying of leave to amend rests in the discretion of the court; and a plaintiff waives a charge of abuse of discretion in sustaining a demurrer without leave to amend when he fails to ask such leave. O. A. Graybeal Co. v. Cook, 16 Cal.App.2d 231, 233, 60 P.2d 525; Buckley v. Howe, 86 Cal. 596, 605, 25 P. 132; Hogan v. Horsfall, 91 Cal.App. 37, 266 P. 1002; Gertridge v. State Capital Co., 129 Cal.App. 86, 18 P.2d 375; Allen v. Stellar, 106 Cal.App. 67, 73, 288 P. 855.

No request for leave to amend was made by plaintiff in the instant case. In his points and authorities filed in the trial court he did state:

"The authorities cited by defendant, state a rule of pleading which is academic, and is not questioned by plaintiff; but these cases are not applicable to the complaint before the court.

"The rule, as established by these cases, is the well known rule that 'pleadings should allege facts and not mere conclusions of law.' If plaintiff's complaint does not conform to this rule, we have no objection to the court sustaining the demurrer and allowing plaintiff a reasonable time to amend, but we are satisfied that plaintiff's complaint does conform to this rule, and does allege 'facts' and not mere 'conclusions of law.'"

[3] This was not, in our opinion, a request for leave to amend; and no amendment or amended complaint was tendered. Also, the ruling of a court either granting or refusing an amendment is subject to review only when it is apparent that there has been an abuse of discretion. Wixon v. Devine, 91 Cal. 477, 27 P. 777; Miner v. Rickey, 5 Cal.App. 451, 90 P. 718; Hanna v. Hirschhorn, 112 Cal.App. 438, 296 P. 891; McCully v. Gano, 116 Cal.App. 695, 3 P.2d 348; College Nat. Bank v. Morrison, 100 Cal.App. 403, 280 P. 218; Reay v. Reay, 97 Cal.App. 264, 275 P. 533; Elaterite, etc., Co. v. Chamberlin, etc., Co., 97 Cal.App. 304, 275 P. 523; Mays v. Wann, 96 Cal.App. 760, 274 P. 1020.

[4, 5] Assuming, in view of the recent decision of the Supreme Court in Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 128 P.2d 522, that the question of whether the trial court, in sustaining the demurrer to plaintiff's complaint, abused its discretion, is open on appeal, though no request was made for leave to amend, we are of the opinion that there was no abuse of discretion. The demurrer interposed was a general one, and challenged the sufficiency of the complaint to state a cause of action. Plaintiff is presumed to have stated his case as strongly as it can be stated. Higgins v. Security Trust, etc., Bank, 203 Cal. 398, 401, 264 P. 744; Tehama County v. Pacific Gas & Elec. Co., 33 Cal.App.2d 465, 469, 91 P.2d 936; Lamson Co., Inc., v. Jones, 134 Cal. App. 89, 91, 24 P.2d 845; Goodfellow v. Barritt, 130 Cal.App. 548, 556, 30 P.2d 740.

The only allegation of any ground for disqualification of the trial judge is that, "Said Honorable Peter J. Shields, Judge of said Court, * * * was related by consanguinity within the third degree, computed according to the rules of law, to Charles W. Deterding, Jr., County Executive and Purchasing Agent of the County of Sacramento, an officer and/or agent of said defendant, County of Sacramento."

Section 170 of the Code of Civil Procedure, at the time of the trial, provided that no judge shall sit or act as such in any proceedings:

"3. When he is related to either party, or to an officer of a corporation, which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law * * *."

Has plaintiff alleged that the trial judge was related within the said third degree either to "an officer of a corporation, which is a party," or to "an attorney, counsel, or agent" of a party?

The complaint alleges that the county of Sacramento is "a political subdivision and body corporate of the State of California"; and it is contended that relationship to "an officer of a corporation, which is a party" is therefore sufficiently alleged.

[6] We are of the opinion, however, that the county of Sacramento is not a "corporation" within the meaning of section 170, supra. In Re Miller's Estate, 5 Cal.2d 588, 597, 55 P.2d 491, the court held that a county is not a corporation at all, but a legal subdivision of the state, charged with governmental powers; and the well-settled principle of law is also enunciated there, that in the absence of express words to the contrary, neither the state nor its subdivisions are included within the general words of a statute. That a county is not included in the term "corporation" as used in section 170, supra, seems obvious from the fact that a superior judge, himself an officer of a county, is not for that reason disqualified to sit in a case in which such county is a party, though under the construction contended for by plaintiff, he would be disqualified if he were related in the prohibited degree to some other officer or to an agent of the county.

Does the complaint then show disqualification of the Judge because of relationship to "an attorney, counsel or agent" of a party when it alleges relationship to "Charles W. Deterding, Jr., County Executive and Purchasing Agent of the County of Sacramento, an officer and/or agent of said defendant, County of Sacramento"? The foregoing allegation is not an allegation that Deterding is an agent of the county, but is merely a recital description of him.

[7] It is elementary that a pleading must allege facts and not conclusions; and, that conclusions of law are not admitted by demurrer, is well established. Fox v. Monahan, 8 Cal.App. 707, 97 P. 765; Buttner v. Kasser, 19 Cal.App. 755, 758, 127 P. 811; Fisher v. Fisher, 23 Cal.App. 310, 313, 137 P. 1094; Moran v. Bonynge, 157 Cal. 295, 107 P.2d 312. Also, Deterding is ambiguously described as an "officer and/or agent" of the county. There is no direct affirmative allegation that he is or was an "agent" of defendant county.

[8, 9] Material facts must be alleged directly and not by way of recital. Philbrook v. Randall, 195 Cal. 95, 103, 104, 231 P. 739; Silvers v. Grossman, 183 Cal. 696, 700, 192 P. 534; Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 225, 23 P.2d 1068. But aside from these defects in the pleadings, it is not alleged that in the capacity of "County Executive and Purchasing Agent", Charles W. Deterding, Jr., had anything to do with the matters involved in the prior action, or that he was in any way interested therein. It has been held that no disqualification exists where one related to a judge within the prohibited degree is involved in an action but has no interest in the success of either party. 14 Cal.Jur. 815. It would seem to follow that no disqualification would exist where one so related to the judge is neither involved in the action nor interested therein.

The "County Executive" of Sacramento County, as provided in the Charter (Stats. of 1933, p. 3095), is an "officer" of the county. The Charter also provides for the appointment of certain other "officers", among them a "Purchasing Agent", who is paid no compensation as such, the position being combined with County Executive. Stats. of 1933, p. 3101. The duties of "Purchasing Agent" are defined by the Charter (Stats. of 1933, pp. 3104, 3105) and have to do only with the purchase and sale of personal property for the county or its boards or commissions.

[10, 11] The mere fact that an officer of a county may be designated also as a purchasing "agent", does not, in our opinion, bring him within the meaning of the word "agent" as used in the phrase "attorney, counsel, or agent" of a party in section 170, supra; nor does a mere allegation in a complaint that a judge is related to the "County Executive and Purchasing Agent * * *, an officer and/or agent of said defendant" within a prohibited degree, state a valid ground of disqualification of such judge to sit in a case in which the county is a party, especially a case involving only the ownership of an easement for a public road with which the "Purchasing Agent" would have nothing to do, control over litigation of the county being in the hands of the Board of Supervisors. § 4041.22, Political Code.

[12-15] Also, under the rule of noscitur a sociis the meaning of a word may be en-

larged or restrained by reference to the object of the whole clause in which it is used. 25 R.C.L. 995. Therefore the word "agent", as used in the foregoing phrase, should be construed in connection with the words "attorney" and "counsel" with which it is associated, and should be applied with the same limitations applicable to them. It could hardly be contended that the fact that a judge was related to an attorney who was counsel for the county in some one action, would disqualify such judge to sit in every other case to which the county might be a party when represented by entirely different counsel. Under subdivision 4 of Section 170, a judge who has himself been an attorney or counsel for a party in proceedings involving different issues is not disqualified if he has not been attorney or counsel in the action or proceeding before the court, nor given advice to any party upon the matter involved therein, nor been employed as attorney or counsel for any party within two years prior to the commencement of the action. Also see Cleghorn v. Cleghorn, 66 Cal. 309, 5 P. 516; Fortson Shingle Co. v. Skagland, 77 Wash. 8, 137 P. 304; Harjo v. Chilcoat, 146 Okl. 62, 294 P. 119; Reeve v. Jahn, 9 Cal.2d 244, 70 P.2d 610. Likewise, the fact that one might be an agent for a county in regard to certain matters would not disqualify a judge to whom he was related, from sitting in every case to which such county might be a party; and it is not alleged here that the "County Executive and Purchasing Agent" was agent of the county in connection with the matters involved in the former action.

The principle upon which disqualification of judges is based is that no man ought to be a judge in his own cause, or in one in which he is so interested that his judgment might be influenced. It would be going to absurd lengths, and would place an unreasonable construction upon section 170, supra, to hold that the mere relationship of a judge in a prohibited degree to any one of the numerous attorneys, counsel or agents that might be employed by a county or a state, would disqualify him in every case to which the county or state might be a party. The phrase as used in subdivision 3 of the section should be limited to "an attorney, counsel or agent of a party to the action", in the action before the court, or there should be some showing that such attorney, counsel or agent was interested in the results of such action.

For the foregoing reasons the complaint failed to state a cause of action, and the judgment of the trial court is therefore affirmed.

SCHOTTKY, J., pro tem., and THOMPSON, J., concurred.



CALIFORNIA DRIVE-IN RESTAURANT ASS'N et al. v. CLARK, Chief of Division of Industrial Welfare, et al.*

Civ. 13550.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1942.

Hearing Granted Nov. 12, 1942.

1. Constitutional law ⇐30

The constitutional provision that the Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors, is not "self-executing", and the method to be employed for establishment of a minimum wage is left to discretion of legislature. Const. Cal. art. 20, § 17½.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

2. Constitutional law ⇐62
Master and servant ⇐69

Under the constitutional provision that the Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors, the sole and exclusive power to establish a minimum wage is vested in Legislature, and such power also includes power to confer authority upon any commission the Legislature may create. Const.Cal. art. 20, § 17½.

3. Constitutional law ⇐62

Under the constitutional provision that the Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors, exclusive and irrevocable authority to establish a minimum wage cannot be delegated

* Subsequent opinion 140 P.2d 657.

by the Legislature to the Industrial Welfare Commission, and Legislature has power to limit, extend, or modify any authority which it has delegated to commission. Const.Cal. art. 20, § 17½.

4. Master and servant ⇐69

The Legislature has the power, by appropriate legislation, to limit, modify, or destroy whatever rules the Industrial Welfare Commission may adopt, since the commission is the creature of the Legislature, subject to control of Legislature in every phase of its deliberations and functions. Const.Cal. art. 20, § 17½.

5. Master and servant ⇐69

Whatever the Industrial Welfare Commission does properly within the limitation of authority granted to it by the Legislature is valid, unless superseded by an act of the Legislature. Const.Cal. art. 20, § 17½.

6. Master and servant ⇐69

If a reconciliation of the conflict between an order of the Industrial Welfare Commission fixing a minimum wage for women employed in restaurants and a subsequently enacted statute on the same subject was impossible, the statute would prevail. St.1929, pp. 1971, 1972, §§ 1, 2; Const. Cal. art. 20, § 17½.

7. Master and servant ⇐69

It being impossible to reconcile the conflict between an order of the Industrial Welfare Commission fixing a minimum wage for women employed in restaurants and prohibiting the deduction of tips from wages and the subsequently enacted statute covering the same subject and authorizing the deduction of tips from wages, the statute must prevail. St.1929, pp. 1971, 1972, §§ 1, 2; Const.Cal. art. 20, § 17½.

8. Master and servant ⇐69

The declaration, in statute authorizing the deduction of tips from employees' wages, that purpose of statute is to prevent fraud upon the public and that statute cannot be contravened by a private agreement, cannot be construed to avoid a conflict between statute and Industrial Welfare Commission's previously adopted order fixing a minimum wage for women employed in restaurants and prohibiting deduction of tips from wages. St.1929, pp. 1971, 1972, §§ 1, 2, 5; Const.Cal. art. 20, § 17½.

9. Constitutional law ⇐70(1)

Construction and interpretation of a statute presents a "judicial question" which the Legislature is without power to limit.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Question".

10. Statutes ⇐179, 190

Ordinarily when the Legislature distinctly states its design in the enactment of a particular statute, no room is left for construction, but the label placed by Legislature upon a statute cannot be permitted to give it a meaning not fairly contemplated within its terms.

11. Statutes ⇐179

A legislative declaration, whether contained in the title or in the body of a statute, that the statute is intended to promote a certain purpose, is not conclusive on the courts, and they must inquire into the real, as distinguished from the ostensible, purpose of statute, and determine whether the statute, in its scope and effect, departs from the declared legislative design.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by California Drive-In Restaurant Association and others against Margarete L. Clark, as Chief of the Division of Industrial Welfare, etc., and others, for an injunction and declaratory relief. From a judgment making a preliminary injunction permanent, defendants appeal.

Affirmed.

Earl Warren, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Leo L. Schaumer and E. A. Lackmann, both of Los Angeles, for appellants.

Edward R. Young, Frank R. Johnston, Thorpe & Bridges, and Gerald Bridges, all of Los Angeles, for respondents.

DORAN, Justice.

This action was commenced by seventy-five owners of what are commonly known as drive-in restaurants in Southern California, asking an injunction and declaratory relief. As described in respondents' brief, the drive-in restaurant business is principally concerned with the preparing and

serving of food and drink to patrons seated in their automobiles which are parked on the premises around the restaurant. The employees serving such patrons are known as "car hops". They are generally young women, although both men and women are employed by respondents.

On June 8, 1923, the Industrial Welfare Commission of the State of California adopted what is referred to herein as Order No. 12-A, fixing the minimum wage for adult women and female minors employed in restaurants. Paragraph 3 thereof provides that: "No employer may include tips or gratuities received by employees designated in Section 1 hereof as part of the legal minimum wage fixed by said section of this Order." In 1929 the Legislature adopted an act requiring all employers who accept tips or gratuities given to employees by the general public to post notice of such policy or practice in a conspicuous place in the establishment in which the business or enterprise is carried on. Stats.1929, ch. 891, p. 1971. Said act defines a "tip" to be, among other things, "any amount deducted from wages due the worker on account of such tips or gratuities paid or left by patrons". Said act, in section 2 thereof, also provides that: "Every employer, or agent of any employer, who collects, takes or receives any tips or gratuities, or a part thereof, paid or given to or left for his employees by patrons, or who deducts any amount from wages due his employees on account of such tips or gratuities, or who requires his employees to credit the amount, or any part thereof, of such tips or gratuities received by them against and as a part of the wages due such employees from said employer, shall post and keep posted in a conspicuous place at the location or locations where the said business or enterprise is carried on, where it can easily be seen by the patrons thereof, a notice or notices, in lettering or printing of not less than forty-eight-point blackface type, to the following effect, as the case may be: * * *"

Following the adoption of the aforesaid provisions the plaintiffs entered into contracts with their "car hops", by the terms of which tips were applied to wages. In that connection, there is no contention that said statutes of 1929 were not followed. On December 28, 1939, defendant Margarete L. Clark, as chief of the Division of Industrial Welfare of the State of California, notified plaintiffs herein, as well as other owners and operators of drive-in restaurants, to attend a meeting to be held in the State Building at Los Angeles, on January 18, 1940. Upon the convening of such meeting the aforesaid chief of the Division of Industrial Welfare delivered to all parties summoned to and present at such meeting a copy of the aforesaid order No. 12-A of the Industrial Welfare Commission, and thereupon announced to each and all of the parties present that the contracts between such employers and the "car hops", so far as they provided for the counting of tips as wages, were unlawful and in violation of the above-named order No. 12-A; that on and after February 1, 1940, the State Division of Industrial Welfare, through its chief, Margarete L. Clark, would prosecute both civilly and criminally plaintiffs and all other owners and operators of drive-in restaurants for any violation of section 3 of order No. 12-A. Thereafter plaintiffs filed the instant action, secured the issuance of a preliminary injunction therein restraining defendants from enforcing or attempting to enforce in any way the provisions of section 3 of order No. 12-A. Following trial such injunction was by judgment made permanent, and from such judgment defendants prosecute this appeal.

Appellants' brief sets forth the statement of questions involved as follows:

"I. Is Section 3 of Order No. 12-A of the Industrial Welfare Commission of the State of California unconstitutional and violative of Article I, Section 1, and Article I, Section 13, of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States?

"II. Did the Industrial Welfare Commission in enacting Section 3 of Order No. 12-A exceed the jurisdiction conferred upon it by Article XX, Section 17½, of the Constitution of California and the legislation enacted pursuant thereto (particularly Statutes of 1921, Chap. 279, as amended, re-enacted into Sections 1171-1203, inclusive, of the Labor Code of California [St.1937, pp. 213-218])?

"III. Did the legislature in enacting the so-called "Tipping Law" (Statutes of 1929, Chap. 891, re-enacted into the Labor Code, Sections 351 [350] to 356, inclusive) repeal by implication Section 3 of said Order No. 12-A?"

Respondents contend, first, that section 3 of order 12-A was repealed by implication upon the enactment of the "tipping law of 1929" for the following reasons: (a) The

Industrial Welfare Commission interpreted section 3 of order 12-A as having been superseded by the "tipping law of 1929". (b) Section 3 is repugnant to and irreconcilable with the "tipping law of 1929". (c) The Legislature intended the "tipping law of 1929" to supersede prior legislation on the matter of tips. And, second, the Industrial Welfare Commission in enacting section 3 of order 12-A acted in excess of its jurisdiction for the following reasons: (a) Section 3 of order 12-A is invalid because it is an unconstitutional interference with the freedom of contract. (b) Section 3 of order 12-A is unconstitutional in that it is a denial of the equal protection of the laws and is not uniform in its operation. (c) The lack of necessary findings by the Commission renders section 3 invalid. (d) The Legislature did not delegate to the Commission the power to prohibit the counting of tips as wages.

The basic law affecting the controversy is to be found in section 17½ of Article XX of the Constitution, which is as follows: "The *Legislature may*, by appropriate legislation, *provide* for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section." (Italics added.)

[1-4] It will be seen from the foregoing provision of the Constitution that it is not self-executing. The method to be employed "for the establishment of a minimum wage for women and minors" is left to the judgment, discretion and wisdom of the Legislature. The sole and exclusive power is vested in the Legislature. Clothed with this exclusive power, which also includes the power to confer authority upon any commission the Legislature may create, the Legislature established by appropriate legislation the Industrial Welfare Commission. Whatever authority the Legislature delegated to the Industrial Welfare Commission it must be emphasized was not irrevocably delegated. Indeed, by reason of the constitutional provision, exclusive and irrevocable authority could not be so delegated. That is to say, although it may have either apparently or actually vested a certain authority in the Industrial Welfare Commission, nevertheless, the Legislature was by the Constitution impressed with an ultimate responsibility which cannot be either avoided or evaded. The Legislature also has the power, by reason of article XX of the Constitution, to limit, extend or modify any authority so delegated. So comprehensive is the power of the Legislature, that all or any of the things required to be done by the Industrial Welfare Commission in effecting the purpose of article XX, could be done by the Legislature directly. Manifestly, however, the Commission was created to facilitate the work incident to the adopted procedure, but, in no sense was the Legislature, by creating this procedure, stripped of its power and relieved of its duty to alter and change it at will. Hence, whatever rules the Industrial Welfare Commission may adopt, the Legislature has the power to limit, modify or destroy, by appropriate legislation, for the Commission is the creature of the Legislature, subject, in effect, to the control of the Legislature in every phase of its deliberations and functions.

[5] Manifestly, the Legislature can act only in the manner provided for in the Constitution. Hence the Legislature's control over its agencies can be effected only by legislation. By the creation of the Industrial Welfare Commission the Legislature has vested certain authority in said Commission. However, such authority is not exclusive, but on the contrary is conditional. Therefore, whatever the Industrial Welfare Commission does properly within the limitation of the authority granted is valid, unless superseded by an act of the Legislature.

[6] The only question presented by the controversy, is therefore simple. The Commission adopted a rule it sought to enforce. Respondents enjoined the enforcement of this rule, contending that the situation sought to be controlled by the Commission was already directly covered by statute, viz., the tipping law of 1929. This appears to be true; hence, the only function of the courts is to reconcile any possible conflict between the rule of the Commission and the statute. If a reconciliation is impossible then the act of the Legislature must prevail, for under the Constitution only the Legislature can "provide" for the things here in controversy.

[7] The statutes of 1929, supra, and section 3 of order No. 12-A, supra, deal with

the same subject. The former authorizes and regulates the deduction of tips from wages, whereas by the latter, such transactions are prohibited. Manifestly, such a conflict cannot be reconciled. Hence, the conclusion is inevitable that the authority of the Legislature must prevail.

[8-11] The statutes of 1929, supra, provide that: "The Legislature also expressly declares that the purpose of this act is to prevent fraud upon the public in connection with the practice of tipping and declares this a law passed for a public reason which can not be contravened by a private agreement and as a part of the social public policy of this state, binding upon all departments of the state government." § 5. It is urged in effect that such a declaration thus incorporated in the statute is sufficient to avoid a conflict. It could not be so construed. The act is comprehensive and fully embraces the subject. It is evident from a reading of the statute that, although it is declared to be to prevent fraud upon the public and cannot be contravened by a private agreement, nevertheless it authorizes as valid the matters therein referred to, subject to the conditions also therein recited. In any event, construction and interpretation present a judicial question which the Legislature is without power to limit. As the Supreme Court has heretofore declared: "While ordinarily it is the rule that, when the lawmaking power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the District Court of Appeal well said during its discussion of this phase of the case: 'The label placed by the Legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms.' In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the Legislature, the statute, in its scope and effect, departs from the declared legislative design * *." Coulter v. Pool, 187 Cal. 181, 185, 201 P. 120, 122.

It is significant and the undisputed fact, as the trial court found, that with reference to paragraph 3 of order No. 12-A "* * * in 1932 the defendant Division of Industrial Welfare of the State of California informed the plaintiff California Pig Stands Inc. that it was legal to count tips as wages, provided signs were posted at the place of business in accordance with the said tipping statute of 1929 * * *; that subsequent to the enactment of the tipping statute of 1929 and until December 28, 1939, the Division of Industrial Welfare of the State of California treated the contracts of employment existing between plaintiffs and female car hop employees, with respect to the counting of tips as wages, as a compliance with the minimum wage laws of the State of California." Thus by contemporaneous construction it would appear that the Division of Industrial Welfare regarded the statute of 1929 as controlling. In that connection it is noteworthy that the law declares that "Contemporaneous exposition is in general the best". Civ.Code, § 3535.

Although section 3 of order No. 12-A may operate "only upon women and minors in the hotel and restaurant industry" as pointed out by appellant, nevertheless such group is not excluded from the operation of the statute of 1929 but, on the contrary, is necessarily included in the general terms of that statute.

Inasmuch as a consideration of the questions as to whether section 3 of order No. 12-A is constitutional or whether the Industrial Welfare Commission exceeded its jurisdiction or whether the so-called "tipping law" (Statutes of 1929, supra) repealed by implication section 3 of order 12-A, bear no relation to the subject of "conflict" which is the basis of the conclusion expressed herein, such questions may be disregarded.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. I am not in accord with the reasoning relied upon nor the conclusion reached by my associates, that the statutes of 1929 (ch. 891, p. 1971), now sections 350–356 of the Labor Code, St.1937, pp. 202, 203, are in conflict with and therefore annul and supersede Industrial Welfare Board Order No. 12-A. In the belief that it may prove enlightening and helpful in the determination of the issues presented upon this appeal, let us here set forth the historic

background surrounding the regulation of minimum wages and hours for women and the adoption of so-called tipping laws in this state. In 1911 the Legislature first attempted by statute to regulate minimum wages and hours for women. This statute brought into being the Industrial Welfare Commission and clothed it with certain powers and prerogatives. Serious doubts were cast upon the constitutionality of this initial statute, based upon the ground that it unlawfully delegated to the Welfare Commission legislative powers. Two years later, in 1913, the Legislature submitted to the people a constitutional amendment, which was adopted in 1914, and became section 17½ of article XX of our state Constitution. It reads: "The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

Pursuant to the foregoing constitutional mandate, the Legislature chose to delegate to the Industrial Welfare Commission legislative power to adopt regulations for the comfort, health, safety and general welfare of employees and to establish a minimum wage for women and minors. This legislative power is now contained in sections 1171 to 1203 of the Labor Code, St.1937, pp. 213–218, and section 1182 reads:

"The commission may also, after a public hearing had upon its own motion or upon petition, fix:

"(a) A minimum wage to be paid to women and minors engaged in any occupation, trade, or industry in this State, which shall not be less than a wage adequate to supply the necessary cost of proper living to, and maintain the health and welfare of, such women and minors.

"(b) The maximum hours of work consistent with the health and welfare of women and minors engaged in any occupation, trade, or industry in this State. The hours so fixed shall not be more than the maximum now or hereafter fixed by law.

"(c) The standard conditions of labor demanded by the health and welfare of the women and minors engaged in any occupation, trade, or industry in this State."

In 1917 the Legislature enacted the first tipping law, under which it was sought to prohibit employers from appropriating to themselves the tips given employees. Stats. 1917, ch. 172, p. 257. In part this act reads as follows: "Any employer or agent or representative of an employer or other person having authority from his employer to hire, employ or direct the services of other persons in the employment of said employer, who shall demand or receive directly or indirectly from any person then in the employment of said employer, any fee, gift or other remuneration or consideration, or any part or portion of any tips or gratuities received by such employee while in the employment of said employer, in consideration or as a condition of such employment or hiring or employing any person to perform such services for such employer or of permitting said person to continue in such employment, is guilty of a misdemeanor."

On July 30, 1918, our Supreme Court declared this law unconstitutional in the case of In re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301. Nothing further was done in relation to a tipping law until 1929, when the Legislature adopted another such statute (Stats.1929, ch. 891), now embodied in sections 350 to 356 inclusive of the Labor Code. This legislation did not have for its object the prohibition against an employer's deducting the amount of tips or gratuities from an employee's wages, but sought only to regulate such practice, as is evidenced by the following sections of the Labor Code:

"351. Every employer or agent who collects, takes, or receives any gratuity, or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than forty-eight-point black-face type, to the following effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for em-

ployees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees.

"352. The notice shall also state the extent to which the employees are required by the employer to accept gratuities in lieu of wages or the extent to which the employee is required to accept and credit gratuities against wages."

The respondents contended, the trial court found, and the majority opinion declares, that whatever legal effect section 3 of order No. 12-A, adopted by the Industrial Welfare Commission on June 8, 1923, ever had was superseded by the provisions of the last mentioned tipping statute of 1929, and that the Commission's regulation was void and without legal effect since the adoption of such statute. As heretofore indicated, these last mentioned sections make it unlawful for an employer to deduct any amount from wages due an employee on account of any gratuity or tip received by such employee unless there is posted in a conspicuous place on the location where the business is carried on a notice in lettering or printing of not less than forty-eight-point blackface type that any gratuities, paid or given to employees are not shared by such employees, or if shared by the employees the extent to which gratuities are shared between employer and employee. The trial court found that whatever legal effect was attached to the Industrial Welfare Commission's order No. 12-A was repealed and invalidated by the adoption of the aforesaid tipping statute of 1929. Section 6 of the just mentioned statute of 1929 provided: "All acts or parts of acts in conflict herewith are hereby expressly repealed." The majority opinion in effect holds that the Industrial Welfare Commission order was annulled and superseded by implication because of its repugnance to the later enacted statute.

In relation to the repeal of laws or statutes by implication, the rule is well established that the earliest act remains in force unless it manifestly appears that the two are inconsistent with and repugnant to each other. People v. Platt, 67 Cal. 21, 22, 7 P. 1. Furthermore, the rule of law that the repeal of a statute by implication is not favored is elementary. Hammond v. McDonald, 32 Cal.App.2d 187, 192, 89 P.2d 407. Whenever it can reasonably be done, the language of a statute should be construed so as to effectuate and promote, rather than to defeat, the obvious purpose of the Legislature, and the legislative intent must be arrived at from the language of the statute. As stated by the Supreme Court in In re Marquez, 3 Cal.2d 625, 628, 45 P.2d 342, 343, "The statute, of course, must be read and construed as a whole in harmony with other statutes relating to the same general subject." If the two statutes may stand together, are not irreconcilable, clearly repugnant, or so inconsistent that the two cannot have concurrent operation, the courts are bound, if possible, to maintain the integrity of both. In other words, where a modification would suffice, a repeal will not be presumed. Penziner v. West American Fin. Co., 10 Cal.2d 160, 176, 74 P.2d 252.

Applying the foregoing rules of construction to the question of whether the tipping law of 1929 repealed by implication section 3 of the order No. 12-A, we find that the object of the claimed repealing statute is thus expressed in section 356 of the Labor Code: "The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and can not be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State."

The aim and purpose of order No. 12-A was to insure the payment to women employees and minor female employees for their labor a minimum wage of $16 per week, irrespective of gratuities or tips received by them. In fixing the minimum wage at $16 per week, the Commission may well have taken into consideration the fact that tips are received by such employees, but to insure the payment of the minimum wage the commission was not bound to recognize a private agreement between employer and employee under the terms of which, through connivance or otherwise, the valid order of the Commission establishing a minimum wage could be circumvented. Nor do I think that in enacting the tipping law of 1929 it can be reasonably inferred therefrom, in the absence of a direct declaration to that effect by the legislative body, that it was intended to vitiate section 3 of order No. 12-A, which order applied only to women and minor fe-

male employees. It must be assumed that at the time of the passage of the 1929 tipping law, the Legislature was aware of the existence of section 3 of order No. 12-A, promulgated as it was in June, 1923. Furthermore, the express purpose of the 1929 statute was to prevent fraud upon the public, while the intent and purpose of the Industrial Welfare Commission order was to insure a $16 per week minimum wage for women and minor female employees irrespective of tips received by them. Therefore, giving a fair and reasonable construction of both statutes, I am not impressed that one is in conflict with or repugnant to the other, but that on the contrary, we have a general statute operating upon all employers and a special statute which provides that as to a particular class, viz., women and minor female employees, the exception provided in the general statute validating appropriation of tips by employers under certain conditions shall not be applicable.

The conclusion in this regard is strengthened when we contemplate the history of the legislation on the subject. We have the constitutional mandate of the people (Const. art. XX, § 17½) empowering the Legislature to invest the Industrial Welfare Commission with plenary power to establish a minimum wage for women and minors and to provide, among other things, for the comfort, safety and general welfare of such employees. Then we have the action of the Legislature outlawing the practice of deducting tips from an employee's wages to prevent fraud and deception upon the public (Stats. 1917, ch. 172), which act was declared unconstitutional in the case of In re Farb, supra. This was followed by the adoption of the 1929 tipping law, which was also designed to protect the public from imposition so far as the giving of tips was concerned. Nowhere in the history of this legislation do we find any indication of a legislative intent to impinge upon the prerogatives of the Industrial Welfare Commission in connection with the performance of its duty to secure to women and minor female employees a minimum wage separate and apart from the tips or gratuities received by such employees. The Industrial Welfare Commission was in my opinion empowered, pursuant to the constitutional provision and legislative enactments made pursuant thereto, to adopt section 3 of order No. 12-A here under consideration, upon the theory that women and children were in a special class and not possessed of equal bargaining power with men in dealing with their employers, and were therefore a proper subject of protective legislation under the police power. Consequently, it is my conviction that we should hold that order No. 12-A is not repugnant to nor inconsistent with the tipping law of 1929, and was not repealed by the enactment of the last mentioned statute.

If it be determined that the trial court and the majority opinion herein erroneously decided the issue just discussed, then there are other, and to my mind, important questions raised by appellants and erroneously decided by the trial court, which should receive consideration on this appeal. In this regard, respondents contended in the trial court and the court concluded that section 3 of order No. 12-A of the Industrial Welfare Commission is in conflict with, contravenes and violates the provisions of sections 1 and 13 of article I of our state Constitution and the Fourteenth Amendment to the Constitution of the United States, and is therefore void and invalid, in that it deprives respondents of their right to freely contract with their employees in derogation of their guaranteed rights, without due process of law. The same contention is now made on this appeal. To epitomize respondents' contention herein, it is that the minimum wage and hour law for women deprives them of their constitutional freedom of contract. But the Constitution does not speak of freedom of contract. It speaks of liberty, and prohibits the deprivation of liberty without due process of law. In its provisions outlawing that deprivation of liberty, the Constitution does not establish or recognize a liberty that is absolute or uncontrollable. The liberty guaranteed by the Constitution is liberty in an organization of social beings which requires the protection of law against those evils which demoralize and menace the health, safety, morals and welfare of the people. Therefore regulation which is reasonable in relation to the subject to which it is applied and which is adopted in the interests of the community is in itself due process. Through the years, now more than twenty-five in number, the courts have recognized and declared that freedom of contract is a qualified and not an absolute right. No one is vested with the absolute freedom to do as he pleases or wills or to contract as he chooses. It is the absence

of arbitrary restraint, and not immunity from reasonable regulations and prohibitions adopted in the interests of the community, that liberty implies. Thus, statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 S.Ct. 1, 46 L. Ed. 55); in forbidding the payment of seamen's wages in advance (Patterson v. The Eudora, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315); in prohibiting contracts limiting liability for injuries to employees (Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 31 S.Ct. 259, 55 L.Ed. 328); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043); and in maintaining workmen's compensation laws. New York C. R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann. Cas.1917D, 642, 13 N.C.C.A. 927.

In connection with the relation of employer to employee, in order to protect the health and safety, as well as to assure the promotion of peace and good order, the Legislature is clothed with a wide field of discretion in making regulations to insure wholesome conditions of work and freedom from oppression. Chicago, B. & Q. R. Co. v. McGuire, supra. The claim so often stressed that employees, and in particular adult employees, should be deemed competent to make their own contracts, was encountered and decisively met more than forty years ago in Holden v. Hardy, supra, wherein the Supreme Court of the United States, in directing attention to the inequality in the footing of the parties, said [169 U.S. 366, 18 S.Ct. 390, 42 L.Ed. 780]:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.

"* * * But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'"

The principles just stated have a peculiar application in regard to the employment of women in whose protection the state has a special interest. The extent of this interest was emphasized in Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 326, 52 L.Ed. 551, 13 Ann.Cas. 957, where the constitutional authority of the state to limit the working hours of women was sustained. It was there emphasized that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and her physical well-being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394, 57 S.Ct. 578, 583, 81 L.Ed. 703, 108 A.L.R. 1330, the Supreme Court, in referring to Muller v. Oregon, supra, said in part: "We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.' Hence she was 'properly

placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.' We concluded that the limitations which the statute there in question 'places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.' Again, in Quong Wing v. Kirkendall, 223 U.S. 59, 63, 32 S.Ct. 192, 56 L.Ed. 350 [352], in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality.' We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the state. In later rulings this Court sustained the regulations of hours of work of women employees in Riley v. Massachusetts, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788 (factories); Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A. 1915F, 829 (hotels); and Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345, 59 L. Ed. 632 (hospitals)."

The Legislature possessed the right to consider that the maximum hours and minimum wage law for women would be an important aid in carrying out its policy of protection along the lines we have just discussed. The adoption of statutes similar to ours in many other states is indicative of an abiding conviction of the existence of the evils, and as to the means to be adopted to check them. Therefore legislative action in relation thereto cannot be regarded as either capricious or arbitrary. Though it may be argued, or even conceded, that the wisdom of such legislative policy is debatable, and the effects thereof uncertain, that does not deprive the legislative branch of the government of the right to its judgment. Furthermore, the eight-hour law and the minimum wage law for women have been held constitutional by the Supreme Court of the United States in Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829, and West Coast Hotel Co. v. Parrish, supra. By reason of the foregoing, the question of whether the restrictions contained in section 3 of the Industrial Welfare Commission's order have a reasonable relation to a proper purpose, must be answered in the affirmative when we stop to consider, first of all, that the proprietor of the restaurant where the tip is received is not in conscience entitled to it, having already been fully paid for the food and refreshments prepared and served by him. Furthermore, how can it be argued that the public is benefited by an agreement between employer and employee, willingly or unwillingly made, by which the former appropriates the gratuity given to the latter by patrons as a reward for courteous, prompt or faithful service? Such an appropriation of tips would destroy rather than encourage all incentive to furnish the type of service which the tip was given to insure. Again, should the constitutional freedom of contract be invoked to defeat a salutary requirement framed in the public interest as well as to safeguard women and minor employees by preventing employers from compelling their employees, under the pretense of an agreement which from the very nature of things would not as a rule be voluntary, to yield up to their employers that which the employees have earned and the employer has no right to appropriate? I think not. Charged as it is by law with the duty of providing for the comfort, health, safety and general welfare of women and minor female employees and of establishing a minimum wage for women, it seems to me that the Commission is vested with the right to provide a minimum wage exclusive of tips, and that is all that order No. 12-A does. It imposes upon the employer an obligation to pay a stated wage and exempts the employee from the asserted evils of the tipping system in earning her basic pay. There is every reason to assume that the general welfare of women and female minor employees would be enhanced by removing them from the sphere of servility begotten of the tipping system. The donor of a tip never looks upon it as a payment of wages, but rather as a gift or present. That being the case, the recipient of the gift is supposed to show becoming humility and gratitude for the gift so "generously" bestowed. Such a method of compensating for services honestly and efficiently rendered is not at all in conformity with the American conception of the dignity of all labor. The state certainly has a right to establish a basic minimum wage for women and minor female employees and

also has the right to provide that such employees shall not be compelled to compete for their wages with the uncertain and varying moods of public generosity. It has well been said that tipping in itself is violative of the code of American business ethics; that it belongs in countries where beggary is a recognized life calling; where petty bribery of government employees is a recognized channel of revenue; where class distinctions are sharp and oppressive, and where cultivated servility is an art. The Oxford English dictionary defines tip as "a small present of money given to an inferior, especially to a servant or employee of another, for services rendered or expected; a gratuity; a douceur." Certainly under the contract between the women employees and the employers with which we are here concerned, the women workers gained nothing by receiving tips, for what they earned in tips they lost in deduction of a like amount from their weekly minimum wage of $16. However debatable may be the merits of the tipping system, I am not prepared to say that order No. 12-A of the Commission, in removing women and minor employees from the claimed evils of that system, was either arbitrary or unreasonable. The judgment of the Commission that such employees should not be exposed to the asserted evils of the system in earning their basic pay cannot be strictured as capricious or illegal. Its wholesomeness in connection with the general welfare of this particular class of employee with which the Commission is concerned, is a matter for the latter's consideration, and in view of its powers, duties and prerogatives under the law through which it acts, I am not persuaded that the courts should interfere with its decision and judgment herein as being without and beyond its jurisdiction.

The power vested in the Industrial Welfare Commission to fix and determine upon a minimum wage for women and female minor employees carries with it the power to adopt such regulations as might be deemed necessary to effect the enforcement thereof and prevent the secret or surreptitious violation of the order fixing wages in a manner which could not be detected by the Commission without unreasonable expense on its part.

In my judgment, respondents' attack upon the validity of order No. 12-A upon the ground that it contains no findings of fact and was not promulgated in conformity with the requirements of law must fail for the reason that this appeal comes to us upon the judgment roll alone, and we must therefore assume that sufficient and competent evidence was introduced in the court below to sustain the finding by the trial judge that "it is further true that every act and thing required by statute to be done by said Commission in the promulgation and adoption of said Order No. 12-A was done by said Commission within the time and in the form required by statute."

Finally, respondents assert and the majority opinion agrees that the judgment must be affirmed for the reason that subsequent to the enactment of the tipping statute of 1929, the Industrial Welfare Commission construed the act as having superseded section 3 of its order No. 12-A and ruled that tips could be counted as wages provided employers complied with the provisions of the 1929 tipping statute. Undoubtedly it is the rule, as set forth in the main opinion, that in construing a statute its contemporaneous and practical construction by a board or commission charged with its execution is entitled to consideration and weight; but it is also the rule that while such construction is entitled to consideration it is not conclusive of the question. Only when it becomes necessary to clear up uncertainties and ambiguities may resort be had to the practical construction of a statute. The clear language or plain meaning of a statute cannot be altered by the contemporaneous construction placed thereon by an administrative board. Montgomery v. Board of Administration, etc., 34 Cal. App.2d 514, 521, 93 P.2d 1046, 94 P.2d 610. The provisions of the statutes and laws now before us do not admit the application of the rule of practical construction, because there is no uncertainty or ambiguity attached to them. Whatever erroneous interpretation or construction may have been placed on the statute and laws by former chiefs and members of the Industrial Welfare Commission, and whatever may have been the reasons for such construction or interpretation and consequent failure to enforce such statutes and laws, we are not authorized to follow such erroneous construction where the meaning of the statutes is certain and without ambiguity.

By the judgment here under consideration it was also decreed that an order made

by the chief of the Division of Industrial Welfare under date of January 18, 1940, by which respondents were directed to furnish uniforms to their employees, was invalid and void, and appellants were restrained from attempting to enforce the same. Appellants concede the validity of this portion of the judgment and do not contend that the chief of the Division of Industrial Welfare was vested with power to compel the owners of drive-in restaurants to furnish uniforms to their employees. This portion of the judgment should therefore in my opinion be upheld.

For the foregoing reasons, it is my belief that the judgment should be reversed and the cause remanded, with directions to the court below to modify the same in accordance with the views I have herein expressed.

20 Cal.2d 849

HAIME v. DE BEAULIEU et al.

L. A. 17395.

Supreme Court of California.

Sept. 28, 1942.

1. Appeal and error ⇐931(3)

Where findings of fact and conclusions of law were waived, every intendment was in favor of judgment and upon all issues before trial court it was to be presumed that the court found all facts necessary to support judgment, and, if there was any substantial evidence to support judgment, it was to be affirmed.

2. Trusts ⇐371(6)

Where defendants, after mortgaged property was purchased by beneficiary at a trustee's sale, made an agreement with mortgagor to purchase property from beneficiary for mortgagor's benefit with understanding that mortgagor could repurchase it from defendants before March 1, 1940, and defendants then entered into an agreement to buy property from beneficiary, and mortgagor was in default under agreement with defendants on March 1, 1940, defendants were justified in endeavoring to quiet title to property in themselves in mortgagor's action to establish a trust therein as against defendants.

3. Mortgages ⇐390

A person who has a mortgagee-trustee status may prosecute an action to quiet title to the property when the mortgagor-beneficiary fails to pay sums advanced by him and he need not bring an action to foreclose the security.

4. Appeal and error ⇐1011(1)

The Supreme Court is not concerned with conflicting evidence.

5. Trusts ⇐372(3)

In mortgagor's suit to establish a trust in mortgaged property which defendants had agreed to purchase for benefit of mortgagor with understanding that mortgagor could repurchase property upon reimbursement of defendants for sums expended by them together with interest thereon, evidence warranted finding that there was no bad faith, misconduct, or breach of trust by defendants so as to deny them interest agreed upon, on moneys advanced by defendants in connection with purchase of property.

6. Trusts ⇐183

Where defendants made an agreement with mortgagor to purchase mortgaged property for benefit of mortgagor with understanding that mortgagor could repurchase property and possession of property by defendants was contemplated by agreement and was consented to by mortgagor, defendants were not liable to mortgagor for use and occupancy of property.

7. Quieting title ⇐44(3)

In mortgagor's suit to establish a trust in mortgaged property where defendants filed a cross-complaint to quiet title in themselves, evidence justified denial of mortgagor's claim for value of improvements made on property by mortgagor, as a condition to defendants being declared owners of property, on ground that under agreement mortgagor lost any claim for value of improvements by failure to make payments to defendants before specified date.

8. Appeal and error ⇐882(19)

Where mortgagor was obligated to make payments to defendants before March 1, 1940, under an agreement by which defendants were to purchase property for benefit of mortgagor, and mortgagor defaulted in performance of such obligation, mortgagor could not complain that an interlocutory decree of August 7, 1940, in mortgagor's suit to establish a trust in property as against defendants, did not allow mortgagor a reasonable time in which to make payments required thereunder.

9. Appeal and error ⇐731(5)

In absence of specifications of particulars wherein evidence was insufficient to support trial court's findings upon which the court fixed the rate of interest to be paid by plaintiff, question whether decrees were erroneous in fixing rate of interest would not be reviewed on plaintiff's appeal.

10. Appeal and error ⇐842(11)

The rate of interest payable by plaintiff on money advanced by defendants under an agreement with plaintiff was a matter of evidence rather than a matter of law as respects conclusiveness of trial court's finding thereon.

11. Appeal and error ⇐1056(1)

Refusal to permit a witness to answer a question asked by plaintiff's counsel concerning witness' statements to others was not prejudicial against plaintiff where it

did not appear whether statements were relevant, and statements might not have benefited plaintiff's case.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Suit by Lulu G. Haime against Louis Hudon de Beaulieu and others to establish a trust in property, wherein defendants filed a cross-complaint to quiet title in themselves. From a final decree quieting title in defendants after plaintiff failed to make payment of a specified amount as required under an interlocutory decree for quieting title in plaintiff, plaintiff appeals.

Affirmed.

For prior opinion, see 122 P.2d 517.

James W. Pierce, of El Monte, for appellant.

Evans & Boyle, of Pasadena, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment quieting title in defendants de Beaulieu, husband and wife, to residence property situated in San Marina, California.

In August, 1939, plaintiff owned the property in question. It was encumbered by a trust deed given to secure a note held by the Mortgage Guarantee Company as payee and beneficiary. Furniture owned by plaintiff was encumbered by a chattel mortgage held by the Carlton Finance Company. Plaintiff being unable to pay the note secured by the trust deed, a trustee's sale was had in that month at which the beneficiary was the purchaser. About September 28, 1939, defendants, friends of plaintiff, at her request, entered into an agreement with her by which they agreed to purchase the property from the Mortgage Guarantee Company for the benefit of plaintiff, and take title in their names, with the understanding that plaintiff could repurchase the property from them at any time on or before March 1, 1940, upon reimbursing defendants for all sums expended by them in the purchase of the property, together with interest at the rate of 6 per cent per annum, and a release of any obligation they had thereby incurred. It was also agreed that plaintiff was to make repairs to the property, and the property was to be rented, the proceeds being used for taxes and interest. It was stipulated at the trial that a written agreement, dated September 28, 1939, signed by plaintiff but not by defendants embodied the terms of the agreement except in the particulars to be called to the attention of the court. Pursuant to the agreement defendants paid the mortgage company $1,000 on a purchase price of $6,115.98 for the property and executed a note and trust deed for the balance payable on April 1, 1940. The deed from the mortgage company to defendants was placed in escrow by the company but was later withdrawn and delivery thereof to defendants refused, inasmuch as plaintiffs had advised the escrow holder that she claimed an interest in the property.

On December 5, 1939, at plaintiff's request, defendants paid the chattel mortgage on the furniture, which was moved into the residence on the property, on the understanding that it would be returned to plaintiff if she reimbursed defendants.

Plaintiff failed to reimburse defendants on March 1, 1940, and on March 12, 1940, she commenced the instant action praying that defendants be required to convey the property to her and for the rental value of the property from January 1, 1940. Defendants answered, and filed a cross-complaint to quiet title to the property.

Finding of fact and conclusions of law were expressly waived by the parties, and on August 7, 1940, a so-called interlocutory decree was rendered providing that if within thirty days thereafter plaintiff pay to defendants certain sums and obtain a release of their obligation to the mortgagee company, the defendants were to convey the property to plaintiff; upon plaintiff's failure to comply, title to the property was to be declared to be in defendants and quieted against plaintiff. Upon motion, that decree was modified on October 4, 1940, allowing plaintiff until October 12, 1940, to furnish the money. The amounts to be paid by plaintiff were less however. On November 4, 1940, the court made its final decree in which it was stated that inasmuch as plaintiff had failed to comply with the interlocutory decree, title to the property was quieted in defendants.

[1] At the outset it should be observed that inasmuch as findings of fact and conclusions of law were waived, every intendment is in favor of the judgment and upon all issues before the trial court it must be presumed that the court found all the facts necessary to support the judgment. Gray v. Gray, 185 Cal. 598, 197 P. 945;

24 Cal.Jur. 956. If there is any substantial evidence to support the judgment it must be affirmed. With these rules in mind we turn to the contentions of plaintiff.

In the modified interlocutory decree the court required the payment by plaintiff as a condition of having the property conveyed to her, of $1,662, with interest on the sum of $1,000 from October 2, 1939, on $500 from April 2, 1940, on $75.09 from April 17, 1940, and on $1,662 from August 7, 1940, all at the rate of 7% per annum. Those sums consisted of the amounts expended by defendants in connection with the transaction.

Plaintiff contends that the defendants should not have been allowed any interest on the amounts specified in the modified interlocutory decree, that the rate of interest was excessive, that defendants were liable for the repairs and improvements made on the property by her of the value of $600, and that she was entitled to the reasonable value of the use and occupation of the property by defendants. She reasons that defendants held title to the property in the dual capacity as resulting trustees and mortgagees in the first instance and later as constructive trustees by reason of their breach of the trust, and that because of breach of trust and bad faith on defendants' part no interest should have been allowed to them on the moneys advanced in connection with the purchase. Her contentions are largely based upon the premise that defendants were guilty of bad faith and breach of trust. With reference to that premise plaintiff makes several claims. Assuming her legal theories to be correct and keeping in mind that we must presume that the trial court found that there was no breach of trust or bad faith, we believe that finding is supported by the evidence.

[2, 3] To establish bad faith and breach of trust contrary to the findings, plaintiff refers to defendants' cross-complaint in which they asserted ownership of the property claiming that they were taking a position adverse to their trust obligation. But the cross-complaint was filed after March 1, 1940, the date upon or before which plaintiff was to repay all moneys advanced by defendants and obtain a release from the mortgage company of defendants' obligation to that company. At that time plaintiff was in default, not having paid those advances or obtained the release. Under those circumstances defendants would be justified in endeavoring to quiet title to the property in the action brought by plaintiff. It is clearly the law that where a person in a position such as defendants, have a mortgagee-trustee status as plaintiff claims, then that person may prosecute an action to quiet title to the property when the mortgagor-beneficiary fails to pay the sums advanced by him, and he need not bring an action to foreclose the security. Hughes v. Korntved, 218 Cal. 3, 21 P.2d 417. Plaintiff did not discharge the obligation on March 1, 1940, the date it was due, and had not tendered the payment. Furthermore, it should be observed that at the trial defendants offered to convey the property to plaintiff upon her compliance with the agreement within thirty days and the first interlocutory decree was made in accordance with that offer.

[4-6] Plaintiff argues that she was prevented from performing under the agreement because by its terms the real property was to be rented, and the rent applied on the interest, taxes and improvements, and that defendants took possession of the property, failed and refused to rent it, and tried to prevent plaintiff from obtaining a loan to reimburse defendants. While it may be true that the property was to be rented and the rents to be so applied there were no rentals as the property was not rented. It does not appear that defendants were obligated to find a tenant for the property. With reference to defendants' possession of the property it appears according to the testimony of Mrs. de Beaulieu that defendants took possession on January 16, 1940, when plaintiff gave her the key to the residence. Plaintiff testified that Mrs. de Beaulieu remained in possession of the property until the last week of January, 1940, when she went into possession and stayed until the third week in February. Plaintiff's counsel testified that plaintiff gave the key to the house to Mrs. de Beaulieu and "was supposed to turn possession over to her (Mrs. de Beaulieu) about the time when the $1,000 was paid to the mortgage company." That is to say defendants were entitled to possession under the agreement. The court may well have concluded that defendants' occupancy was with plaintiff's consent and in accordance with their right. Although it is stated in the bill of exceptions with reference to Mrs. de Beaulieu's testimony "That she never tried to rent the real property because the Mortgage Guarantee Company told her not to rent it," there is no evidence that defendants refused

to rent the property or prevented plaintiff from so doing. No one came to rent the property while defendants were in possession. Plaintiff rejected one offer by a prospective tenant. Defendants' occupancy of the property with plaintiff's consent was wholly consistent with its being available for rent. After being in possession for a time, defendant, Mrs. de Beaulieu, left the property and "when she came back the plaintiff had moved defendants' things out and was in possession and remained in possession for about two days and then left." In regard to the claim that defendants prevented plaintiff from obtaining a loan on the property, it appears, according to the record, that while defendants were in possession of the property "On an occasion while she (Mrs. de Beaulieu) was talking on the telephone two gentlemen came to appraise the real property and overheard her telephone conversation, and what she said over the telephone was not complimentary towards the plaintiff. She did not make any comments to the appraisers concerning Mrs. Haime's credit standing, but on other occasions might have said something to other persons concerning Mrs. Haime's credit standing." It does not necessarily follow that such conduct constituted a breach of trust, bad faith, or an obstruction to plaintiff's obtaining a loan on the property. Furthermore, there is testimony on the part of plaintiff's witness, Mr. Wagstaff, with whom plaintiff was negotiating for a loan on the property, that "I understood her (Mrs. de Beaulieu) to say afterwards that she was the owner of the building, but I don't recall even mentioning Mrs. Haime's name. What Mrs. de Beaulieu said over the telephone did not necessarily cause me to cancel the loan, because the loan did not stack up to the full $6,000.00 application." Although there is conflicting evidence, this court cannot be concerned with it, and we cannot say from the whole record that the trial court was without justification in finding that there was no bad faith, misconduct or breach of trust on defendant's part. We find no reason therefore why defendants were not entitled to interest on the sums expended by them; the agreement provided for such interest. Nor were they liable for the use and occupancy of the property. The possession thereof by them was also contemplated by the agreement and was consented to by plaintiff.

It may be true that where a mortgage gives the mortgagee no right to the possession of the mortgaged property and the mortgagor does not consent to the possession by the mortgagee, a wrongful occupation of the premises by the mortgagee imposes a liability for use and occupation (Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St.Rep. 175) but as above seen those circumstances were not present in the instant case as found by the trial court.

[7] Plaintiff asserts that she should have been allowed $600, the value of the repairs and improvements made on the property by her, as a condition to defendants being declared the owners of the property. Under the agreement between the parties plaintiff was obligated to make those repairs and improvements within fifteen days after defendants purchased the property from the mortgage company. It was stipulated at the trial that, except as thereafter pointed out to the court, the written agreement, reference to which has heretofore been made, sets forth the rights and liabilities of the parties. There is no evidence contrary to the terms of that written agreement, which provided that unless plaintiff complied with the agreement "she shall forfeit any and all right that she may have in and to said property, together with any and all right of demanding a deed from said Louis Hudon de Beaulieu and Bessie Estell de Beaulieu, and she hereby agrees to release and forever discharge said Louis de Beaulieu and Bessie Estell de Beaulieu from any obligation of whatsoever kind or nature, arising out of this obligation and/or agreement or otherwise pertaining to said property." We believe the trial court was justified in concluding that if the payments were not made to defendants, plaintiff should lose any claim to the value of the improvements.

[8] Plaintiff asserts that she was not allowed by the interlocutory decree a reasonable time in which to make the payments to defendants, contending that the first interlocutory decree of August 7, 1940, allowing her thirty days called for an excessive amount, and that the time there given should not be calculated as a part of the time available, and that when the modified interlocutory decree was made on October 4th, she was given only ten days in which to make the payments. However, under the additional circumstances here presented we cannot agree. She was obligated under the agreement to make the payment on or before March 1, 1940. She failed to make it through no fault of defendants as

we have seen and that failure under the agreement would end her rights. We find no evidence in the record where she at any time thereafter tendered the payments to defendants in the amount she admitted to be due or in any other amount. As far as appears she did not have the funds available at any time. While the amounts specified in the first interlocutory decree may have been excessive by the inclusion therein of improper items, we are of the opinion that under all of the circumstances the trial court did not abuse its discretion in the respect claimed.

[9, 10] Plaintiff claims that both the first interlocutory decree and the modified interlocutory decree were erroneous in fixing the interest payable by her on the moneys advanced by defendants at 7 per cent per annum rather than 6 per cent called for in the written agreement. But she does not specify in her bill of exceptions the particulars wherein the evidence was insufficient to support the 7 per cent interest rate. She does not specify that the evidence was insufficient to support the allowance of 7 per cent interest and that the only evidence on the subject called for 6 per cent. The most she specifies is that the evidence does not warrant the allowance of any interest whatsoever. In the absence of specifications of the particulars wherein the evidence is insufficient to support the findings, the question will not be reviewed on appeal. Regoli v. Stevenson, 179 Cal. 257, 176 P. 158. The rate of interest payable was a matter of evidence rather than a matter of law as contended by plaintiff. If the evidence established that 7 per cent was to have been paid that would be controlling.

[11] Finally plaintiff asserts that evidence was improperly excluded. All that appears from the record is that Mrs. de Beaulieu testified that "what she said over the telephone (when two appraisers were at the property) was not complimentary towards plaintiff" and on other occasions she "might have said something to other persons concerning plaintiff's credit standing." According to the bill of exceptions "The counsel for the plaintiff then asked her what she said and the court refused to permit her to answer, whereupon counsel for plaintiff stated to the court that the conversation might disclose that she said something derogatory towards the property, and the court then stated that if counsel wanted to find out he could do so outside the courtroom." It does not appear whether the question referred to the purported statements on the telephone while the appraisers were at the property or the other occasions on which Mrs. de Beaulieu might have made statements to other persons concerning plaintiff's credit rating. If it were the former, we have heretofore seen that whatever statements were made they did not cause the prospective lender to refuse to make the loan. If it were the latter, there is nothing to indicate that the statements were not complimentary to plaintiff's credit rating, in which event they would not have benefited plaintiff's case and further it does not appear whether the statements were relevant. It cannot be said that prejudicial error was committed.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.



20 Cal.2d 879

WALKER v. CITY OF SAN GABRIEL et al.

L. A. 18350.

Supreme Court of California.

Sept. 29, 1942.

1. Certiorari ⇐22
Mandamus ⇐72

Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board.

2. Licenses ⇐38

A board commits an "abuse of discretion" when it revokes a license to conduct a legitimate business without substantial competent evidence establishing just cause for revocation, and hearsay evidence alone is insufficient to support revocation unless specially permitted by statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

3. Licenses ⇐38

Where revocation of license to operate an automobile wrecking business was sought before the city council, letter from chief of police enumerating charges

against licensee, deemed sufficient to justify revocation, was not competent "evidence" of truth of the charges, and hence city council abused its discretion when it revoked the license upon the letter only.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

In Bank.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge pro tem.

Mandamus proceeding by O. P. Walker against the City of San Gabriel, California, and others, to compel the reinstatement of a revoked business license to operate an automobile wrecking yard. From a judgment of nonsuit petitioner appeals.

Reversed.

For prior opinion, see 122 P.2d 634.

Keller & Smith, of Alhambra, and Morris Lavine, of Los Angeles, for appellant.

Herbert S. Farrell, of Alhambra, for respondents.

SHENK, Justice.

The petitioner applied to the Superior Court in Los Angeles County for a writ of certiorari to annul an order of the city council of the respondent city of San Gabriel revoking his license to conduct an automobile wrecking business in that city. The trial court issued an alternative writ of mandamus as an appropriate step in the proceeding. Issue was joined by the respondents' answer. After the introduction of oral and documentary evidence the respondents moved for a judgment of nonsuit, which was granted. The petitioner appealed. The following are the facts disclosed at the trial:

For thirteen years prior to January, 1941, the petitioner had conducted an automobile wrecking business in the city of San Gabriel. On the 22nd day of that month he received notice that the city council proposed to revoke his license to operate his business, and that January 28, 1941, was fixed as the time for a hearing. An ordinance of the city required the issuance of a license to engage in the business of automobile wrecking. It provided that such a license be issued and accepted with the understanding that the city council might revoke it upon being satisfied that any term or condition thereof had been violated or that the holder was an unfit person to be entrusted with the privilege granted by the license. It was expressly provided that before any license be revoked for any of the reasons stated the holder should be given an opportunity to be heard by notice in writing fixing the time for hearing.

On January 28, 1941, the time fixed in the notice, the petitioner appeared before the city council with his attorney, who informed the members of the council that "Mr. Walker stood ready, able and willing to produce evidence and testimony as to why his license should not be revoked, but should await the evidence of why it should be." Whereupon Police Officer Jorgensen read a letter addressed to the city council and signed by the chief of police of the city. That letter set forth numerous charges against the petitioner, claimed to be violations of the ordinances of the city or otherwise deemed sufficient to justify a revocation of the license.

Thereupon the petitioner was asked if he had anything to say. His attorney replied that until the persons making the complaints were produced, and an opportunity given to cross-examine them, there was no evidence before the city council and nothing for the petitioner to refute. The city council offered to continue the hearing to a later date if the petitioner desired to introduce evidence on his own behalf. But the petitioner, through his attorney, declined to produce any witnesses until witnesses supporting the charges made by the chief of police had been produced and subjected to cross-examination. The city council thereupon revoked the petitioner's license.

At the trial the sufficiency of the notice to revoke the license and of the fixing of the time for hearing was conceded by the petitioner. His principal contention then and now is that the city council acted arbitrarily and committed an abuse of its discretion when it revoked his license upon hearsay evidence only.

[1] Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Mann v. Tracy, 185 Cal. 272, 196 P. 484; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513; Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, 110 P.2d 714.

It is not contended that the provisions of the ordinance are not in conformity with the requirement of due process. See Carroll v. California Horse Racing Board, 16 Cal.2d 164, 105 P.2d 110, and cases cited. But it is claimed that the city council had no power to revoke the petitioner's license without a showing of just cause, as defined by the ordinance, and that the letter from the chief of police, being hearsay only, did not constitute competent evidence that just cause existed.

[2] It is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license. In Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, at page 230, 59 S.Ct. 206, at page 217, 83 L.Ed. 126, the Supreme Court of the United States observed that the "assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." There must be substantial evidence to support such a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end. See Englebretson v. Industrial Acc. Comm., 170 Cal. 793, 151 P. 421; Employers Assurance Corp. v. Industrial Acc. Comm., 170 Cal. 800, 151 P. 423; State Compensation Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 231 P. 996; Smith v. Board of Police Commissioners, Cal.App., 35 P.2d 555; Id., 1 Cal.App.2d 292, 36 P.2d 670; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; Thrasher v. Board of Medical Examiners, 44 Cal.App. 26, 185 P. 1006.

[3] There was no evidence before the city council on the hearing to revoke the petitioner's license except the letter from the chief of police enumerating the charges against the petitioner. It was on that evidence alone that the council purported to revoke his license. The letter was competent only as a statement of the charges against the petitioner, but was not competent evidence of the truth of the charges stated therein. In the absence of competent proof of the charges against the petitioner the city council was without power to revoke his license and therefore abused its discretion in doing so.

The judgment is reversed.

CURTIS and CARTER, JJ., and PETERS, J. pro tem., concurred.

TRAYNOR, Justice (concurring).

The city council did not reserve the power to revoke licenses at its discretion. It reserved the power to revoke, if it adjudged, after a hearing on the law and the facts, that a legal ground for revocation was established. The ordinance vested the adjudicating function in the council and prescribed that it should be exercised only after a hearing. It is sufficient to hold that the hearing intended was an adversary hearing, at which evidence was to be taken and a decision made, based on that evidence. The city had the burden of establishing its case, and until it introduced evidence the defendant licensee rightly took the position that there was no evidence to rebut. The majority opinion correctly characterizes the letter read by the police officer as a recital of the charges. The case may be disposed of simply on the ground that no hearing on these charges was had. If, however, the paper is to be regarded as evidence, it is clearly hearsay that would be inadmissible in a court trial if proper objection were made. In administrative hearings hearsay commonly is admissible even over objections (Wigmore, Evidence, 3d Ed., vol. 1, §§ 4-b, 4-c), and the court does not now decide that it is not. What the court decides is that, in the absence of statutes to the contrary, there is no substantial evidence to support an administrative decision if the only evidence is hearsay. Accordingly, the majority opinion assumes that in reviewing the decision of a local administrative tribunal with respect to a disputed issue of fact the trial court can go no further than to inquire if the administrative tribunal had before it any substantial evidence to support its decision, whether the review is by mandamus or by certiorari.

The opinion cites with approval Dierssen v. Civil Service Commission, 43 Cal.App. 2d 53, 110 P.2d 513, and Naughton v. Retirement Board of San Francisco, 43 Cal. App.2d 254, 110 P.2d 714, 718. The first case held that anyone attacking the decision of a local adjudicating board by petition for mandate must allege that the board

acted fraudulently, capriciously, or arbitrarily, and that a charge against the board's decision of issues of fact is not sustained if the board had any substantial evidence before it to sustain its decision. The second case cited followed the same rule. The majority voted to annul the decision of the board on the ground that there was no evidence in the record to support the board's finding. Peters, J., concurring said: "If mandamus is used, the extent of the 'review' is to determine, as pointed out in the main opinion, whether 'the local board has acted arbitrarily and clearly in abuse of its discretion'. So far as the evidence is concerned, that means the superior court's power is limited to determining whether there is any substantial evidence to support the findings of the board. There is no doubt that the cases hold, as stated in the main opinion, that mandamus may be used by the aggrieved party. Whichever remedy is used, so far as the evidence is concerned, the extent of the 'review' is exactly the same."

Why permit mandamus to be extended to reach a result that would have been reached by certiorari? It would be better to preserve the traditional distinctions between the two writs. In this instance certiorari was clearly the applicable writ. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Legault v. Board of Trustees, 161 Cal. 197, 118 P. 706, 39 L.R.A.,N.S., 519; Murray v. Board of Supervisors, 23 Cal. 492, 493; Nider v. City Commission, 36 Cal.App.2d 14, 97 P. 2d 293; Rigdon v. Common Council, 30 Cal. App. 107, 157 P. 513; Great Western Power Co. v. Board of Supervisors, 21 Cal.App. 146, 131 P. 88. On certiorari the court would have directed the council to certify up the record of its proceedings, and would readily have determined whether that record showed that the council had before it any substantial evidence to support its decision. Instead, the court, proceeding by mandamus, permitted persons who were present at the council meeting to testify as to what occurred there and to give oral evidence as to what evidence was presented at the council meeting. Counsel for the city objected that the best evidence rule was thereby violated, but the objection was overruled. If the record of the hearing before the council had been introduced, as it should have been, the court would then have been in the same position as if it had proceeded by certiorari.

While the law thus seems to be settled in this state that local agencies may exercise adjudicating powers and that their decisions are respected by courts if there is substantial evidence to support them, it is anomalous that the Legislature is without power to put the decision of state boards on the same footing. In Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457, a majority of this court held that it would be an unconstitutional vesting of judicial power in a state board to give any degree of finality to its decision of issues of fact in the revocation of a professional license. In consequence, there must be a complete judicial retrial of its fact decisions. The objections to that doctrine are set forth at length in the dissenting opinion in the Laisne case. The majority opinion there concluded that such constitutional judicial power could be vested in local administrative bodies and that the exercise of such power could be controlled, as to local boards, by the writ of certiorari. Laisne v. California State Board of Optometry, supra, 19 Cal.2d page 847, 123 P.2d 457. The inconsistency in characterizing the revocation of a license by a state-wide board as ministerial and reviewable by mandamus, while the same function when performed by a local board would be judicial and reviewable by certiorari, has been pointed out in the Laisne dissent and elsewhere. Laisne v. California State Board of Optometry, supra, 19 Cal.2d page 869, 123 P.2d 457; see Elliott, Certiorari and the Local Board [1941], 29 Cal.L.Rev. 586, 598; McGovney, Court Review of Administrative Decisions [1942], 15 So.Cal.L.Rev. 391, 409; Turrentine, Restore Certiorari to Review the Acts of State-Wide Administrative Bodies in California [1941], 29 Cal.L.Rev. 275; [1937] 25 Cal.L.Rev. 694, 704.

If the writ of certiorari lies to review the revocation of petitioner's license by the local board in the present case, it would follow under the majority opinion in the Laisne case that an exercise of constitutional judicial power is involved. Upon what ground, then, can it be held consistently that the writ of mandate is available? There is no refusal to perform a ministerial duty or absence of an adequate remedy, as in Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848. See Laisne v. California State Board of Optometry, supra, 19 Cal.2d page 833, 123 P.2d 457. The only plausible explanation for the extension of mandate to review the acts of local boards seems to be the unexpressed recognition that it is irrational to

hold that a particular activity, the revocation of licenses, is nonjudicial and reviewable exclusively by mandate when the revocation is by a state-wide board and still adhere to the older doctrine that it is a judicial function and reviewable by certiorari exclusively when the revocation is by a local agency.

If it were contended that the record of the city council's hearing disclosed that it had before it other evidence supporting its decision than that disclosed by the testimony in the trial court, there would be no alternative but to remand the case to the trial court, with instructions to issue a writ of certiorari. Since it appears, however, that in the trial court counsel for the city did not contend that the city council had before it any other evidence, it seems that the result would have been the same had the case been tried on certiorari. Consequently, it is unnecessary to dissent from the judgment.

GIBSON, C. J., and EDMONDS, J., concurred.



20 Cal.2d 832

PEOPLE v. YOUNG.

Cr. 4421.

Supreme Court of California.

Sept. 24, 1942.

1. Automobiles ⇐344

The 1941 amendment to section of Vehicle Code dealing with negligent homicide, which struck out the words "in a negligent manner or in the commission of an unlawful act not amounting to a felony" and inserted the words "with willful disregard of, or willful indifference to, the safety of others", intended that something more than ordinary negligence was to be required in order to sustain a conviction. Vehicle Code, § 500, St.1941, p. 1414.

2. Negligence ⇐13

"Ordinary negligence" consists of acts or omissions which are not compatible with standard of care exercised by an abstract man of ordinary prudence, and the test of such negligence is an objective rather than a subjective one.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Negligence".

3. Statutes ⇐225¾

Legislature would be presumed to have intended that the terms used in section of Vehicle Code dealing with negligent homicide should be interpreted in accordance with definition given by the courts to other similar terms if those definitions may reasonably be said to fit the particular words used. Vehicle Code, § 500, St.1941, p. 1414.

4. Automobiles ⇐181(1), 344

The section of Vehicle Code dealing with negligent homicide and the section dealing with civil liability of a motorist for injuries to a guest both envisaged something more than ordinary negligence, but less than the conventional intentional tort. Vehicle Code, § 403, St.1935, p. 154; § 500, St.1941, p. 1414.

5. Automobiles ⇐181(1)

"Willful misconduct", within section of Vehicle Code dealing with civil liability of a motorist for injuries to a guest, implies at least intentional doing of something either with knowledge that serious injury is probable result, or intentional doing of act with wanton and reckless disregard of possible results. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

6. Automobiles ⇐181(1), 344

"Reckless disregard of the safety of others", within section of Vehicle Code dealing with negligent homicide, is doing an act while recklessly ignoring the safety of others, and it is thus equivalent to "willful misconduct" as used in automobile guest statute. Vehicle Code, § 403, St.1935, p. 154; § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Disregard of the Safety of Others".

7. Automobiles ⇐344

"Willful indifference to the safety of others", as used in section of Vehicle Code dealing with negligent homicide, is an intentional lack of regard concerning safety of others, or an intentional doing of some-

thing with knowledge that serious injury is a probable result. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Indifference to the Safety of Others".

8. Automobiles ⇐181(1), 330

The term "reckless driving" as used in section of Vehicle Code defining reckless driving, and the term "willful misconduct", as used in automobile guest statute, have similar meaning. Vehicle Code, § 403, St. 1935, p. 154; § 505, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Driving".

9. Negligence ⇐11

An actor's conduct is in "reckless disregard of the safety of another" if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that actor's conduct not only creates unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to him.

10. Automobiles ⇐355(13)

Evidence was insufficient to sustain conviction of motorist for negligent homicide of street car passenger who had just alighted from street car, where it appeared merely that motorist was guilty of ordinary negligence in attempting to overtake street car while exceeding speed limit, though not traveling at excessive speed, and in failing to observe that street car was going to stop to discharge a passenger. Vehicle Code, § 500, St.1941, p. 1414; § 571, St. 1935, p. 189.

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Maude Mae Young was convicted of negligent homicide, and she appeals.

Reversed.

For prior opinion, see 122 P.2d 957.

Newton F. Rozzelle, of San Diego, for appellant.

Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Harold P. Curtis, H. Pitts Mack, and Robert L. Barbour, Deputy Dist. Attys., all of San Diego, for respondent.

CARTER, Justice.

Defendant was found guilty by the court sitting without a jury of violating section 500 of the Vehicle Code, St.1935, p. 173 as amended by St.1941, p. 1414. The accident out of which the case arose, occurred on September 26, 1941, at the intersection of Thirtieth and Palm Streets in the city of San Diego. Thirtieth Street runs in a northerly and southerly direction and at that time was protected by boulevard stop signs. It is a surfaced street forty feet wide and located thereon are two pairs of street car tracks. For a block south from its intersection with Palm Street, the grade of Thirtieth Street was estimated by various witnesses to be from five to twenty per cent downward. The distance from the east side of a street car standing upon the east tracks to the east curb on Thirtieth Street is 10 feet 4 inches. There is no safety zone at the point where a northbound street car stops to receive or discharge passengers at the intersection of Palm and Thirtieth Streets. Palm Street is also forty feet wide and extends easterly and westerly.

On September 26, 1941, at approximately 5:00 p. m., defendant was driving her car north on Thirtieth Street behind a street car traveling in the same direction. It was a clear day and the streets were dry. The street car gradually came to a stop at its regular stopping place just south of the south line of Palm Street to discharge decedent, a passenger on the street car. Decedent, a boy thirteen years old, stepped down from the right front door of the street car, and while he was taking a second step in the direction of the east curb of Thirtieth Street, he was struck by the left front fender of defendant's car. He was rolled along or carried by defendant's car until it came to a stop 100 feet north of the street car between the tracks and the east curb of Thirtieth Street, receiving injuries causing his death.

The conductor on the street car and several other witnesses testified that defendant's car was traveling at thirty-five miles per hour at the time decedent was struck and that decedent was struck by the front of the left front fender of defendant's car. There was a skid mark on the pavement forty-seven feet long, from where defend-

ant's car stopped toward the point of impact. The amber stop lights on the rear of the street car were operating. The street car prior to coming to a stop was traveling from twenty to twenty-five miles per hour.

Defendant testified that she approached the rear of the street car, and when it was about one-half block from the place of the accident she was driving parallel with it at a speed of twenty-five miles per hour; that when the decedent dismounted from the street car the front of her car was past the door of the street car; that decedent stepped from the street car onto the top of the left front fender of her car; that she had no warning that the street car was going to stop or discharge a passenger at the intersection of Palm and Thirtieth Streets; that she stopped her car as soon as she could after collision; that the street car did not slow down gradually, rather it stopped suddenly. There were dents both on the top and front of the fender.

Section 500 of the Vehicle Code, for the violation of which defendant was found guilty, reads, except as hereafter noted, as follows:

"When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle *with reckless disregard of, or wilful indifference to, the safety of others,* [in a negligent manner or in the commission of an unlawful act not amounting to a felony], the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years." The change in the section from its former wording made by the 1941 amendment consisted of the deletion of the words in parenthesis and the addition of the words in italics appearing in the foregoing quotation.

[1] There can be no doubt that the Legislature intended that something more than ordinary negligence was to be required by the 1941 amendment. The words deleted and those substituted in their place clearly have a different meaning. We believe this is clear even though it is noted that the 1941 amendment still refers to the crime as "negligent homicide." The term negligent as there used is given a sense not ordinarily ascribed to it by reason of the specific requirements as to the manner in which the vehicle must be driven to establish the crime, that is, "reckless disregard of, or wilful indifference to, the safety of others."

[2-9] In endeavoring to define the meaning of the terms used in the section in order that they may be intelligently applied to a given set of facts, certain principles must be kept in mind. There are classes of wrongful conduct, or what might be termed misconduct, in the law of torts which exist in the shadowy realm between the two well established classes of ordinary negligence and intentional wrongdoing. Ordinary negligence consists of acts or omissions which are not compatible with the standard of care exercised by an abstract man of ordinary prudence. The test of such negligence is an objective rather than a subjective one. On the other hand, in the case of the intentional tort such as trespass and assault and battery, the test is subjective inasmuch as we are concerned with the intent of the alleged wrongdoer. Various terms have been used from time to time to describe conduct which falls within that intermediate realm, all of which have been difficult to apply. To add to the difficulty, there have been indications in some statutes and court decisions that there are distinct classes of conduct within that realm. Such terms as gross negligence and wilful misconduct have been employed. In keeping with the policy of the law that a statute imposing a penalty should be as concrete and certain as circumstances will permit, we believe that the Legislature intended that the terms used in section 500 should be interpreted in accordance with the definitions given by the courts to other similar terms if those definitions may reasonably be said to fit the particular words used. Certainly the intention to increase the confusion arising from an extension of the differentiation of classes of conduct within that realm is not to be presumed. With these thoughts in mind we turn to one of the most frequently defined classes of conduct in that realm, wilful misconduct, upon which the liability of a host for an injury to his guest is made to depend as contemplated by section 403 of the Vehicle Code. While the policy behind sections 500 and 403 is probably not the same, they both envisage something more than ordinary negligence but less than the conventional intentional tort. If the definition of wilful misconduct is consonant with the words used in section 500, their meaning may be said to be similar. The most acceptable

definition of wilful misconduct is stated in Howard v. Howard, 132 Cal.App. 124, 129, 22 P.2d 279, 281, as follows:

"But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." See, also, Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447; Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430. Reckless disregard of the safety of others appearing in section 500 is doing an act while recklessly ignoring the safety of others. It is thus equivalent to, quoting from the definition, the "intentional doing of an act with a wanton and reckless disregard of its possible result." Wilful indifference to the safety of others, is an intentional lack of regard concerning the safety of others, or an "intentional doing of something * * * with a knowledge that serious injury is a probable * * * result." With particular reference to a reckless disregard for the safety of others it is worthy of note that reckless driving is defined as driving a car "in wilful or wanton disregard for the safety of persons." Vehicle Code, § 505, St.1939, p. 2107. And in a well reasoned decision by the superior court sitting as an appellate tribunal in People v. McNutt, 40 Cal.App.2d Supp. 835, 105 P.2d 657, the court concluded that reckless driving and wilful misconduct as specified by the Vehicle Code were the same. See, also, People v. Thompson, 41 Cal.App.2d Supp. 965, 108 P.2d 105; People v. Nowell, 45 Cal.App.2d Supp. 811, 114 P.2d 81. While it is true that with reference to the disregard for the safety of others in defining reckless driving, the character of the disregard is described as "wilful or wanton" rather than "reckless" as appears in section 500, there is no substantial difference. It has been stated that:

"The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." Restatement, Torts, § 500. There may have been instances in which the phrase "reckless disregard for the safety of others" has been considered as conduct less reprehensible than that described in the above quotation, but it must be remembered that we are here interpreting a criminal statute carrying a severe penalty, and thus it is reasonable to suppose that the Legislature was concerned with conduct which was at least quasi criminal in character.

[10] An examination of the record compels us to conclude that the evidence was insufficient to establish a violation of section 500 of the Vehicle Code in light of the foregoing discussion. It has been held that the violation of a statutory duty alone does not constitute wilful misconduct. Porter v. Hofman, supra; that speed alone or inattention to the roadway ahead alone, does not constitute wilful misconduct. Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165; that colliding with a car at an intersection while traveling sixty miles per hour was not wilful misconduct. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. The defendant in the case at bar was merely negligent. She was driving her car up an incline. She was overtaking and endeavoring to pass a street car in the proper traffic lane for that purpose. She may have been exceeding the speed limit but cannot be said to have been traveling at a particularly excessive speed. She was observing the street car, but did not know that it was going to stop to discharge a passenger, except in the sense of her general knowledge that street cars do stop at intersections to permit passengers to dismount. The people's evidence shows that the street car stopped gradually, but defendant's failure to observe that was the lack of that care expected of a man of ordinary prudence, that is, ordinary negligence without a high degree of probability of injury to others. The driver of a vehicle overtaking a street car stopped or about to stop for the purpose of discharging passengers where there is no safety zone is required to stop the vehicle at the rear of the street car and there remain until any persons alighting have reached a place of safety. Vehicle Code, § 571. Assuming defendant violated that rule, the mere violation thereof under the circumstances did not constitute wilful misconduct or reck-

less disregard of, or wilful indifference to the safety of others. She testified that she did not see the decedent until he stepped from the street car onto her fender. The people's witnesses stated that deceased had stepped down and commenced to take the next step forward when he was struck. This is not a case where defendant had an opportunity to see the deceased for some distance but still continued on her course, thus showing an element of intent to cause injury or a high degree of probability thereof.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.



20 Cal.2d 858

BRAY et al. v. JONES.

L. A. 17798.

Supreme Court of California.

Sept. 29, 1942.

Rehearing Denied Oct. 26, 1942.

1. Taxation ⇐627

A delinquent tax list notice which contained name of person whose property was assessed, a description of property and a figure representing the total amount of taxes, penalties and costs, conformed to the requirements of statute as to "notice", even though it did not state that such figure did include penalties and costs. Pol.Code, §§ 3764, 3766.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

2. Taxation ⇐615

The contents and form of a delinquent tax list are governed by the law in effect at the time of the list's first publication and not by amendment to the law which became effective prior to the second and third successive publications of the list. Pol.Code, §§ 3764, 3766, and § 3817d, as amended by St.1935, p. 1064.

3. Taxation ⇐679(5)

A tax deed acquired by plaintiff from the state in 1937 and covering property acquired by the state at tax sale in 1930 was not void because of the statute prohibiting a sale by the state to private individuals before 1938, where the 1937 amendment excepted therefrom property sold to the state in 1930 or earlier. Pol. Code, § 3817d, as amended by St.1937, p. 147.

4. Taxation ⇐699

Any temporary limitation which the state placed upon its own freedom to sell property acquired at tax sale in no way diminished the limitations on former owner's privilege of redemption as the state is free to terminate the privileges of former owner to redeem by fixing the time when it will dispose of the property. Pol.Code, § 3817d as amended by St.1937, p. 147.

5. States ⇐89

The legislature has full control over the sale of property belonging to the state, which it may direct sold, and to regulate or change at any time the method of its disposition.

6. Taxation ⇐705

The statute relating to sale of unredeemed property at auction and providing for notice by registered mail to the person against whom the property was last assessed does not require tax collector to instruct postal authorities to hold the notice of sale for 21 days, and failure to so instruct would not invalidate deed subsequently issued. Pol.Code, § 3771a.

7. Taxation ⇐297

A tax levy calling for an amount in excess of the amount budgeted for certain school district, which excess was less than ten per cent. of the item budgeted and a reasonable allowance for tax delinquency, was not void. Pol.Code, § 3714(5).

8. Taxation ⇐810(3)

In action to quiet title by holder of tax deed against former owner, record disclosed that the delinquent tax list was properly published in the body of a newspaper and not in a supplement as contended by defendant. Pol.Code, § 3766.

In Bank.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by W. F. Bray and others against Ida T. Jones to quiet title to certain prop-

erty. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 122 P.2d 981.

Raphael Dechter and Lyman P. Robertson, both of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, and R. Leslie Sparks, all of Los Angeles, John O. Palstine, of Long Beach, and Herbert C. Kelly, of San Diego, amici curiae, for appellant.

West & Vizzard and Edw. West, all of Bakersfield, for respondents.

Earl Warren, Atty. Gen., and H. H. Linney, Asst. Atty. Gen., amici curiae, for respondents.

TRAYNOR, Justice.

Plaintiffs, as holders of a tax deed, brought this action to quiet title to real property against the defendant, the former owner. The property was sold to the state on June 30, 1930, for non-payment of taxes for the year 1929. Five years elapsed without redemption and, on July 15, 1935, the county tax collector executed his deed to the state. Thereafter the property was sold at public auction, and the deed of the county tax collector, dated October 19, 1937, was executed to the plaintiffs. Defendants appeal from the judgment quieting title to the property. They contend that the several proceedings leading to the sale to the state in 1930, the deed to the state in 1935, and the deed to the plaintiff in 1937, were void.

[1] The asserted invalidity of the proceedings leading to the sale to the state on June 30, 1930, is attributed to an alleged failure of the notice of sale to comply with section 3764 of the Political Code, which at that time provided that the delinquent notice should contain: "the names of persons and a description of the property delinquent, and an amount equal to the total amount of all taxes, assessments, penalties, and costs due, and which are a lien thereon."

The preliminary paragraph of the notice of sale, published in the Bakersfield Californian in June of 1930, read as follows:

"Default Having Been Made in the payment of taxes levied in the year 1929 for the County of Kern, for the year ending June 30, 1930, upon the real and personal property described in the Delinquent List hereto appended:

"Now, Therefore, I, C. E. Day, Tax Collector in and for the said County of Kern, by virtue of authority in me vested, hereby give public notice that unless the taxes delinquent as appear in said list, together with penalties and costs, are paid on or before the sale date given below, the real estate upon which taxes are a lien, will By Operation of Law be sold to the State of California, on Monday the 30th of June, 1930, at 12 o'clock M. (except any lot, place or parcel on said list which has heretofore been sold to the State)."

The delinquent list sets forth under the heading "Paleto": "Jones, John T., rec. No. 13895, W ½ of SW¼ of SE¼, Sec. 2, Twp. 11, R. 23, $4.73." At page 12, the list states: "All figures in the foregoing list relating to taxes, percentages and costs, represent dollars, except the two right hand figures in each item which represent cents."

The list contains the name of the person whose property is assessed and a description of the property, as required by Political Code, section 3764. The description is followed by the figure $4.73. Since presumably public officials follow the law and perform their duties properly, it must be assumed in the absence of evidence to the contrary that the figure $4.73 represented the total amount of taxes, assessments, penalties and costs delinquent. Pol.Code, §§ 3897(7) and 3786; Code Civ.Proc. § 1963 (15). The defendant made no attempt to prove that the amount set opposite the description does not correctly represent that total, but relies on an alleged defect in the preliminary statement that "Unless the taxes delinquent as appear in said list, together with penalties and costs, are paid * * *" the property will be sold to the state. Defendant contends that this statement made the notice void because it did not specifically state that penalties and costs were included in the list but stated in effect that taxes only were included and that the owner of the property would be compelled to pay, in addition to the amount of the taxes shown on the list, a sum representing penalties and costs in order to redeem the property and prevent the sale. The list must of course include the total of the taxes, costs, and penalties, but there is no requirement that the notice state that it does so. The statement, added by the tax collector pursuant to the mandate of Political Code, section 3765, is phrased in substantially the language of that section: "The tax collector must append and publish with

the delinquent-list a notice that unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold." When, as in this case, the notice sets forth the name of the person whose property is assessed, a description of the property, and "an amount equal to the total amount of all taxes, assessments, penalties, and costs due," and provides that the property will be sold unless the taxes delinquent, together with interest and penalties are paid, the notice conforms to the requirements of Political Code, sections 3764 and 3765.

Defendant relies on several cases holding notices invalid because of non-compliance with section 3764. Bussenius v. Warden, 71 Cal.App. 717, 236 P. 371; Knoke v. Knight, 206 Cal. 225, 273 P. 786; Fleishman v. Davis, 128 Cal.App. 174, 16 P.2d 776; Redman v. Newell, 114 Cal.App. 215, 299 P. 746; Rexon v. Gaffey, 119 Cal.App. 389, 6 P.2d 534; Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497; Jones v. Walker, 47 Cal.App.2d 566, 118 P.2d 299. None of these cases is controlling here. In the leading case of Bussenius v. Warden, supra, upon which the others are based, the court expressly recognized that preliminary statements phrased like the one in the present case were appended to meet the requirements of Political Code, section 3765. What the courts took exception to was the statement in the notices that the lists contained only taxes and costs. In Bussenius v. Warden, supra [71 Cal.App. 717, 236 P. 373], for example, there was a statement in the notice that "* * * the figures appearing opposite * * * each description * * * 'were intended to, and do, represent respectively in dollars or in cents, * * * as the case may be, the amount due for taxes and costs.'" Similar statements were contained in the notices in Knoke v. Knight, supra; Fleishman v. Davis, supra; Redman v. Newell, supra; Snodgrass v. Errengy, supra, and Jones v. Walker, supra. The figures, expressly set forth as taxes and costs, were clearly exclusive of penalties. In the present case, however, the statement with respect to the figures refers to taxes, percentages and costs, not to isolate penalties therefrom, but merely to specify that they are represented by figures denoting dollars and cents. The statement suggests the inclusion rather than the exclusion of penalties, for the statutes formerly used "percentage" in place of "penalties." Before 1895, Political Code, section 3765 required the tax collector to append and publish with the tax list a notice that unless the delinquent taxes, together with costs and percentage were paid, the property would be sold at public auction. In 1895 the Legislature adopted an amendment replacing "percentage" with "penalty" to denote the percentage that was added as penalty. St.1895, p. 326. The new term was chosen, not to inaugurate a new concept but to lend greater precision to the old. It was used in the preliminary statement in the present case as required by section 3765. The question here is not whether the collector was required to use "penalties" and not "percentages," but whether a declaration that penalties were excluded from the list should be read into a statement that certain figures represent dollars and cents. Only if the statute had required that the "penalty" be set forth as a separate item, would it be violated by a failure to do so or by the setting forth of the item as "percentage." Gottstein v. Kelly, 206 Cal. 742, 276 P. 347. In the absence of such a requirement, however, it would be unreasonable to read the exclusion of penalties into the tax collector's reference to "taxes, costs and percentages."

In any event the cases relied upon by the defendant were concerned with section 3764 when, as interpreted by Gottstein v. Kelly, supra, it required taxes, assessments, penalties, and costs to be separately stated. The failure to set forth the amount due for penalties, emphasized by the statements in the notices that penalties were not included, was plainly in violation of the statute as it then read. Immediately after the decision in Gottstein v. Kelly, supra, however, the Legislature amended section 3764 to make clear that taxes, assessments, penalties and costs were not to be set forth separately, but were to be included in a single total amount. It is with the amended section that the present case is concerned. Cases holding notices invalid for not meeting certain requirements can have no application to notices that must meet new requirements inconsistent with the old.

The asserted invalidity of the proceedings leading to the deed to the state on July 15, 1935, is attributed to the failure of the tax collector to include a reference to Political Code section 3817c3 in the notice in the addenda to the delinquent list for 1935, as prescribed by Political Code sections 3764 and 3817d, as amended in 1935. St 1935, p. 1064.

Section 3764 provides that "On or before the eighth day in June of each year, the tax collector shall publish the delinquent list * * *." Section 3766 provides that "the publication must be made once a week for three successive weeks * * *." The list in question in the present case was first published on June 6, 1935, in accordance with the statutory requirements then prevailing. On June 11, 1935, five days after the first publication, the act adding section 3817c3 to the Political Code and amending section 3817d became effective as an urgency measure. Stats.1935, p. 1061, 1062, That act required that the notice for the years 1935, 1936, and 1937 refer to the new section 3817c3, which was not in effect on June 6, 1935, and was therefore not mentioned in the published notice.

[2] On June 8, 1935, the contents and form of the list were governed by the law then in effect. The list was made up in conformity with that law and published thereunder, and became the delinquent list for 1935. Since the formulation of the list and its first publication preceded the effective date of the 1935 amendment, its contents and form did not come within the purview of that amendment merely because its two successive publications followed that effective date. Section 3766 requires republication of the list in the form that section 3764 prescribed at the time of the first publication of the list. Precision would be endangered and consistency destroyed under a rule that required deviations from the original list whenever the sequence of its publications fell within the period of statutory changes. Section 3766 contemplated not successive lists, but successive publications of the same list. There are, moreover, practical obstacles to the preparation of delinquent lists. They require time and painstaking care, and it would be unreasonable to expect the tax collector to prepare new lists in the short interval between the required times for publication.

[3, 4] Defendant's contention that the tax deed issued to plaintiff was void because section 3817d as amended in 1935, prohibited a sale by the state to private individuals before January 1, 1938, is without merit in view of the 1937 amendment, St. 1937, p. 147, specifically excepting property sold to the state in the year 1930 or earlier years. Defendant errs in contending that she had a vested right to redeem the property after its sale to the state, for under Political Code, section 3817 there has never been a privilege of redemption after sale to the state unless the state chooses not to sell the property. The 1935 amendment was simply an election not to sell the property, while the 1937 amendment was an election to permit its sale. Any temporary limitation that the state placed upon its own freedom to sell in no way diminished the limitation on defendant's privilege of redemption. The state is free to terminate the privilege of the former owner to redeem by fixing the time when it will dispose of the property.

[5] "The Legislature has full control over the sale of property belonging to the state, which it may direct sold, and to regulate or change at any time the method of its disposition." Buck v. Canty, 162 Cal. 226, 233, 121 P. 924, 927; see also, Baird v. Monroe, 150 Cal. 560, 567, 89 P. 352; Young v. Patterson, 9 Cal.App. 469, 471, 99 P. 552. For the same reasons there is no merit in the contention of amicus curiae that Political Code section 3897, as it read in 1929 rather than as in 1935, governed the sale made to the purchaser in 1937. The case of Anglo-California National Bank v. Leland, 9 Cal.2d 347, 70 P.2d 937, cited by defendant, holds only that the general rule governing sales to individuals does not prevent the state from extending the period of redemption where it holds the title to tax deeded land as it did in section 3817c4 of the Political Code.

[6] Defendant contends that the tax collector erred in failing to instruct the United States postal authorities to hold for twenty-one days the notice of the 1935 sale mailed to the defendant pursuant to Political Code section 3771a. The record proves, however, that the tax collector complied exactly with that section, and was not required thereunder to make such an instruction. There was no instruction on the envelope that it be returned to the tax collector within a certain number of days, as there was in Joslin v. Shaffer, 66 Cal. App. 69, 225 P. 307, and Healton v. Morrison, 162 Cal. 668, 124 P. 240, cited by defendant. The statement in Numitor Gold Mining Co. v. Katzer, 83 Cal.App. 161, 256 P. 464, that the collector must give such an instruction disregarded the fact that it is not required by the statute. This statement was not necessary to the decision in that case and is disapproved.

[7] There is no merit in the contention that the tax levy was void because it called for an amount in excess by $926.61 of the $10,000 budgeted for a certain school district. The excess, which was less than 10 per cent of the item budgeted, was a reasonable allowance for tax delinquency. Pol. Code, § 3714(5); Ryan v. Byram, 4 Cal.2d 596, 51 P.2d 872; Otis v. County of Los Angeles, 9 Cal.2d 366, 70 P.2d 633.

[8] An examination of the record discloses that the delinquent list for 1935 was published in the body of a newspaper and not in a supplement, as contended by defendant.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, JJ., and PETERS, J. pro tem., concurred.



21 Cal.2d 11

JUDSON et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18115.

Supreme Court of California.

Oct. 1, 1942.

As Modified on Denial of Rehearing Oct. 30, 1942.

1. Appearance ⇐9(1)

Whether an appearance is a "general appearance" or a "special appearance" is determined by the character of the relief sought and not by the intention of the party that it shall or shall not operate as a general or special appearance.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance" and "Special Appearance".

2. Appearance ⇐9(1)

Statement of a party that he is making a special appearance is not conclusive as to whether the appearance is special or general.

3. Appearance ⇐9(1, 2)

If defendant by his appearance insists only on the objection that he is not in court for want of jurisdiction and confines his appearance for that purpose only, then he has made a "special appearance", but if he raises any other question or asks any relief which can be granted only on the hypothesis that court has jurisdiction, then he has made a "general appearance".

4. Appearance ⇐9(5)

Where petitioner for writ of prohibition to restrain court from rendering judgment against petitioner sought dismissal of case against petitioner, under code provisions providing for dismissal of action for want of prosecution for five years, the petition invoked affirmative action of the court to terminate the litigation, and thus petitioner put in a "general appearance". Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⇐60(6)

Provision of code of civil procedure for dismissal of action for want of prosecution for five years does not apply when it has been impossible to bring the case to trial because of conduct of the defendant in either secreting himself within the state to prevent service of summons, or in residing outside the state. Code Civ.Proc. § 583.

6. Dismissal and nonsuit ⇐60(3)

The statute requiring court to dismiss an action for want of prosecution for five years, though "mandatory" in form, should not be applied where, though the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for plaintiff to have brought the action to trial. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

7. Dismissal and nonsuit ⇐60(6)

Where summons was not made on defendants because of their evasion and concealment, statute requiring a court to dismiss an action for want of prosecution for five years was not applicable. Code Civ. Proc. § 583.

TRAYNOR, J., dissenting.

In Bank.

Proceeding by Mrs. R. W. Judson, Sr., and others against the Superior Court of Los Angeles County for a writ of prohibition to restrain the respondent from rendering judgment against petitioners fol-

lowing entry of their default in an action brought against them.

Writ denied.

For prior opinion, see 116 P.2d 96.

Rehearing denied; TRAYNOR, J., dissenting.

Macfarlane, Schaefer, Haun & Mulford, Macfarlane, Schaefer & Haun, and William Gamble, all of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and Victor L. Mindlin, all of Los Angeles, for respondent.

PER CURIAM.

Upon a further consideration of the questions presented by the petitioners in this proceeding, the opinion upon which the case was decided when the matter was before the District Court of Appeal, and now modified in part, is adopted as the opinion of this court. In stating the reasons for the decision, Mr. Justice White said:

"In this proceeding, the petitioners claim that they are entitled to a writ of prohibition restraining respondent court from rendering judgment against petitioners, following the entry of their default in an action brought against them in said court. On April 18, 1935, an action was commenced in respondent superior court against petitioners by one Charles R. Bertrand, and upon the same date summons was issued. On April 21, 1941, petitioners herein as defendants in the action served and filed a notice of motion to dismiss the action for want of prosecution, by reason of the fact that five years had elapsed since the filing thereof. § 583, Code Civ.Proc. In the aforesaid notice of motion it was stated specifically that the moving parties 'will make a special appearance for the purpose of moving this Court for an order dismissing the above entitled action.' Without narrating in detail each and all of the acts done by plaintiff in the action to effect service of complaint and summons upon petitioners, as defendants therein, suffice it to say that at the hearing of the aforesaid motion in respondent court, there were introduced various affidavits from which it appeared that plaintiff had made constant, diligent and unceasing, but unavailing, efforts to serve petitioners with process throughout the years intervening between the filing of the action and the hearing on the motion to dismiss same. Based upon such affidavits, the filing of which is alleged in respondent court's answer to the petition herein, and which filing is undenied, the court denied the motion of petitioners on the ground that they had either secreted themselves within the State of California to prevent service of summons, or had resided outside the State of California, by reason of which respondent court determined that at no time did it have the power to proceed to trial in said action.

"Petitioners' contentions herein are twofold: A. That the motion to dismiss under section 583 of the Code of Civil Procedure is not a general appearance, and that, therefore, the court had no right to order the default of the defendants entered. B. That after five years had elapsed from the time an action is filed, and said cause has not been brought to trial, the trial court loses jurisdiction over said action for all purposes, except to dismiss the same.

[1-3] "Whether an appearance is general or special is determined by the character of the relief sought and not by the intention of the party that it shall or shall not operate as a general or special appearance. The statement of a defendant or party that he is making a special appearance is not necessarily conclusive. The test is—Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. In re Clarke, 125 Cal. 388, 58 P. 22. The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he had made a general appearance. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Zobel v. Zobel, 151 Cal. 98, 90 P. 191.

[4] "In the instant case we are impressed that petitioners in seeking a dismissal of the case, pursuant to the provisions of section 583 of the Code of Civil Procedure, were invoking the affirmative action of the court in their behalf to terminate the litigation. How they could apply for the relief asked on any other theory than that they were submitting themselves to the general jurisdiction of the court in the action is not apparent to us, because the relief they sought was such as could be given only to a party in a pending case. Zobel v. Zobel, supra."

[5] The petitioners' claim that when an action is not brought to trial within five years after the filing thereof, the court loses jurisdiction thereof for all purposes, save only to dismiss it, and that the court must exercise its obligatory duty. Answering that contention, said Mr. Justice White, the provisions of section 583 of the Code of Civil Procedure require the court to dismiss an action when the statutory requirements are met. But, he correctly observed, the rule is not so rigid as to be without exception, and an action should not be dismissed when, as a result of the conduct or action of a defendant, the plaintiff may not proceed to trial with reasonable certainty that a judgment would conclusively determine the rights of the parties.

In the present case, according to affidavits filed in 1940 in response to a motion to dismiss the action, the plaintiffs were advised by persons living where the petitioners had formerly made their home, that they were then residing without the State of California. Later, the petitioner Ross W. Judson successfully moved the court to quash service of summons upon him. In connection with the petitioners' last motion, the ruling upon which is now presented for determination, facts were shown which justified a finding that service of summons had not been made upon them because of their evasion and concealment.

[6, 7] Under these circumstances, to require the plaintiffs to take the uncertain path of publication of summons against defendants who, they had been informed, were non-residents, would reward subterfuge and make dishonesty profitable. The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for the plaintiff to have brought the action to trial. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; and Kinard v. Jordan, 175 Cal. 13, 164 P. 894. The facts of the present case show much greater justification for an exception to the statutory requirement than those heretofore presented as the basis for an order denying a motion to dismiss.

Because of the former decisions, Mr. Justice White concluded, "the only hypothesis upon which the petitioners could base their motion to dismiss under section 583 of the Code of Civil Procedure was that respondent court had the power to proceed to trial of said cause, and this hypothesis necessarily presupposes and includes that respondent court was clothed with jurisdiction of the persons of petitioners. Such appearance on the part of petitioners was therefore a general appearance by them, and the fact that the court denied petitioners' motion is of no consequence in determining the nature of their appearance any more than was the designation of the same by petitioners as a special appearance. Having made a general appearance and thereafter failing to plead in the action, and the court having correctly ruled upon such motion under the facts here presented, no error was committed by respondent court in directing the entry of the default of said petitioners, and respondent court should not be restrained from entering a judgment against them." Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245, is overruled and Anderson v. Nawa, 25 Cal.App. 151, 143 P. 555, is disapproved.

It is ordered that the alternative writ issued herein be discharged; the peremptory writ prayed for is denied.

TRAYNOR, Justice (dissenting).

I dissent. It is my opinion that the respondent court has not acquired jurisdiction over the petitioners and should therefore be restrained from entering a default judgment against them. While I agree that the court properly denied petitioners' motion, I do not believe that petitioners made a general appearance in seeking a dismissal of the action. Had they requested a ruling that could be made only upon the hypothesis that the court had jurisdiction over them, the appearance would be general, for by making the request they would admit that the court had jurisdiction, thereby waiving its lack of jurisdiction. Thus,

in the case of In re Clarke, 125 Cal. 388, 58 P. 22, relied upon in the majority opinion, the defendant admitted the jurisdiction of the court by demurring to the complaint. A court does not sustain demurrers and decide moot questions of persons over whom it has no jurisdiction. Likewise, in Zobel v. Zobel, 151 Cal. 98, 90 P. 191, cited in the majority opinion, the defendant filed an answer, a pleading preparatory to a hearing on the merits, which could not be considered by the court if it did not have jurisdiction over the defendant. I do not believe, however, that a defendant invariably makes a general appearance by raising a question other than lack of jurisdiction, and I therefore disagree with the statements to the contrary in Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317, and Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826. It has been held by this court that by requesting and securing an order extending time to plead, a defendant does not make a general appearance or admit that the court has acquired jurisdiction over his person. Benson v. Benson, 176 Cal. 649, 169 P. 369; Davenport v. Superior Court, 183 Cal. 506, 511, 191 P. 911. A court does not need jurisdiction over the person to grant such an order, and there is no inconsistency in requesting such an order while maintaining that the court lacks jurisdiction. Similarly, a court without jurisdiction over the person can dismiss an action under section 583 of the Code of Civil Procedure, and a defendant, without being inconsistent or impliedly recognizing the jurisdiction of the court, can request such an order while maintaining that the court lacks jurisdiction. There is nothing in section 583 to limit the class of persons who can have actions dismissed. Neither expressly nor by implication does the statute make a general appearance a condition of securing the dismissal of an action thereunder. Thus, in Charpstein v. Eells, 132 Cal. 507, 64 P. 1080, 1082, in holding that an appearance to dismiss an action for failure to serve a summons within the three years prescribed by Code of Civil Procedure section 581(7), as amended in 1889, was a special appearance only, the court declared: "* * * if defendant voluntarily appears, and answers, and demands a trial, after the three years the court has jurisdiction to proceed. In this case the respondent did not so appear. The fact that plaintiff, after three years, had the summons served upon her, and that default was entered, did not show any consent or voluntary appearance. When she appeared it was for the purpose of asking that the action be dismissed as to her. She had the right to have it dismissed." See also, Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245; Anderson v. Nawa, 25 Cal.App. 151, 143 P. 555; Altpeter v. Postal Telegraph-Cable Co., 26 Cal.App. 705, 148 P. 241; McBaine, Practice: Objections to Jurisdiction Over the Person and the Subject Matter, 30 Cal.L.Rev. 690.



20 Cal.2d 865

BILA v. YOUNG et al.

L. A. 17904.

Supreme Court of California.

Sept. 29, 1942.

1. Mandamus ⇐154(4)

Where allegations of petition in mandamus proceedings to compel Social Welfare Board to award petitioner old age security payments presented a question of law as to whether board properly interpreted provisions of statute under which it operated, petition stated a cause of action entitling trial court to examine board's action. St.1937, pp. 1083, 1085, §§ 2160(g), 2163, 2164.

2. Mandamus ⇐70

Where the action of an administrative board involves construction of the statute under which the board functions, a "question of law" is presented which may be reviewed upon mandate.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

3. Evidence ⇐47

The Supreme Court could take notice of rules adopted by Social Welfare Board.

4. Paupers ⇐43(2)

A transfer of realty assessed at less than $3,000 by an applicant for old age security payments did not constitute a "transfer of property for purpose of qualifying applicant for aid" so as to render applicant ineligible therefor, in view of statutory provision that ownership of realty does not disqualify a person from receiving old age payments unless assessed value of realty amounts to $3,000. St.

1937, pp. 1083, 1085, §§ 2160(g), 2163, 2164.

See Words and Phrases, Permanent Edition, for all other definitions of "Transfer of Property for Purpose of Qualifying Applicant for Aid".

5. Mandamus ⇐172

The administration of the Welfare and Institutions Code being conferred upon local boards of supervisors and the Social Welfare Board, in mandamus proceedings to compel latter board to award petitioner old age security payments, the trial court had no power to determine amount of payments or date at which such payments should be made. St.1937, pp. 1083, 1085, §§ 2160(g), 2163, 2164.

In Bank.

Appeal from Superior Court, Los Angeles County; Norman A. Bailie, Judge pro tem.

Mandamus proceedings by Rosanna Bila against Archibald B. Young and others to compel the Social Welfare Board to award petitioner old age security payments. From a judgment for petitioner, Archibald B. Young and others appeal.

Reversed with directions.

For prior opinion, see 120 P.2d 904.

Earl Warren, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Clarence A. Linn, of San Francisco, for appellants.

Joseph K. Coady and Henry K. Elder, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

In this mandamus proceeding, petitioner sought to compel the respondent Social Welfare Board, and its individual members, to make an award of old age security payments in the sum of $40 a month. Pursuant to the provisions of the Welfare and Institutions Code (Stats.1937, ch. 369, as amended), petitioner made application in March, 1939, to the Board of Supervisors of Los Angeles County for monthly old age security payments. After extensive investigation on the part of the board this application was denied in October, 1939. Thereafter, as provided in Welf. & Inst. Code, § 2182, an appeal was taken from the decision of the board of supervisors to the respondent board. The appeal was dismissed after a hearing thereon as provided by statute and the present action was then instituted.

The Social Welfare Board (hereafter called the Board) demurred to the first amended petition for a writ of mandate. After further amendment, the demurrer was overruled and an answer was filed. The evidence presented consisted of the transcript of proceedings before the Board. Thereafter judgment was rendered in favor of petitioner, and the Board brought this appeal upon a bill of exceptions in which the specifications of error challenged the court's power to review the Board's action and the sufficiency of the evidence to support the judgment.

[1, 2] Insofar as respondent's first specification of error is concerned, we think the trial court was clearly correct in holding that the petition states a cause of action entitling the court to examine the action of the Board. Under the allegations of the petition a question of law is presented as to whether the Board properly interpreted the provisions of the statute under which it operates. Thus, it is alleged that the Board acted arbitrarily and capriciously in that it "made the granting of old age security to your petitioner contingent upon your petitioner securing a life estate in certain property of which she was not the owner; that such a contingency was not then and is not now a requirement for the securing of old age security under the Social Welfare Act." Where the action of an administrative board involves construction of the statute under which it functions, a question of law is presented which may be reviewed upon mandate under the procedure existing in this state. Sweesy v. Los Angeles, etc., Retirement Board, 17 Cal.2d 356, 110 P.2d 37; Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917; cf. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800; Bowman v. Los Angeles City Board of Education, 46 Cal.App.2d 319, 115 P.2d 906; Simmons v. Board of Police, etc., Com'rs, 48 Cal.App. 2d 682, 121 P.2d 39. Under the allegations of this petition, therefore, a cause of action was stated and the court was entitled to examine the petitioner's contention that the Board erroneously interpreted the provisions of the statute.

Under the allegations of the petition and the evidence produced, it seems clear that the Board misconstrued the provisions of the statute. The order of which petitioner complains resulted from the Board's doubts concerning a transfer of Los Angeles real property assessed at $550 from

petitioner to her brother. The property was the petitioner's home, and the transfer occurred after her application for old age payments had been denied by the board of supervisors. At the original hearing before the Board this transfer of real property was questioned, as was the transfer of $1,000 to the same brother in 1938, several months prior to the application for old age payments. The ground for the Board's doubt is found in section 2160 of the Welfare & Institutions Code, St.1937, p. 1083, which provides that aid shall be granted to any person who meets the conditions specified and "(g) Who has not made any voluntary assignment or transfer of property for the purpose of qualifying for such aid." Section 2163 of the Code states: "No aid under this chapter shall be granted or paid to any person who owns personal property the value of which exceeds five hundred dollars." Section 2164 provides: "No aid under this chapter shall be granted or paid to any person who owns real property the assessed value of which, as assessed by the county assessor, exceeds three thousand dollars at the time such person makes application for aid." Petitioner claimed that the transfer of the $1,000, which was received from an earlier sale of Colorado property, and the transfer of the Los Angeles property were made in consideration of prior debts which she owed to her brother. The Board was dissatisfied with the evidence of petitioner's debt to her brother and continued the hearing for further information. It was stated by the chairman and the members of the Board at that time, however, that an attempt should be made to secure a reconveyance to petitioner of a life estate in the Los Angeles property in order to clear any suspicion that the transfer was made to qualify her for aid. At the final hearing on the matter the Board was informed that the brother declined to reconvey a life estate in the Los Angeles property. Thereupon a motion was made and carried that petitioner's appeal be denied.

[3] The final denial of petitioner's appeal resulted, it is clear, from the Board's conclusion that the transfer of the Los Angeles real property was made to qualify petitioner for old age payments and from the refusal of petitioner's brother to comply with the Board's request for reconveyance. The Board's position in interpreting Welfare & Institutions Code, § 2160(g), as indicated in this case, is that a conveyance of real property for an inadequate consideration disqualifies an applicant even though the value of the property is less than the statutory maximum permitted, but that any re-acquisition of a life interest in the property would operate to remove the disqualification. This position is expressed formally in the rules adopted by the Board of which we may take notice. Rule 135-00 provides in part: "A transfer or assignment of real property by an applicant * * * without receipt of adequate consideration * * * may render him ineligible for aid, even though the value of the property does not exceed the maximum set by law." Rule 135-80 provides, however, that a transfer of real property with a reservation of a full life estate will not be interpreted as a voluntary transfer for the purpose of qualifying for aid, and Rule 136-30 states that, despite a prohibited transfer, the county "may grant * * * aid if the applicant * * * is otherwise eligible, provided the property is reconveyed, and adequate consideration is received, or the full privileges of a life estate are secured."

[4] We think that the Board's order in this case, based upon its interpretation of Welfare & Institutions Code, § 2160(g), resulted from an error in construing the statute. The question of the Board's power to grant aid where the property is reacquired, despite a voluntary transfer in violation of the statute, need not be determined at this time since no order granting aid under such circumstances is involved here. Nor need we be concerned about the transfer of $1,000 to petitioner's brother some months prior to her application for aid because, although the Board considered that factor at some length at the first hearing, its order entered at the final hearing was based solely upon its conclusion with respect to the Los Angeles real property. The conveyance of that property which concededly was assessed at less than $3,000 constituted, in the Board's mind, a transfer for the purpose of qualifying for aid. But under Welfare & Institutions Code, § 2164, ownership of real property does not disqualify a person unless the assessed value of the real property amounts to $3,000. If ownership of this particular property could not have disqualified petitioner from receiving aid, there is no ground under the statute for concluding that a transfer of the property was made in or-

der to qualify petitioner for aid. In other words, the Board's conclusion, embodied in Rule 135-00, that a transfer for an inadequate consideration will "render * * * (an applicant) * * * ineligible for aid, even though the value of the property does not exceed the maximum set by law" does not constitute a proper interpretation of the statute under which it functions. The Board's order, having resulted from a misconstruction of the statute, must be held to be erroneous.

[5] The judgment entered by the trial court, however, instructing the Board to make payments in the sum of $40 a month from the date of petitioner's first application is incorrect. Since the administration of this statute is conferred upon local boards of supervisors and the respondent Social Welfare Board, the trial court had no power to determine the amount of payments or the date at which such payments should be made. The judgment is therefore reversed with directions to the trial court to issue a peremptory writ of mandate directing the respondent Board to determine petitioner's right to old age security payments in accord with the principles set forth herein. Each side is to bear its costs upon this appeal.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, JJ., and PETERS, J., pro tem., concurred.



20 Cal.2d 885

PEOPLE v. PUTNAM.

Cr. 4425.

Supreme Court of California.

Sept. 29, 1942.

1. Criminal law ⇐238

Testimony of prosecuting witness at preliminary hearing was sufficient to establish that there was reasonable cause to commit accused under statute dealing with crimes against children and that trial court did not abuse its discretion in denying accused's motion to set aside the information. Pen.Code, §§ 288, 995.

2. Criminal law ⇐768(1)

An accused is entitled in sex offenses to a cautionary instruction to jury as to weighing the evidence of prosecuting witness.

3. Criminal law ⇐785(6)

In prosecution under statute dealing with crimes against children, instruction stressing 12-year-old prosecuting witness' immaturity and seeking to have his testimony viewed with caution for that reason alone was properly rejected as failing to instruct on the difficulty of defending against the charge. Pen.Code, § 288; Code Civ.Proc. § 1880, subd. 2.

4. Criminal law ⇐768(1)

Although ordinarily the jury need not be advised as to the reason for a rule of law in an instruction, an accused in a prosecution for sex offenses is entitled to have the jurors informed that the charges made against him are easily made and difficult to disprove, and that the testimony of the prosecuting witness should be examined with caution.

5. Criminal law ⇐768(1)

A simple admonition to view the testimony of a prosecuting witness in a prosecution for sex offenses with caution would be misleading as conveying the impression that the trial judge mistrusts the testimony of the particular witness.

6. Criminal law ⇐785(6)

In prosecutions for sex offenses, there is no general rule that testimony of children admittedly competent as witnesses is less trustworthy than testimony of older persons and hence there is ordinarily no occasion for a cautionary instruction on that basis. Code Civ.Proc. § 1880, subd. 2.

7. Criminal law ⇐824(1)

The trial court in a criminal case must instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts, and the court is not relieved of such duty to give instructions whose necessity is developed through the evidence introduced at the trial, an instruction being "necessary" if it is vital to a proper consideration of the evidence by the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Instruction".

8. Criminal law ⇐824(10)

A cautionary instruction in prosecutions for sex offenses is "necessary" to insure proper consideration of the evidence by jury and trial court must give such instruction on his own motion.

9. Criminal law ⇐555

No corroboration is required in prosecutions for sex offenses.

10. Criminal law ⇐1173(1)

The circumstances of the case must determine whether trial court's failure to instruct the jury constitutes prejudicial error.

11. Criminal law ⇐1173(2)

In prosecution under statute dealing with crimes against children, where trial court had instructed jury that a witness is presumed to speak the truth and a different verdict would not have been improbable had jury been cautioned as to testimony of the prosecuting witness, trial court's failure to give the cautionary instruction was prejudicial error. Pen.Code, § 288.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Roy J. Putnam was convicted of a violation of the statute dealing with crimes against children, and he appeals.

Reversed.

For prior opinion, see 123 P.2d 573.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Appellant, convicted of violating section 288 of the Penal Code, appeals from the judgment and from an order denying a motion for a new trial.

[1] Appellant contends at the outset that the trial court erred in denying his motion, made under section 995 of the Penal Code, to strike the information "on account of the insufficiency of the preliminary transcript." At the preliminary hearing the complaining witness, a boy twelve years old, testified as follows: He was playing in Westlake Park in the city of Los Angeles on April 9, 1941, when appellant offered him a job distributing handbills. He accepted the job and the following day met appellant in the park at an appointed time, and was told that appellant had to go home to change his clothes and then had to go to the printer's to get the bills because they weren't ready. The boy accompanied appellant in the latter's car to his lodgings a short distance from the park. During the ride appellant placed his hand on the boy's leg and in the words of the witness "on the way over to the house * * * he kept feeling my private parts." When they arrived at a rooming house they went to the room of appellant, who proceeded to change his clothes in the boy's presence, and asked if the witness wanted to see his private parts. The boy said no, and did not see them. Appellant also asked the boy if he knew what his own private parts were. While appellant was engaged in changing his clothes, he again felt the boy's private parts. A few minutes later they left the house and the complaining witness told appellant to "get a new boy, I'm through," and ran home and reported the incident to his mother. At the hearing the boy's mother corroborated the complaint made by her son. The manager of appellant's rooming house testified that she saw the complaining witness in the company of appellant at the rooming house on the day in question. The foregoing testimony is sufficient to establish that there was reasonable or probable cause for appellant's commitment, and that the trial court did not abuse its discretion in denying the motion to set aside the information. In re McCarty, 140 Cal.App. 473, 35 P.2d 568; In re Mesquita, 139 Cal.App. 91, 33 P.2d 459; Ex parte Heacock, 8 Cal.App. 420, 97 P. 77.

Appellant contends that the order denying his motion was based, not on the evidence presented at the hearing but upon a statement by the prosecuting officer that additional evidence would be presented at the trial. The argument on the motion and the comments of the trial judge reveal that the commitment was based upon the examination of the witnesses. Although at one time during the hearing on the motion the trial judge remarked, "I am frank to state that the showing on the part of the People, in my opinion is very slight here," he later stated, in denying the motion, that he could not ignore the statement of the complaining witness, "That he kept feeling my private parts."

[2] Appellant lays great emphasis upon the contention that the trial court erred in refusing to give a cautionary instruction offered by appellant. Cautionary instructions in criminal prosecutions for sex offenses originated with the observation of Sir Matthew Hale that rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Pleas of the Crown 634. See People v. Benson, 6 Cal. 221, 65 Am.Dec. 506; People v. Rogers, 26 Cal.App.2d 371, 79 P.2d 404; Magwire v. People, 77 Colo. 149, 235 P. 339; Doyle v. State, 39 Fla. 155, 22 So.

272, 63 Am.St.Rep. 159; State v. Loomer, 105 Kan. 410, 184 P. 723; State v. Lightheart, 153 Minn. 40, 189 N.W. 408; Crump v. Com., 98 Va. 833, 23 S.E. 760. In a number of jurisdictions such instructions are regarded as an improper invasion of the province of the jury. Doyle v. State, supra; Black v. State, 119 Ga. 746, 47 S.E. 370; State v. Peterson, 102 Mont. 495, 59 P.2d 61; State v. Birchard, 35 Or. 484, 59 P. 468; State v. Rutledge, 63 Utah 546, 227 P. 479; Crump v. Com., supra; see People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Barnett, 99 Cal.App. 409, 278 P. 885; People v. Hoosier, 24 Cal.App. 746, 142 P. 514. In some jurisdictions their allowance or refusal is wholly within the discretion of the trial court. Magwire v. People, supra; State v. Trusty, 122 Iowa 82, 97 N.W. 989; State v. Loomer, supra; Strand v. State, 36 Wyo. 78, 252 P. 1030; Territory v. Bodine, 32 Hawaii 528. See, also, People v. Barnett, supra; People v. Fraysier, 36 Cal.App. 579, 172 P. 1126; People v. Currie, 16 Cal.App. 731, 117 P. 941. In still others failure to give such instructions constitutes error and ground for reversal of judgments of conviction. People v. Adams, 14 Cal.2d 154, 93 P.2d 146; People v. Vaughan, 131 Cal.App. 265, 21 P.2d 438; People v. Garrett, 27 Cal.App.2d 249, 81 P.2d 241; Conners v. State, 47 Wis. 523, 2 N. W. 1143; Rex v. Parkin, 31 Manitoba 438. Any uncertainty as to the right of a defendant to such protection in this state was dispelled by this court in People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 103, 130 A.L.R. 1485, stating: "We are firmly of the view that in all cases of this character the defendant should be afforded the benefit of a cautionary instruction as was here requested to the general effect that such a charge is easily made and difficult to disprove for which reason the testimony of the prosecuting witness should be examined with caution." Compare People v. Rangod, 112 Cal. 669, 44 P. 1071; People v. Knight, 63 Cal. App. 63, 218 P. 79; People v. Hoosier, supra, which were decided before trial courts were authorized to comment on the evidence.

[3-5] The instruction that appellant requested was: "You are hereby instructed to view with great care and caution the testimony of a child of immature years." The court properly refused to give this instruction, for it would have failed to instruct the jurors of the difficulty of defending against the charges made. Although ordinarily the jury need not be advised as to the reasons for the rule of law in an instruction, the facility with which charges of the kind here involved may be invented places the defendant in a peculiarly vulnerable position, usually with no defense except his own denial of the asserted misconduct. The defendant is entitled to have the jurors informed that the charges made against him are "easily made and difficult to disprove" and that "the testimony of the prosecuting witness should be examined with caution." People v. Lucas, supra. A simple admonition to view the testimony of the complaining witness with caution would be inadequate and misleading, for it would convey the impression that for undisclosed reasons the trial judge distrusts the testimony of the particular witness. See People v. Rudolph, 28 Cal.App. 683, 153 P. 721; People v. Kawasaki, 23 Cal.App. 92, 137 P. 287. The cautionary instructions approved by the appellate courts of this state as well as others in cases like the present one have embodied the reasons that prompted them. People v. Adams, 14 Cal.2d 154, 93 P.2d 146; People v. Garrett, 27 Cal.App.2d 249, 81 P. 2d 241; People v. Vaughan, supra; People v. Hewitt, 78 Cal.App. 426, 248 P. 1021; People v. Fraysier, supra; People v. Currie, 16 Cal.App. 731, 117 P. 941.

[6] The particular instruction requested in this case, stressing the witness's immaturity and seeking to have his testimony viewed with caution for that reason alone, was rejected by the trial court, probably because it did not apply to the evidence and circumstances of the case. People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Modina, 146 Cal. 142, 79 P. 842. See, also, cases cited in 8 Cal.Jur., p. 821. There is no general rule that the testimony of children admittedly competent as witnesses is less trustworthy than the testimony of older persons; hence there is ordinarily no occasion for a cautionary instruction on that basis. See cases cited in 27 Cal.Jur. 181. In the present case the complaining witness was twelve years old, well above the age of the incompetent child witness envisaged in subdivision 2 of section 1880 of the Code of Civil Procedure.

[7] While the trial court did not err in refusing the particular instruction requested, it does not follow that it was justified in failing to give an appropriate instruction. See People v. Frey, 165 Cal. 140, 131 P. 127; People v. Tapia, 131 Cal. 647, 63 P. 1001. It is incumbent upon a court in

a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. People v. Warren, 16 Cal.2d 103, 104 P.2d 1024; People v. Scofield, 203 Cal. 703, 265 P. 914; People v. Nudo, 38 Cal.App.2d 381, 101 P.2d 162; People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090; People v. Best, 13 Cal.App.2d 606, 57 P.2d 168; see 8 Cal.Jur. 309. The court is not relieved of the duty to give instructions whose necessity is "developed through the evidence introduced at the trial." People v. Warren, supra [16 Cal.2d 103, 104 P.2d 1031]. An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. People v. Warren, supra; People v. Tapia, supra; People v. Heddens, 12 Cal. App.2d 245, 55 P.2d 230. Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony (People v. Warren, supra; People v. Heddens, supra), corroborative evidence in cases involving the obtaining of property by false pretenses (People v. Curran, supra), testimony of expert witnesses (People v. Williamson, 134 Cal.App. 775, 26 P.2d 681), admission of confessions and the necessity of independent proof of the corpus delicti (People v. Frey, supra (murder)), definition of manslaughter in prosecution for murder where evidence might sustain verdict of manslaughter (People v. Manzo, 9 Cal.2d 594, 72 P.2d 119), and presumption of innocence and burden of proof. People v. Matthai, 135 Cal. 442, 67 P. 694; People v. Soldavini, 45 Cal.App.2d 460, 114 P.2d 415.

[8] A cautionary instruction in cases like the present one is necessary to insure a proper consideration of the evidence by the jury. It has long been recognized that there is no class of prosecutions "attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance." People v. Benson, supra; see People v. Lucas, supra; People v. Adams, supra; People v. Baldwin, 117 Cal. 244, 249, 49 P. 186; People v. Vaughan, supra. Thus in the Adams case this court observed that "As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt." [14 Cal.2d 154, 93 P.2d 152.]

[9] The requirement of cautionary instructions in cases like the present one is prompted by the same considerations that necessitate instructions with respect to corroborative evidence. See People v. Benson, supra; People v. Miller, 27 Cal.App.2d 722, 81 P.2d 567; People v. Garrett, supra; People v. Vaughan, supra; People v. Caldwell, 55 Cal.App. 280, 203 P. 440. No corroboration is required in cases like the present one since it is ordinarily precluded by the very nature of the offense. People v. Troutman, 187 Cal. 313, 201 P. 928; People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887; People v. Von Benson, 38 Cal.App.2d 431, 101 P.2d 527. The rule permitting a conviction on the uncorroborated testimony of the prosecuting witness is necessary to protect the public but it needs a counterweight to protect the accused. The policy that requires the court to instruct of its own motion on the law relative to corroboration imposes a corresponding duty to give cautionary instructions, for the very secrecy that precludes corroboration also precludes effective denial. The ordinary reaction to an accusation of a sex offense usually committed in secret is that the offense has been committed, and a necessary safeguard against injustice is a warning to view such accusations cautiously.

[10, 11] The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error. People v. Britton, 6 Cal.2d 10, 56 P.2d 491. In People v. Garrett, supra, a judgment of conviction for violation of section 288 of the Penal Code, resting upon the uncorroborated testimony of a ten-year-old child who apparently had been coached before testifying was reversed for refusal of the trial court to give a cautionary instruction. See, also, Conners v. State, supra. In People v. Lucas, supra, a failure to give a cautionary instruction did not constitute reversible error where an examination of the record disclosed that the evidence clearly pointed to the appellant's guilt. It is apparent from

the record in the present case, however, that the failure to give a cautionary instruction was prejudicial and that a different verdict would not have been improbable had the error not occurred. The complaining witness, a twelve-year-old boy, testified that while he was riding in appellant's automobile appellant placed his hand on the boy's leg. When asked to show where, he placed his hand, according to the court's description, "pretty close to the groin, I would say, on the front of the leg though, right directly on the front of the leg opposite the groin." The witness went on to testify that during a drive of from five to ten minutes appellant rubbed and patted his leg approximately nine or ten times; that after arriving at appellant's rooming house appellant changed his clothes in the boy's presence, meanwhile asking the boy if he wanted to see appellant's private parts; and that while at the rooming house appellant again patted the witness' leg. The testimony disclosed that appellant did not at any time touch the boy's bare skin nor make any attempt to unfasten his trousers. The witness, having testified that appellant "felt" or "touched" his private parts while they were driving to appellant's rooming house, was interrogated by the court as follows: "Q. Did he ever take your private parts in his hand? A. No, he did not. He felt them.

"Q. How did he feel them? A. He ran his hand over them.

"Q. How many times? A. Only the once." At the preliminary hearing the witness testified that while driving in the car appellant placed his hand on the witness' leg only three or four times and when asked if appellant then touched his private parts, answered that "he did in the house." Appellant denied the charges. The jury was properly instructed that a witness is presumed to speak the truth, but it was not cautioned as to the testimony of the prosecuting witness. In view of the circumscribed extent of the acts alleged and the inconsistencies in the witness' testimony, it is doubtful whether the same verdict would have been rendered had the cautionary instruction been given.

The judgment and the order denying the motion for new trial are reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, JJ., and PETERS, J. pro tem., concurred.

21 Cal.2d 33

LAMB v. CALIFORNIA WATER & TELEPHONE CO.

L. A. 17655.

Supreme Court of California.

Oct. 2, 1942.

1. Waters and water courses ⇐257(1)

If water company was a public utility when it entered into contract granting lower riparian owner right to use water for irrigation at certain rate, and had dedicated the impounded water to a public use, the contract was subject to regulation by the Railroad Commission, and question whether lower riparian owner personally knew that he was dealing with a public utility was immaterial. Gen.Laws 1937, Act 6386.

2. Waters and water courses ⇐257(1)

The filing of a condemnation action by a water company is evidence of an intention to dedicate impounded waters to a public use so as to give the Railroad Commission jurisdiction over rates and service. Gen. Laws 1937, Act 6386.

3. Waters and water courses ⇐257(1)

Whether or not lower riparian owner, at time he entered into contract with water company giving him right to use all water necessary for irrigation at certain rate, knew that water impounded by water company's dam had been dedicated by the company to public use, so as to give Railroad Commission jurisdiction over rates and service, was immaterial. Gen.Laws 1937, Act 6386.

4. Waters and water courses ⇐144, 256, 257 (1)

The purpose for which water company was organized was a factor which might be considered in determining the character of the use to which water appropriated by the company was to be put, and whether Railroad Commission had jurisdiction over rates and service. Gen.Laws 1937, Act 6386.

5. Waters and water courses ⇐256, 257(1)

Provisions of applications for water service allowing water service, furnished by water company which had impounded waters of river, to be terminated at the request of either party after a specified period, did not affect the public nature of the water company, and did not affect Railroad Commission's jurisdiction over rates and service. Gen.Laws 1937, Act 6386.

6. Waters and water courses ⇐257(1)

Evidence *held* sufficient to justify finding that defendant's predecessor dedicated whole capacity of its water system to public use before execution of contract between defendant's predecessor and plaintiff's predecessor fixing rate for water to be used for irrigation so as to empower Railroad Commission to fix defendant's rates for water service to plaintiff. Gen.Laws 1937, Act 6386.

7. Eminent domain ⇐276

A lower riparian owner may not wait until completion by a public utility of a dam intended to impound all waters of a stream and then enjoin the use of the dam or the impounded waters, but his remedy is to sue for damages in an inverse condemnation action. Const. art. 1, § 14.

8. Waters and water courses ⇐240

Public utility could purchase appropriated water rights or compensate for damages arising because of the appropriation made by it without resorting to the courts. Const. art. 1, § 14.

9. Waters and water courses ⇐257(1)

Under constitutional provision that the use of all water appropriated or to be appropriated is declared to be a public use subject to the regulation of the state, contract between water company and lower riparian owner for the furnishing of water to the lower riparian owner at certain rate was subject to subsequent regulation and control of the state. Const.1879, art. 14, § 1.

10. Waters and water courses ⇐256

Where water of river was appropriated by water company and dedicated to a public use, the company no longer had the right to reserve from its water supply any private interest so as to exclude the exercise of the public's regulatory power. Const.1879, art. 14, § 1.

11. Waters and water courses ⇐256, 257(1)

The supplying of water by public utility to lower riparian owner after public utility impounded water of river, and rate to be charged for the service, were subject to the action of the Railroad Commission. Gen.Laws 1937, Act 6386.

12. Waters and water courses ⇐257(1)

Until Railroad Commission acted to regulate rates to be charged by public utility for water, contract between water company and user of water, whereby water company was to furnish water at certain rate, was enforceable. Gen.Laws 1937, Act 6386.

13. Damages ⇐60, 120(1)

Where water company, a public utility, agreed with riparian owner, in exchange for easement for a water main, to give him a perpetual right to receive such water as was necessary for his land for irrigation purposes at a fixed monetary rate, upon failure of the company to perform the contract because of supervention of public regulations, the company was required to compensate the owner in the amount of the value of the riparian right taken from his predecessor together with the value of the easement until it was abandoned, and, as a credit upon such amount, the owner would be charged for the value of benefits received by the predecessor and his successors in interest. Gen.Laws 1937, Act 6386.

14. Specific performance ⇐49(2)

Where trial court found that there was insufficient evidence to show that consideration for contract of a water company, a public utility to furnish water to a riparian owner for irrigation purposes at a certain monetary rate was adequate, owner was not entitled to specific performance of the contract. Civ.Code, § 3391.

15. Specific performance ⇐49(2)

The statute providing that specific performance cannot be enforced against a party if he has not received an adequate consideration for the contract makes adequacy of consideration a prerequisite to the granting of such relief. Civ.Code, § 3391.

16. Injunction ⇐59(2)

Injunction would not lie to enjoin public utility from raising rates on water furnished to user, in excess of rate specified in contract between public utility's predecessor and user's predecessor, where the public utility was merely charging the rate set by the Railroad Commission, since the user, until the contract rate was annulled by the Railroad Commission, could secure adequate compensation by an action for damages.

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Walter C. Lamb against the California Water & Telephone Company for a declaration of rights under an arbitration agreement respecting a pipe-line right of way and water right between a ri-

parian owner and a water company, and for an injunction against repudiation of such agreement by defendant as the water company's successor in interest. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

For prior opinion, see 121 P.2d 852.

Lowell Howe, of Chula Vista, and Charles C. Loosli, of San Diego, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, and Philip Storer Thacher, of El Cajon, for respondent.

EDMONDS, Justice.

A contract entered into more than 50 years ago in connection with the water which is made available for irrigation by the Sweetwater Dam in San Diego County, is the basis of the appellant's action for declaratory and other relief. By that contract, the respondent's predecessor in interest gave a perpetual right to the use of water upon a certain tract of land. The respondent, a public utility, now refuses to supply water except upon the payment of the rates fixed for all users.

In the year 1884, Erastus Lake acquired certain lands riparian to the Sweetwater River. Two years later, the San Diego Land & Town Company, an upper riparian owner, began the construction of the Sweetwater Dam for the purpose of impounding all the waters of the river and, at the same time, commenced the construction of water mains and distributing systems in anticipation of sales of water to the inhabitants of the surrounding area.

The dam was completed in the early part of 1888. Certain differences arose over the diversion of the river's waters, and also because of the maintenance, through Lake's property, of a water main constructed by the water company. The dispute was submitted to arbitration, and the decision of the arbitrators was confirmed in a written contract between Lake and the company.

By the terms of this agreement in consideration of Lake's granting to the company an easement for a water main through his land, and his express waiver of all claims "for other or further compensation or damage" which the land or Lake as its owner "may have already sustained, or which may be hereafter sustained * * * by reason of the diversion of the waters of said river" by the company, "or the construction and maintenance of said line of pipe, or the entry upon said lands for the inspection and repair of said pipe and taps under this agreement," the company granted Lake "a perpetual right to him and his assigns, said right to be appurtenant to and to run with the land, to use all the water necessary for the irrigation at all times" of Lake's property at a rate not to exceed $3.50 per acre annually. The company and its successors in interest, including the respondent company, furnished water in accordance with this agreement for almost 50 years.

In 1937 the respondent by letter notified the appellant Lamb, the present owner of the land formerly owned by Lake, that it had completed construction of a new water main and was therefore abandoning the easement through his property created by the contract. In addition, the respondent said, thereafter any water service would "be rendered pursuant to the company's applicable rules and regulations and to the company's rates applicable for such service on file with the Railroad Commission of the State of California." Upon receipt of this notice, Lamb began this action for a declaration of his rights under the contract of 1888, alleging that he is entitled to water service at the contract rate. Claiming that he has no adequate remedy at law to protect his rights under the contract, Lamb also asks that his right to receive water from the company be declared an easement in favor of his land and a perpetual burden upon the plant and distributing system of the respondent, and he seeks an injunction permanently enjoining the company from raising the rates on the water furnished to him pursuant to the contract and requiring it to continue to supply the water upon the terms specified in the agreement.

By way of answer the respondent interposed four defenses: (1) That the parties to the contract intended their respective rights and obligations to continue only so long as the company maintained its easement on the Lake property; (2) that the San Diego Land & Town Company was organized for the purpose, among others, of supplying water to the public and in 1888 dedicated all waters thereafter acquired by it to the use and service of the public, and that it was a public utility at the time the contract in question was executed; that the company has returned and released to the appellant all rights it is entitled to receive under the contract; (3) that an application for an order abolishing the alleged preferential and discriminatory rates for water

and services furnished the appellant had been filed and was then pending with the Railroad Commission of the State of California, and the commission has the power to abolish discriminatory, unreasonable and preferential rates being enjoyed or claimed by any consumer regardless of any written contract existing between the consumer and the public utility; (4) that the appellant has used a quantity of water greatly in excess of that "necessary for the irrigation * * * of * * * [Lake's] 15 acres."

Pending the trial of the action, the Railroad Commission dismissed the company's application without prejudice. The third defense was then stricken by the trial court.

In addition to the facts stated above, the following testimony is uncontradicted: The charter of the company, issued in 1881, states that the company was organized, among other purposes, for "the supply of water to the public." After commencing construction of the dam, the company brought suit, in the spring of 1887, to condemn as a reservoir site and for "a public use" a parcel of land lying above and adjacent to the dam then under construction. In the following year, the board of trustees of National City passed an ordinance authorizing the company to lay and maintain water pipes in the city for the purpose of supplying water to the city and the inhabitants thereof for the term of 50 years, and to charge and collect such fees or rates as the city board of trustees should establish. On the same day, a rate ordinance was passed by the city fixing the charges for water service furnished to its inhabitants.

At the time the Lake contract was executed, the company had received 212 applications for water service from the residents of National City and also the inhabitants of the surrounding area. The application forms concluded with the proviso "(This Contract shall remain in force until the first day of next January, when it may be terminated at the request of either party; but in case no such request is made, then the same shall continue in force for one year thereafter, and so on from year to year, until such request is made. * * *)"

Upon this evidence the trial court found that the company constructed the Sweetwater Dam for the purpose of impounding the waters of the Sweetwater River above the Lake land; that the dam and water distributing system were completed in February, 1888, at which time the company began the distribution of water to the surrounding area. The court also found that Lake took no measures to prevent the erection of the dam and actually acquiesced in such erection; and that it was manifest, or in the exercise of ordinary diligence should have been manifest, to Lake that its purpose was "to devote, not a part only, but all of the flow of the river to be effectively impounded by it to a public use." In addition, the court's findings are that on or before the completion of the dam in February, 1888, the company definitely indicated its intention to devote all of the flow of the river impounded by it to a public, as distinguished from a private, use, including water destined for a different use than the supply for National City; and that the company had, prior to the execution of the Lake contract, become a public utility. The court concluded that, when the Lake contract was made, the company was entitled, in the capacity of a public utility, to make use of all of the flow of the Sweetwater River effectively impounded by the dam, and that it had dedicated all such water to the public use long prior to the execution of the contract. Accordingly, the judgment upholds the Lake contract as a valid and subsisting agreement, subject to the regulation and control of the Railroad Commission, and denies the appellant either an injunction or specific performance.

The appellant, at great length, analyzes and attacks the findings of the trial court, asserting that it (a) extended the rule of estoppel by substituting imputed knowledge for actual knowledge; (b) charged Lake with knowledge of the contents of a condemnation complaint to which he was not a party; (c) ignored the element of estoppel assertedly requiring a change in position on the part of the public in reliance upon the acquiescence of the riparian owner, and (d) ignored the fact that the estoppel had not been pleaded. He also contends that three of the trial court's findings are not supported by the evidence. Thus he charges that the trial court based its finding that Lake took no measures to prevent the erection of the dam, acquiesced in such erection, and by the use of ordinary diligence should have ascertained that all of the flow of the river effectively impounded by the dam was dedicated to a public use, by charging him with knowledge of the contents of the condemnation complaint.

The specific finding that on or before the completion of the dam in 1888 the company indicated its intention to devote all the water

effectively impounded by the dam to a public, as distinguished from a private, use, is attacked by the appellant upon the ground that there is no evidence from which the court could find that the Sweetwater Dam was completed in that year. He argues that the only evidence from which the court could possibly find that the company indicated an intention to devote the impounded waters to a public use is the condemnation complaint, which, he asserts, "can in no wise affect the appellant's rights under the contract here before the court." Moreover, he says, the finding that the company, prior to the execution of the contract, had begun actual service of water to areas either inside or outside of National City is totally unsupported by the evidence.

Other points are also relied upon. The question of adequacy of consideration for the contract was not litigated in this action, urges the appellant, and therefore no finding thereon is proper. Discussing the merits of his action, he contends that when a riparian owner transfers his riparian rights to a water company and simultaneously receives from it the right to receive a quantity of water for the irrigation of his land, the water conveyed to him retains its riparian character even though the land no longer borders upon the stream. And if, because a public interest has intervened, the appellant is not entitled to an injunction to protect his asserted riparian rights, then he argues that, although relegated to an action for damages, his damages should be fixed by the judgment in the present action.

[1] Answering these points, the respondent contends that all of the essential findings of the trial court are supported by substantial evidence. According to the water company, the repeated assertion of the appellant that the knowledge of the contents of the condemnation complaint filed in 1887 was erroneously imputed to Lake by the trial court, rests upon a misconception of the purpose for which the condemnation pleadings were introduced in evidence. The allegations of the complaint, it asserts, were merely offered in evidence to show a declaration of intention by the company to dedicate the impounded waters to a public use at a time prior to the execution of the contract, and not to charge Lake with knowledge, actual or imputed, of such declarations as the basis for an estoppel. If the company was a public utility at the time it entered into the Lake contract and had dedicated the impounded water to a public use, the contract is subject to regulation by the Railroad Commission, and the question whether Lake personally knew he was dealing with a public utility is immaterial.

[2, 3] The preliminary point to be determined is whether the evidence sufficiently supports the finding of the trial court that, prior to the execution of the contract, the water impounded by the respondent's dam had been dedicated by the company to a public use. It has been held that the filing of a condemnation action is evidence of an intention to dedicate impounded waters to such a use (Producers' Transp. Co. v. Railroad Commission, 176 Cal. 499, 169 P. 59; Byington v. Sacramento Valley West Side Canal Co., 170 Cal. 124, 148 P. 791), and Lake's knowledge or lack of knowledge concerning it is immaterial.

[4, 5] The purpose for which a company is organized is also a factor which may be considered in determining the character of the use to which the water appropriated by the utility is to be put (Williamson v. Railroad Commission, 193 Cal. 22, 29, 222 P. 803; Brewer v. Railroad Commission, 190 Cal. 60, 210 P. 511; Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 140 P. 591, 948), and further support for the finding is found in the authorization of service extended by National City to the company, together with the fixing by the city of the rates to be charged for such service, at a date prior to the execution of the contract. Brewer v. Railroad Commission, supra; Palermo Land & Water Co. v. Railroad Commission, 173 Cal. 380, 160 P. 228. It is undisputed that 212 applications for water service, some of which came from non-residents of National City, had been received by the company before it entered into the contract with Lake. And the concluding provisions of each application allowing the water service to be terminated at the request of either party after a specified period has been held not to affect the public nature of the utility. Osborne v. San Diego Land & Town Co., 178 U.S. 22, 20 S.Ct. 860, 44 L. Ed. 961.

[6] Although it is true, as urged by the appellant, that a utility may reserve for private purposes a portion of the waters appropriated by it, and not already dedicated to a public use (Allen v. Railroad Commission, 179 Cal. 68, 82, 175 P. 466, 8 A.L.R. 249; Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 P. 119), the record is devoid of any evidence showing any pri-

vate use of the impounded waters by the company prior to the execution of the Lake contract. Upon this record, the finding of the trial court that, before entering into the contract with Lake, the company had dedicated all of its waters to a public use, is fully supported by substantial evidence.

As contended by the appellant, there is no direct evidence in the record that the dam was completed in 1888. A clipping from a newspaper published in 1888, announcing the turning on of the water supplied to the inhabitants of National City, and an account in a scientific magazine of the dam's construction, were introduced at the trial for identification only. But the contract discloses by its terms that Lake's riparian water had already been diverted by the company, and the appellant concedes in his briefs that the dam effectually impounded all of the ordinary flow of the river. The language in the contract, together with the prior receipt of applications for water service and the ordinances of National City, afford ample indirect evidence of the appropriation of the water by the company.

[7, 8] It is elementary that under the provisions of the California Constitution, private property may not be appropriated by a public utility without just compensation. Const., art. I, § 14. But a lower riparian owner may not wait until the completion by a public utility of a dam intended to impound all the waters of a stream and then enjoin the use of the dam or the impounded waters. At that time his remedy is to sue for damages in an inverse condemnation action. Collier v. Merced Irr. Dist., 213 Cal. 554, 563, 564, 2 P.2d 790; Conaway v. Yolo Water & Power Co., 204 Cal. 125, 131, 133, 266 P. 944, 58 A.L.R. 674; Miller & Lux v. Enterprise Canal, etc., Co., 169 Cal. 415, 429, 147 P. 567; Gurnsey v. Northern California Power Co., 160 Cal. 699, 711, 117 P. 906, 36 L.R.A.,N.S., 185; Barton v. Riverside Water Co., 155 Cal. 509, 515, 101 P. 790, 23 L.R.A.,N.S., 331; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 252, 76 P. 1032, 65 L.R.A. 940; Fresno, etc., Co. v. Southern Pacific R. Co., 135 Cal. 202, 207, 208, 67 P. 773; Southern California Ry. Co. v. Slauson, 138 Cal. 342, 344, 345, 71 P. 352, 94 Am.St.Rep. 58. Of course, the public utility may purchase the appropriated rights or compensate for the damages arising because of an appropriation made by it without resorting to the courts, and the contract between Lake and the company evidences such an agreement.

By the terms of that contract, Lake, in consideration of the grant of a perpetual water right to be appurtenant to his land, waived all claims to damages because of the company's appropriation of his riparian rights. Had the consideration for this contract been an agreed amount of money, the present controversy would not have arisen. The question therefore decisive of this appeal, is whether a public utility which had already dedicated and appropriated the waters of a lower riparian owner to a public use may subsequently enter into a contract with the lower riparian owner, granting to him in exchange for his waiver of damages for the diversion of his waters, a perpetual right expressly made appurtenant to his land to receive so much of the appropriated water as is necessary for his land at a fixed monetary rate which is not subject to regulation by public authority.

[9, 10] At the time Lake and the water company executed their agreement, the California Constitution of 1879 provided: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law * * *." Art. XIV, § 1. By the express terms of this constitutional provision, the contract, insofar as the agreement to furnish water is concerned, was subject to subsequent regulation and control of the state. Williamson v. Railroad Commission, supra; Limoneira Co. v. Railroad Commission, 174 Cal. 232, 162 P. 1033; Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 P. 404, 29 L.R.A.,N.S., 213; Law v. Railroad Commission, 184 Cal. 737, 740, 195 P. 423, 14 A.L.R. 249. The water having been appropriated and dedicated to a public use, the utility no longer had the right to reserve from its water supply any private interest so as to exclude the exercise of the public regulatory power. Limoneira Co. v. Railroad Commission, supra; Leavitt v. Lassen Irrigation Co., supra.

In this respect the rights of the parties differ from those shown in Copeland v. Fairview Land & Water Co., supra. In that action, the riparian right appurtenant to a tract of land was transferred to a holding company which simultaneously re-

transferred the right to the owner of the tract in consideration of the issuance to it of the entire capital stock of the corporation. Subsequently the stock was transferred to purchasers of the lots into which the tract was subdivided. The court held that the water right so conveyed to the lot purchasers retained its riparian character. In the present action, there was no transfer by Lake of his water right to the company as a trustee, with a simultaneous retransfer to him of his riparian right in another form. On the contrary, after the intervention of the public interest by an appropriation and dedication of his water to a public use, he waived his damages for such a taking in consideration of the grant of a perpetual right to receive the water so appropriated and dedicated by the company.

[11, 12] Under the Public Utilities Act, Deering's Gen.Laws, 1937, Act 6386, the Railroad Commission exercises the regulatory power of the state over the rates of and service extended by a public utility. The supplying of water to the appellant and the rate to be charged for the service by the respondent utility is subject to the action of the commission. Nevertheless, until the commission has acted to regulate the rates specified in a contract by which water is to be supplied by a public utility, the agreement made by the parties will be recognized and enforced. Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 10 P.2d 780; and see Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 159 P. 865, L.R.A.1917E, 680; Fresno Canal, etc., Co. v. Park, 129 Cal. 437, 62 P. 87; Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 28 P. 873, 18 L.R.A. 221, 28 Am.St.Rep. 142.

[13] In the event that the commission orders the company to charge the appellant the same rate for the water supplied to him as it charges others in the vicinity, the company will thereby be excused from performing its contract with him. He would then be entitled to restitution. Law v. Railroad Commission, supra, 184 Cal. page 741, 195 P. 423, 14 A.L.R. 249; and see Ogren v. Inner Harbor Land Co., 83 Cal.App. 197, 256 P. 607. Section 108 of the Restatement of Restitution provides: "A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution * * * if the other is privileged not to perform because of supervening impossibility, in accordance with the rule stated in the Restatement of Contracts, section 468. * * *" The section referred to reads: "* * * Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time. * * *"

Applying these rules to the facts shown in the present action, upon any failure of the company to perform the contract caused by the supervention of public regulation, justice requires that it must compensate the appellant in the amount of the value of the riparian right taken from his predecessor in interest, together with the value of the easement for the maintenance of the water main until it was abandoned. As a credit upon such amounts, the appellant must be charged for the value of the benefits received by Lake and his successors in interest.

[14, 15] The finding of the trial court, fully justified by the record, that there is insufficient evidence from which it could find that the consideration for the Lake contract was adequate forecloses the appellant from securing the remedy of specific performance. The declaration of section 3391 of the Civil Code that "Specific performance cannot be enforced against a party * * * if he has not received an adequate consideration for the contract," makes adequacy of consideration a prerequisite to the granting of such relief. Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065; O'Connell v. Lampe, 206 Cal. 282, 274 P. 336; O'Hara v. Wattson, 172 Cal. 525, 157 P. 608; Haddock v. Knapp, 171 Cal. 59, 151 P. 1140; Morrison v. Land, 169 Cal. 580, 147 P. 259; Wilson v. White, 161 Cal. 453, 119 P. 895; Notten v. Mensing, 20 Cal.App.2d 694, 67 P.2d 734; Kelsey v. San Fernando Development Co., Inc., 124 Cal.App. 279, 12 P.2d 70.

[16] Nor is the appellant entitled to injunctive relief. The record discloses no evidence that the respondent has refused to deliver water to the appellant but only that it insists upon the payment of a higher rate than that prescribed by the con-

tract. Until the contract rate is annulled by the Railroad Commission, the appellant may secure adequate compensation for the failure of the respondent to perform its obligations under the contract by an action for damages.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

CARTER, J., concurred in the judgment.



20 Cal.2d 870

LOS ANGELES COUNTY v. LA FUENTE.

L. A. 18258.

Supreme Court of California.

Sept. 29, 1942.

1. Paupers ⇐51

In county's action for reimbursement for aid granted to defendant's parents under the Old Age Security Law, trial court's finding that defendant was not ready, able and willing to support her parents, and that she made no offer to support them in adequate living quarters, was not supported by the evidence. St.1937, pp. 1078–1095, §§ 2000–2228.

2. Paupers ⇐51

In county's action for reimbursement for aid granted to defendant's parents under the Old Age Security Law, witness' testimony relative to defendant's home that it was "unorthodox and very incomplete", that it was unsanitary because on one occasion "it wasn't clean, it was dirty; there were dirty dishes and the stove * * * and the floor had not been attended to", constituted an opinion not justifying designation of house as not being "adequate living quarters". St.1937, pp. 1078–1095, §§ 2000–2228.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Living Quarters".

3. Paupers ⇐43(2)

Under the Old Age Security Law, one who is otherwise eligible to aid is not rendered ineligible by reason of an unaccepted offer of support in the home of a relative. St.1937, pp. 1083, 1094, §§ 2160, 2224.

4. Paupers ⇐43(2)

Provisions of the Old Age Security Law authorizing the granting of support to any person who is not receiving adequate support from a husband, wife, or child, able and responsible under the law to furnish such support is not "ambiguous" and no rule of construction allows a court to write into it an exception which would restrict its operation. St.1937, pp. 1083, 1094, §§ 2160, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Ambiguous".

5. Paupers ⇐43(2)

The right to receive benefits of the Old Age Security Law is not conditioned upon the destitution and pauperism required for indigent relief provided by the state and its subdivisions under the Welfare and Institutions Code. St.1937, pp. 1078–1095, §§ 2000–2228; pp. 1097–1102, §§ 2500–2615.

6. Paupers ⇐43(2)

Under the Old Age Security Law, only the receipt of support from responsible relatives renders an applicant ineligible for benefits thereunder. St.1937, pp. 1083, 1094, §§ 2160, 2224.

7. Constitutional law ⇐70(3)

The state may provide a needy aged person with a certain measure of independence and happiness of mind in addition to physical security, and whether it is wise to give benefits to one who has a child willing and able to support him is a question for the attention of the legislature and not for the courts. St.1937, pp. 1083, 1094, §§ 2160, 2224.

8. States ⇐119

In determining whether the appropriation of public money is to be considered a "gift" within the constitutional prohibition, the primary question is whether the funds are to be used for a public or private purpose, and if the money is for a public purpose, the appropriation is not a gift even though private persons are benefited by the expenditure. Const. art. 4, §§ 22, 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

9. Constitutional law ⇐70(1)

The courts will not disturb a legislative determination of what constitutes a public purpose so long as it has a reasonable basis.

10. States ⇐119

The relief of aged persons who are in need clearly may be a special matter of state concern in promoting public health and welfare, and in enacting the Old Age Security Law, the legislature has not made a "gift of public money" within the constitutional prohibition. St.1937, pp. 1078–1095, §§ 2000–2228; Const. art. 4, §§ 22, 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift of Public Money".

11. Paupers ⇐51

A county which furnished aid under the Old Age Security Law to defendant's parents was entitled to reimbursement from defendant who was able to contribute to the financial support of the parents, even though defendant offered to support parents in her home before the aid was extended. St.1937, pp. 1083, 1094, §§ 2160, 2224.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by County of Los Angeles against Gretta La Fuente for reimbursement for old-age benefits rendered to defendant's parents. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 119 P.2d 772.

Gretta La Fuente in pro. per., for appellant.

J. H. O'Connor, Co. Counsel, and L. K. Vobayda and Gerald G. Kelly, Deputy Co. Counsels, all of Los Angeles, for respondent.

EDMONDS, Justice.

The Old Age Security Law (Welfare & Institutions Code, §§ 2000–2228, St.1937, pp. 1078–1095) gives a county a cause of action against specified responsible relatives of a person who has received aid under that statute. The appellant is the defendant in such an action and denies liability for the amount paid by the county of Los Angeles to her parents upon the ground that they were ineligible for benefits because of an offer of support made by her to them.

Parker and Isa Gray, the parents of the appellant, received old age security benefits totaling $738 from October 1, 1937, to February 1, 1939. From her employment as a teacher in the public schools, the appellant earned $2,610 in the school year 1937-38, $2,720 in 1938-39, and at the time of the trial of this action in December, 1939, she was earning $293 per month on a ten-month school year basis. She has an eighteen-year-old son dependent upon her for support.

When Mr. and Mrs. Gray applied to the county for old age pensions, Mrs. La Fuente requested it to deny their applications upon the ground that she was able and willing to support them in her home. Her offer in this regard is not only undisputed but was admitted by Mrs. Gray, who also conceded in her testimony that Mrs. La Fuente stated that they might bring their incompetent daughter with them. And counsel for the county stipulated that the appellant notified the agencies administering the law allowing old age security benefits she would care for her parents if they would come and live with her.

Mrs. Gray frankly stated the reasons why she and her husband did not accept their daughter's proposal. In the first place, said Mrs. Gray, "we have never gotten along in our lives, and we could not get along. She has a suspicious disposition, and she has a jealous disposition. * * * For another thing, I have an incompetent daughter that I have taken care of for eighteen years, and I could not throw her down because she has nobody else to lean on. I am the only one she has confidence in, and her home is her whole life."

The appellant did not seriously challenge the county's showing that she is financially able to contribute to the support of her parents, basing her defense primarily upon her offer to care for them in her own home. She admitted that she owns the house in which she is living, and that, for a number of years, she has been a teacher in the public schools. But the trial court made findings that she was not "ready, able and willing, nor did she at any time offer to support * * * her father and mother in adequate living quarters"; also, that she did not notify the respondent's Department of Charities of her willingness to render financial aid to her parents. Judgment followed in favor of the county for the full amount of the benefits given Mr. ar Mrs. Gray, with interest.

The appellant's contentions upon appeal are numerous, and not all of them are pertinent. Her argument that the county "secretly" extended aid to her parents from 1934 to the spring of 1937, without her knowledge and prior to any demand upon her to support them, is of course immaterial, since the payment by the county of the amount sued for did not commence until October, 1937. Equally without the issues of this case is the appellant's argument that Mrs. Gray was ineligible for aid because she could have secured compensation for her care of an incompetent daughter (the appellant's sister) by suing the daughter's husband. Of more substance is the appellant's contention that her parents were not in need because she had offered, and still offers them, support in her home. The appellant also argues that, since no objection has ever been made by her parents to the physical inadequacy of her home, and the county did not question its facilities until the trial of this action, the court should not have considered evidence concerning the accommodations offered by her. Other contentions of the appellant consist of assertions that a number of the trial court's findings of fact are not supported by the evidence.

The county takes the position that, under the evidence, the home offered Mr. and Mrs. Gray by the appellant was not properly habitable and that the relationship between the appellant and her parents is entirely incompatible. It also asserts that Mr. and Mrs. Gray's applications fulfilled the requirements of the Old Age Security Law, and the offer of aid by the daughter, even if adequate, did not deprive them of their right to secure its benefits.

[1] The defense of offer of support may be considered (1) as affecting the eligibility of the applicants for benefits under the statute, and (2) as affecting the liability of the appellant, as a responsible relative, to reimburse the county extending the aid, irrespective of the question of eligibility. For there is no evidence to support the court's finding that the appellant was not ready, able and willing to support her parents or that she made no offer to support them in adequate living quarters. Although Mrs. Gray placed the refusal to live with her daughter, in part, upon the idiosyncrasies of the latter's disposition, it is apparent from the record that the motivating influence was her desire to continue the care of the incompetent daughter in the home which they then occupied. It would be very dangerous to the incompetent, said Mrs. Gray, to have different arrangements made for her.

[2] And if the court's reference to "adequate living quarters" was based upon the testimony of a health inspector of the city of Los Angeles, the record shows that, upon a final inspection of Mrs. La Fuente's house, he found plumbing conditions passable. His criticism of the building as "unorthodox and very incomplete" and the statement that the kitchen was unsanitary because, on one occasion, "it wasn't clean, it was dirty; there were dirty dishes and the stove * * * and the floor had not been attended to", constitute opinions which do not justify the designation of the house as not being "adequate living quarters." In this connection, it is significant that at no time has Mrs. Gray, or her husband, refused to live with her daughter upon the ground that the house she occupies is not adequate. Nor has the county ever contended, until the time of trial, that Mrs. La Fuente's home was unsuitable for her parents. Upon this record, therefore, the question is whether a child who is financially able to contribute to a parent's support may be compelled to reimburse a county, in whole or in part, for old age benefits if the parent has refused to live with the child in reasonably suitable quarters.

As enacted in 1929, the Old Age Security Act (Stats.1929, ch. 530, p. 914; Deering's Gen. Laws, 1931, Act 5846) made certain requirements of an applicant concerning age, citizenship and residence, and in addition provided that to be eligible one must have "no children or other person able to support him and responsible under the law of this state for his support." § 2. And the board of supervisors of a county extending the aid could require the recipient to transfer his property to the county as security for the aid so advanced. Quite logically, the Legislature gave the county no right to reimbursement against a responsible relative, for if the applicant had such a relative he was not entitled to benefits. The statute apparently contemplated that an aged person, neglected by a responsible relative, should enforce that liability by legal action. Civ.Code, § 206; see note, 26 Cal.L.Rev. 339–340.

Ineligibility arising from the existence of a financially responsible relative was retained when the Legislature amended the statute in 1935 to read: "Aid may be

granted under this act to any person who: * * * Has no relative of the following degree of kindred: Husband, wife or child, able and responsible under the law of this State for his support * * *" Stats.1935, pp. 1767, 1768, § 2, and the aid granted expressly was made a debt of the recipient, including a lien against his real property. § 4. But there was no provision requiring responsible relatives to reimburse the county.

In 1937, these legislative policies were radically changed by the Old Age Security Law, enacted as a part of the Welfare and Institutions Code. Stats.1937, ch. 375, p. 1185; Welfare & Institutions Code, §§ 2000-2228. The new statute provided, in part: "Aid shall be granted under this chapter to any person who comes within all of the following descriptions: * * * Who is not receiving adequate support from a husband, wife, or child, able and responsible under the law of this State to furnish such support." § 2160. And the debt or liability created for aid granted was shifted from the recipient thereof to a spouse or adult child pecuniarily able to support the recipient. § 2224. The Legislature also declared that all liens theretofore imposed upon the property of a recipient should be discharged. § 2225 [subsequently held unconstitutional in County of Los Angeles v. Jessup, 11 Cal.2d 273, 78 P.2d 1131. But cf. County of Alameda v. Janssen, 16 Cal.2d 276, 106 P.2d 11, 130 A.L.R. 1141.

[3, 4] The rights of the parties must be measured by the 1937 statute, and to hold that an unaccepted offer of support in the home of a relative renders ineligible the applicant for old age security benefits requires the interpolation of words which the Legislature has not used. There is no ambiguity in section 2160 of the Welfare and Institutions Code, and no rule of construction allows a court to write into a clear provision of law an exception which would restrict its operation.

It is true that the Old Age Security Law declares: "Subject to the provisions of this chapter, every person residing in the State, if in need, shall be entitled to aid in old age from the State." § 2001, supra. But the *"need"* of the applicant necessary to qualify for the benefits of the law is defined by the Legislature to be the absence of actual receipt of support by the applicant from responsible relatives and by the property limitations of the law. §§ 2163, 2164, supra. Under these sections, an applicant may be eligible although he owns personal property not exceeding $500 in value § 2163 and real property having an assessed value not in excess of $3,000. § 2164.

[5] The right to receive benefits is not conditioned upon the destitution and pauperism required for indigent relief provided by the state and its subdivisions under division IV of the Welfare and Institutions Code. Welfare & Institutions Code, §§ 2500-2615. And although the Old Age Security Law is declared to be an additional method of supporting and providing for the aged poor (Welfare & Institutions Code, § 2004), yet no person receiving aid under its provisions "shall be deemed a pauper by reason thereof. No warrant drawn in payment of the aid given under the provisions of this chapter shall contain any reference to indigency or pauperism." § 2009. Further dignity is given to the receipt of old age security benefits by the policy that such aid shall be provided to every applicant in his home, if possible, § 2005, and the benefits must be paid by warrant and not in the form of merchandise orders for food, rent or otherwise. § 2183.

[6, 7] Both the letter and the spirit of the Old Age Security Law clearly show that only the receipt of support from responsible relatives should render the applicant ineligible for benefits under it. The reason for the social policy given effect by the statute is clearly illustrated in the present action, where the appellant's mother asserts that she and her daughter have never been able to live together harmoniously. Certainly the state may provide a needy aged person with a certain measure of independence and happiness of mind, in addition to physical security. Whether it is wise to give benefits to one who has a child willing and able to support him is a question for the attention of the Legislature and not for the courts. Moore v. State Social Security Commission, 233 Mo.App. 536, 542, 122 S.W.2d 391, 394; Conant v. State, 197 Wash. 21, 84 P.2d 378.

But, argues the appellant, may an extension of aid under such circumstances be justified under the California Constitution?

The only provision seriously urged as conflicting with the legislative grant of old age security benefits is section 31 of article IV, prohibiting the Legislature from making or authorizing a gift of public money or thing of value to any individual or cor-

poration. The section expressly provides, however, that nothing shall prevent the Legislature from granting aid pursuant to section 22 of article IV, which in turn authorizes the granting of aid to "aged persons in indigent circumstances." Therefore, the legislative provision for old age security benefits does not constitute a violation of the Constitution if (1) it is not a gift of money or thing of value, or (2) it is a grant of aid to indigent aged.

[8, 9] In determining whether an appropriation of public money is to be considered a gift within the constitutional prohibition, the primary question is whether the funds are to be used for a public or a private purpose. If the money is for a public purpose, the appropriation is not a gift even though private persons are benefited by the expenditure. County of San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155 [use of county funds to pay delinquent assessments on over-burdened property]; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433 [street improvements]; Allied Architects' Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029 [erection of memorial hall for war veterans]; Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 P. 631 [transportation, tuition and living expenses for education of veterans]; Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288 [free school text books]; Patrick v. Riley, 209 Cal. 350, 287 P. 455 [payments for destruction of diseased cattle]; Sacramento & San Joaquin Drainage Dist. v. Riley, 199 Cal. 668, 251 P. 207 [flood control]; City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912 [bond issue for relief of indigent sick and poor]; Housing Authority of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794 [slum clearance]; Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510 [free treatment in county hospital only for those unable to pay]; and see notes in 9 Cal.Law Rev. 431, 18 Cal.Law Rev. 697. Applying this rule it was recently decided that the act of the Legislature in releasing liens against the property of recipients of old age security benefits was reasonably justifiable as being for the general public welfare, although such releases were also a grant of aid pursuant to section 22 of article IV for the support of indigent aged. County of Alameda v. Janssen, supra. The courts will not disturb a legislative determination of what constitutes a public purpose so long as it has a reasonable basis. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Powell v. Pennsylvania, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253; Veterans' Welfare Board v. Riley, supra; Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L.R.A. 474, 27 Am.St.Rep. 95.

[10] The care and relief of aged persons who are in need clearly may be a special matter of state concern in promoting public health and welfare, and, for the reasons stated, the Legislature in enacting the Old Age Security Law, based upon a broad social policy, has not made a gift of public money within the constitutional prohibition. It is therefore unnecessary to determine whether one who owns property not exceeding the amount specified by the Old Age Security Law, and who has refused the offer of a home with a relative responsible under the law for his support, is in indigent circumstances within the meaning of section 22 of article IV of the Constitution.

[11] But even though the recipient of old age security benefits may be entitled to receive the benefits of the law, yet, the appellant contends, the county should have no right to reimbursement from a responsible relative when, before the aid was extended, the relative offered to support the recipient in his home. Section 2224 of the Welfare and Institutions Code is complete in itself, and gives a right of action to the county if the person receiving aid has within the state a spouse or adult child pecuniarily able to support him. Upon the direction of the designated authorities, recovery may be had of such portion of the aid advanced as the relative is able to pay. County of Lake v. Forbes, 42 Cal.App.2d 744, 109 P.2d 972.

The measure of responsibility, as fixed by this statute, is in terms of money. If, as contended by the appellant, the only way in which she could support her parents was in her home and not by pecuniary assistance, such fact would constitute an absolute defense to her liability under the statute. The intention of the Legislature in this regard is also shown by the 1941 amendment to section 2181 of the Welfare and Institutions Code, St.1941, p. 3198, establishing a relative's maximum contribution scale based entirely upon the monetary income of the relative and the number of persons dependent on that income for support, and also providing the board of supervisors with discretion to accept less than the amount established by the scale in the

event of unusual expenses. But there is no evidence of the appellant's inability to give her parents any financial assistance other than her own assertion to that effect, unsupported by any testimony as to how her relatively large income is spent. Under such circumstances, the trial court was clearly justified in finding that she is able to contribute to the financial support of her parents and to reimburse the county for the aid advanced to them.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.



20 Cal.2d 814

TANNER et al. v. TITLE INSURANCE & TRUST CO. et al.

L. A. 17671.

Supreme Court of California.

Sept. 24, 1942.

Rehearing Denied Oct. 22, 1942.

1. Mines and minerals ⇐79(1)

Under lease of several landowners' respective lots as one tract, with exclusive right in lessee to drill for and produce oil on any part thereof, each owner shares proportionately in royalties, irrespective of lots on which oil is discovered.

2. Mines and minerals ⇐47

A landowner does not have absolute title to oil and gas in place as corporeal real property, but has exclusive right to drill therefor on his premises.

3. Mines and minerals ⇐79(1)

A community oil lease, whereby owners of leased lots pooled their interests and agreed that each should share in all benefits thereunder in ratio of acreage owned by each to entire acreage leased, gave none of them any rights in others' land, except to share in oil royalty, but transferred to lessee each owner's right to drill for and produce oil for term of lease, thus creating in lessee a right constituting a "profit a prendre".

See Words and Phrases, Permanent Edition, for all other definitions of "Profit A Prendre".

4. Mines and minerals ⇐70(1)

The royalty return rendered by lessee to lessor for a profit a prendre in land is analogous to rent and an "incorporeal hereditament".

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporeal Hereditament".

5. Mines and minerals ⇐79(1)

One to whom lessor under oil lease assigns fractional interest in royalties reserved to himself acquires estate in real property, an "incorporeal hereditament" analogous to right to receive future rents.

6. Mines and minerals ⇐79(1)

Each of several landowners executing community oil lease, providing that each should share benefits thereunder in proportion to acreage owned by each, assigned or conveyed to co-lessors a percentage interest, constituting "incorporeal hereditament in gross", in all oil produced on his land by lessee during continuance of lease in consideration of similar mutual assignments by other lessors, and one lessor's interest in oil produced on co-lessors' property is entirely separate from royalty interest retained by him in oil produced from his own premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporeal Hereditament in Gross".

7. Mines and minerals ⇐74

Though percentage of royalty reserved by lessor under oil lease in oil produced from his land passes to grantee of fee as incident of conveyance, except as such rights are reserved by deed, the incorporeal hereditament in gross, owned by grantor in oil produced from his co-lessors' land under community oil lease does not follow such conveyance, but can only be conveyed by specific transfer of such interest.

8. Mines and minerals ⇐74

Where neither trust deed of grantors' interest in two of nine lots covered by community oil lease, nor agreement between lessee, grantors and beneficiary for subordination of lease to trust deed purported to transfer to beneficiary grantors' incorporeal hereditament in gross in oil produced from other lessors' lots, beneficiary had no right, title or interest in or to such lots or their owners' royalty in oil produced therefrom.

9. Stipulations ⇐17(2)

Counsel's stipulation during trial of action to quiet title to royalty in oil from two of nine lots included in community oil lease that beneficiary of trust deed, executed by other lessors, who were not parties to action, was successor to all of such lessors' right, title and interest in lease and realty covered by trust deed, is not controlling, as beneficiary cannot bind such lessors by stipulation made with others.

10. Mines and minerals ⇐79(1)

A provision of written agreement for oil lessees' surrender of all leased lands except two lots, on which oil was being produced, that parties mutually release and discharge each other from all obligations under lease with respect to surrendered lands, did not mean that owners of such lands surrendered their rights as community lessors in lots retained by lessee, but parties' relationship as to such lots continued as before and such owners had right to participate in all royalties payable under lease.

11. Mines and minerals ⇐79(1)

Where owners of leased oil lands surrendered by lessee continued regularly to receive their share of royalties under community lease from oil produced on lands retained by lessee without objection by owners of retained lands, for five years, surrender agreement did not bar such owners from future participation in royalties.

12. Contracts ⇐170(1)

The interpretation placed on contract by parties thereto, as evidenced by their conduct after its execution, may be considered in determining its meaning.

13. Mines and minerals ⇐79(1)

Where community oil lease specified that owners of lots surrendered by lessee should be entitled to continue to share in royalties under lease, such owners did not forfeit such right by producing oil from their lots and appropriating all royalties therefrom to themselves.

14. Contracts ⇐143, 147(1)

The intention of parties to written contract as expressed in agreement is controlling, in absence of fraud or mistake, and courts are not empowered to depart from plain meaning of writing and insert term or limitation not found therein under guise of construction or explanation.

15. Contracts ⇐168

Implied covenants in contract are justified only when they are not inconsistent with some express term of contract and contract could not be effectively performed in absence of such implied terms.

16. Contracts ⇐168

Every contract contains implied covenant by each party not to prevent or hinder performance by other party.

17. Mines and minerals ⇐79(1)

The law will not allow one to claim royalties under community oil lease and at same time diminish amount of oil which might otherwise be recovered for common benefit of all lessors.

18. Evidence ⇐8

The Supreme Court may not take judicial notice that well drilled on land included in community oil lease after lessees' surrender of such land is draining oil from source of supply under such lease.

19. Quieting title ⇐10(1)

In action to quiet title, plaintiff must recover on strength of his own title, not on weakness of defendant's claim.

20. Mines and minerals ⇐79(7)

Where parties suing to quiet title to royalty interest under community oil lease did not prove that they owned such interest, judgment quieting title thereto in them as against beneficiary of trust deed, executed by previous owners of such interest, was improper, though it appeared that such beneficiary was not entitled to any portion of royalty payable from oil produced on plaintiff's land.

In Bank.

Appealed from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by George Tanner and another against the Title Insurance and Trust Company and others to quiet title. Judgment for plaintiffs, and defendants appeal.

Reversed.

For prior opinion, see 123 P.2d 497.

Rehearing denied; CURTIS and CARTER, JJ., dissenting.

Cree & Brooks, of Long Beach, Richardson & Jordon and Harold Richardson, all of Whittier, and Frank C. Charvat, of Long Beach, for appellants.

Burke, Hickson, Burke & Marshall, Harry C. Williams, and Daniel G. Marshall, all of Los Angeles, for respondents.

EDMONDS, Justice.

A rather unusual situation in the relations of adjoining landowners has occasioned the present controversy. Each of the parties, or his predecessor in interest, was, at one time, a lessor, with others, under what is termed a community oil lease. In an action to quiet title, brought by the respondents as the owners of two lots from which oil is being produced, the trial court determined that they are entitled to all of the landowners' royalty, and that the appellants, who are the owners of land which was surrendered by the lessee, have no interest therein. The appellants assert the right to share in the royalties provided for by this lease, and, also, to the entire proceeds of the oil which was discovered upon land owned by them, or their predecessors in interest, after the date of the surrender.

There is no dispute concerning the facts of the case. In 1921, Standard Oil Company leased nine contiguous parcels of land, described as lots, each of which comprises five acres. One Beaty and his wife were then the owners of the westerly one-half of lots 171 and 172 and joined in the lease. Some years later they executed a deed of trust for the benefit of the appellant Whittier Building and Loan Association. Under the terms of an agreement executed by the lessee, the trustors, the trustees and the association, the lease was made subordinate to the deed of trust. In 1934 the beneficiary became the purchaser of the property at a trustee's sale and three years later conveyed it, without reservation. Frank H. Olds and his wife, who are the other appellants, executed the lease as the owners of lot 173. The respondents are, respectively, the owners and lessors of lots 174 and 176.

The lessee drilled two wells, one on lot 174, and the other on lot 176. Oil in paying quantities has been produced from each of these wells for some years.

In 1933, the oil company, by an instrument in writing executed by it and the lessors, surrendered all land included within the terms of its lease except lots 174 and 176. At the time of the surrender, each of the lessors was then participating in the land-owners' royalties accruing under the terms of the lease. This participation continued until the commencement of the present action.

Three years later, the owners of the surrendered lots sued the respondents to quiet their respective titles and in June, 1937, a decree was rendered in their favor. Following the discovery of deeper sand in the Montebello Oil Field in the latter part of 1937, the appellants Olds leased their lot to the Bush Oil Company. Beginning in May, 1939, oil was produced from that lot and was being produced at the time of the trial. Royalties paid to the appellants Olds upon this production up to November 1, 1939, amounted to $13,500. No part of these royalties has been shared with the respondents. About the same time, and following the conveyance of the westerly half of lots 171 and 172, this land was also leased to Bush Oil Company, which, from 1939 and to the time of the trial of this action has produced oil in paying quantities from it.

As their sole ground for a reversal of the judgment, the appellants rely upon a provision of the lease reading as follows: "Said Lessors agree to, and they do hereby, pool their interest in this lease, and agree that during the continuance of this lease each owner of land subject thereto shall share in all benefits accruing to the whole lease in the ratio which the acreage owned by said Lessors bears to the entire acreage leased. This provision as to apportionment of benefits to be operative, notwithstanding the surrender by the Lessee of any land described herein." The respondents contend that the Whittier Building and Loan Association did not acquire any right to share in the royalties by virtue of the subordination agreement executed in connection with the Beaty deed of trust. And conceding, for the purpose of argument, that it did acquire such a right, so they say, the association divested itself of that right by its conveyance of the Beaty land. As against all of the appellants, the respondents urge that the surrender agreement extinguished the rights of the owners of the surrendered lots, including the appellants, to further participation in the community royalties. And as another and alternative ground, they contend that, under a proper construction of the clause relating to the sharing of royalties after a surrender, the owners of the surrendered lots forfeited their rights to participation when, subsequent to the time of the release of their lots,

they began producing oil from them and failed to share the royalties derived from that production with their colessors under the community lease.

[1] The distinguishing feature of a lease under which several landowners lease their respective lots as one tract, with the sole and exclusive right to the lessee to drill for and produce oil upon any part of it, is that each owner shares proportionately in the royalties irrespective of the lot or lots upon which oil is discovered. The owners of lots upon which no well is drilled share equally the fruits of the common venture with the lessors whose land proves productive. Also, it is often found that certain lots are either non-productive or cannot be economically used by the lessee. Under such circumstances it is usual to provide for the withdrawal of such land from the lease in order that it may be devoted to profitable uses. In the event of such a release, the rights of the owners of the surrendered lots to continued participation in royalties from production upon the land remaining under the lease must be considered. Accordingly, community oil leases commonly provide for the apportionment of benefits among all owners, notwithstanding the surrender by the lessee of any of the lands subject to the lease.

Such a provision was considered in First National Bank of Redondo v. Standard Oil Co. of California, 91 Cal.App. 705, 267 P. 548. That case arose after oil was discovered upon lots retained under the lease following the surrender of the non-producing lots. The owners of the producing lots claimed all of the royalties under the lease, asserting that the notice of surrender terminated the lease given by the lessee. The court rejected this contention and decreed that the owners of the surrendered lands were entitled to participate in future royalties. The appellants contend that the principles stated and applied in that case are controlling in the present controversy.

[2, 3] Under California law, the owner of land does not have an absolute title to the oil and gas in place as corporeal real property, but has the exclusive right to drill for them upon his premises. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 135, 114 P.2d 351, 135 A.L.R. 546; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 649, 52 P.2d 237; Callahan v. Martin, 3 Cal.2d 110, 117, 43 P.2d 788, 101 A.L.R. 871. By the express terms of the community lease now before the court, the landowners "pooled" their interests and agreed that, during its continuance, each of the lessors should share in all benefits accruing thereunder in the ratio which the acreage owned by him bore to the entire acreage leased. Reading the instrument as a whole, it gives no one of the lessors any rights in the land of the others except to share in the oil royalty. Each owner-lessor transferred to the lessee oil company his right to drill for and produce oil and other petroleum products for the term of the lease. The right thus created in the lessee is a profit à prendre. La Laguna Ranch Co. v. Dodge, supra, 18 Cal.2d page 135, 114 P.2d 351, 135 A.L.R. 546; Dabney v. Edwards, 5 Cal.2d 1, 11, 53 P.2d 962, 103 A.L.R. 822; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 649, 52 P.2d 237; Callahan v. Martin, supra, 3 Cal.2d page 122, 43 P.2d 788, 101 A.L.R. 871; Dallapi v. Campbell, 45 Cal.App.2d 541, 546, 114 P. 2d 646; Lever v. Smith, 30 Cal.App.2d 667, 671, 87 P.2d 66.

[4-6] The royalty return which the lessee renders to his lessor for a profit à prendre in land is analogous to rent, an incorporeal hereditament. Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237; Callahan v. Martin, supra, 3 Cal.2d page 123, 43 P.2d 788, 101 A.L.R. 871. And where the lessor under an oil lease assigns to third persons fractional interests in the royalties which he has reserved to himself, the holder of such an interest also acquires an estate in real property, an incorporeal hereditament analogous to the right to receive future rents. La Laguna Ranch Co. v. Dodge, supra, 18 Cal.2d page 135, 114 P.2d 351, 135 A.L.R. 546; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237; Callahan v. Martin, supra, 3 Cal. 2d page 124, 43 P.2d 788, 101 A.L.R. 871; Lever v. Smith, supra, 30 Cal.App.2d page 671, 87 P.2d 66. By executing the community lease, the respondents and each of the other lessors assigned or conveyed to his colessors a percentage interest in all oil produced on his land by the lessee during the continuance of the lease. The consideration for that transfer was the similar mutual assignments of the other lessors. The royalty interest thus transferred by each landowner to his colessors is an incorporeal hereditament in gross

(Callahan v. Martin, supra) and the grantee's interest in the oil produced upon the property of one of the colessors is entirely separate and distinct from the royalty interest retained by him in oil which might be produced from his own premises. The only connection between the two interests is that the pro-rata assignment by one of the lessors of the royalty from his land is the consideration for the conveyance of the other lessors to him.

[7, 8] Although the cases clearly establish that the percentage of the royalty reserved by a lessor in oil produced from his land passes to a grantee of the fee as an incident of the conveyance (see cases collected in note 94 A.L.R. 660), except as such rights are reserved by the deed, the incorporeal hereditament owned by the grantor in the oil produced from the land of the colessors, existing in gross, obviously does not follow the conveyance of the lessor's land, but can only be conveyed by a specific transfer of that interest. And as neither the subordination agreement nor the trust deed executed by Mr. and Mrs. Beaty purported to transfer to the appellant association their incorporeal hereditament in gross in the oil produced from the land of either Tanner or Hunt, the trial court properly decreed that Whittier Building and Loan Association has no right, title or estate in or to lots 174 and 176, or in the landowners' royalty in oil produced therefrom.

[9] The stipulation relied upon by the association is not controlling. During the trial, counsel stipulated that it is the successor in interest "as to all [the Beaty's] right, title and interest in the lease, and in and to the real property mentioned by virtue of the trustee's deed." Neither Mr. or Mrs. Beaty is a party to this action, and the association cannot bind them by a stipulation made with others.

[10] The rights of the appellants Olds, however, are governed by the principles followed in First National Bank of Redondo v. Standard Oil Co. of California, supra, unless it may be said that the surrender agreement of 1933, or the independent oil development by them, terminated their right to the royalties under the community lease. The respondents concede that a mere unilateral surrender by the lessee, as was involved in the Bank of Redondo case, does not terminate the right of the owners of surrendered premises to continue to share in the royalties accruing under the community lease. But the agreement of June 1, 1933, they urge, is not a simple surrender by the lessee, but is a bilateral agreement, executed by the lessee and all of the lessors, for the purpose of terminating the lease as to all of the land except lots 174 and 176, and by its terms foreclosed the appellants Olds, as the owners of surrendered lot 173 from further participation in the community royalties.

This agreement recites that "pursuant to the provisions of said agreement of lease * * * the parties hereto desire to terminate [it] * * * as to all of the lands covered thereby, save and except that portion of said lands hereinafter described, * * *." "In consideration of the premises," the agreement continues, "the parties hereto do hereby mutually agree as follows: The lessee does hereby terminate and surrender all of its right, title and interest in and to said agreement of lease * * * as to all of the lands covered thereby, save and except [Lots 174 and 176] * * *. The lessors hereby accept the foregoing termination and surrender * * * and the parties hereto do hereby mutually release and discharge each other from any and all obligations thereunder with respect to all of the lands covered thereby, save and except that portion of said lands hereinabove specifically described. * * *"

According to respondents, the effect of this agreement was to terminate the entire community lease, including the provision relating to the continued sharing of royalties after a surrender, as to all of the withdrawn lots, including the lot owned by the appellants Olds. Referring to the last provision of the agreement, they contend that when the parties "mutually released and discharged each other from any and all obligations" with respect to the surrendered lands, the appellants thereby released their right to continue to receive a share of the community royalties.

Admittedly this agreement is more than a quitclaim by the lessee since it was executed by all of the parties to the community lease. But its form and terms indicate an intention to affect only the relationship between the lessors, collectively, and the lessee. As to certain lots, the right to explore and drill for oil was terminated, but the rights and obligations

of the lessors, among themselves, with respect to the lots remaining under the lease were in no way affected.

In this connection, it should be stated that the surrender agreement was entered into at the request of the lessee. Therefore, it is only reasonable to assume that the lease was intended to relate only to the rights and duties of the lessee and not to the contractual relationship existing among the lessors themselves. The purpose of the lessee in employing the bilateral form of agreement was to eliminate any question which might well arise as to its unilateral contract. In the agreement executed by the parties the lessors together are designated as "the parties of the first part" and the lessee is referred to as "the party of the second part." The agreement recites that it is made pursuant to the lease, which may only be taken to mean that it was executed in accordance with the provision giving the lessee the right to surrender any portion of the premises. And the lease specifically provides that such surrender shall not affect the existing distribution of royalties.

The respondents attach undue significance to the word "terminate". That word is used several times in the lease itself but only in the sense of dissolving the lessee's relationship thereunder. Bearing in mind that the parties making the mutual release are the lessors together on the one part, and the lessee on the other part, the clause of the agreement whereby "the parties" mutually release and discharge each other from any and all obligations under the lease with respect to the surrendered lands, should be interpreted as meaning that the lessee agrees to a discharge of the lessors' obligation to retain such lots under the lease, and the lessors agree to release the lessee's obligation thereunder.

There is no reasonable basis for construing the provision to mean that the owners of the released lands surrendered their rights as community lessors in the lots retained under the lease. As to those lots, the relationship of the parties continued as before, and the owners of the surrendered lands have the right to participate in all royalties payable under the lease.

[11, 12] However, assuming that there is any ambiguity in the wording of the surrender agreement, such ambiguity must be resolved against the construction contended for by the respondents by reason of their conduct thereunder. From June, 1933, until 1938, when this suit was filed, the owners of the surrendered lands, including the appellants Olds, continued regularly to receive their share of the royalties under the lease, and the respondents at no time voiced any objection to this continued apportionment. In the determination of the meaning of a contract claimed to be indefinite, the interpretation placed upon the contract by the parties themselves, as evidenced by their conduct subsequent to its execution, may be considered. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785. The present position of the respondents is in direct conflict with their conduct for over five years after the agreement was made. For these reasons, the surrender agreement does not bar the appellants Olds from future participation in the royalties accruing under the community lease.

[13] The respondents also contend that the appellants forfeited their right to share in royalties under the lease by producing oil from their surrendered lot and appropriating all of the royalties therefrom to themselves. The underlying intent and purpose of a community lease, they urge, is that each party shall participate in all of the production from any of the lands in proportion to his holdings, and it would be destructive to this fundamental purpose to permit one lessor to retain all of the royalty from oil produced upon his land and at the same time participate in the royalty payable on account of oil produced from the lands of the other lessors.

The argument would be sound if all of the lands upon which oil is being produced were included in the community lease. But since the surrender agreement was executed, the lots mentioned in it have not been a part of the land leased to the Standard Oil Company. The owners of these lots, therefore, might devote them to any profitable use. The community lease contains no provision prohibiting the production of oil from surrendered lots, nor that, in the event of such production, the owners of lands retained under the lease are entitled to participate therein. On the contrary, it particularly specifies that the owners of the surrendered lots shall be entitled to share in royalties under the community lease notwithstanding the surrender.

[14] To sustain the respondents' contention, such a limitation would have to be added to the clause providing for continued apportionment. But in the absence of fraud or mistake, the intention of the parties as expressed in the agreement is controlling, and courts are not empowered under the guise of construction or explanation to depart from the plain meaning of the writing and insert a term or limitation not found therein. Brant v. California Dairies Inc., 4 Cal.2d 128, 48 P.2d 13; Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484. The parties might have added a clause under which an owner of surrendered land would have no further right to royalties in the event that oil was discovered upon it. Certainly such subsequent discovery of oil may not be deemed an unforeseen event and therefore without the contemplation of the parties to a community oil lease. Such a lease is executed by the respective parties to it because of their hope or expectation that oil may be found under some or all of the land leased. But as the parties to the contract now before the court did not limit the rights of an owner of surrendered land, a court may not do so upon a claim that, as events now show, it operates unfairly.

[15] True, courts have frequently considered implied covenants as being within a contract but such covenants are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed. Williston on Contracts, vol. 5, § 1293; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051. But the facts of the present case do not show any basis for implying a covenant in the lease which would have the effect of dividing the royalty provided for in it differently than the parties have agreed upon by the plain terms of their contract.

The respondents would be in an entirely different position if their suit was based upon pleadings and proof that the appellants Olds, by the production of oil on their land, are draining oil from the pool tapped by the wells on lots 174 and 176, and are thus impeding the full performance of the community lease.

[16,17] Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. Williston on Contracts, vol. 5, § 1293A. Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors.

For example, in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, the defendant leased plaintiff's oil property and also acquired a lease on adjacent land upon which it drilled wells, thereby draining oil from the plaintiff's land. The lease with the plaintiff contained no offset clause. Nevertheless, the court held that a covenant would be implied obligating the lessee to drill wells to offset those on the adjacent property.

[18] In the present case, however, no evidence was offered to show that the well on the land of the Olds is draining oil from the source of supply under the community lease, and contrary to the contention of the respondents, this court may not take judicial notice of any such alleged fact.

[19, 20] In an action to quiet title, the plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's claim. Valle v. Ingram, 18 Cal.2d 761, 117 P.2d 869; Denman v. Smith, 14 Cal.2d 752, 97 P.2d 451; Coffin v. Odd Fellows Hall Association of Modesto, 9 Cal.2d 521, 71 P.2d 266; Knoke v. Knight, 206 Cal. 225, 273 P. 786; Rockey v. Vieux, 179 Cal. 681, 178 P. 712; Sears v. Willard, 165 Cal. 12, 130 P. 869; Williams v. City of San Pedro, 153 Cal. 44, 94 P. 234; Winter v. McMillan, 87 Cal. 256, 25 P. 407, 22 Am.St.Rep. 243. Although it appears that the appellant Whittier Building and Loan Association is not entitled to any portion of the landowners' royalty payable from oil produced from the respondents' land, since the respondents did not prove that they own the Beatys' royalty interest under the lease, a judgment quieting title to it in them as against the association is improper. Knoke v. Knight, supra; Rockey v. Vieux, supra; Sears v. Willard, supra; Williams v. City of San Pedro, supra; Jones v. Walker, 47 Cal. App.2d 566, 118 P.2d 299.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and PETERS, J., pro tem., concurred.

STARK v. COKER et al.

L. A. 17728.

Supreme Court of California.

Sept. 28, 1942.

Rehearing Denied Oct. 26, 1942.

1. Judgment ⇐713(2), 720

Generally, a judgment is "res judicata" to a subsequent action on the same matter actually determined and also as to all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation, and every matter coming within its legitimate purview. Code Civ.Proc. §§ 1908, 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⇐725(1)

A former judgment is "res judicata" only to that which appears upon its face to have been adjudged, or which was actually and necessarily included therein or necessary thereto. Code Civ.Proc. § 1911.

3. Judgment ⇐731

When it affirmatively appears that an issue was not determined by the judgment, such judgment is not "res judicata" upon that issue. Code Civ.Proc. §§ 1908, 1911.

4. Judgment ⇐565

Where judgment in action by trustee under trust deed and by plaintiff as beneficiary thereunder to set aside reconveyance executed by trustee denied relief but expressly declared that it was without prejudice to plaintiff to establish his rights in the real property covered by the trust deed, the judgment was not "res judicata" to plaintiff's rights under the note which the trust deed secured. Code Civ.Proc. §§ 1908, 1911.

5. Judgment ⇐565

Where judgment in action by trustee under trust deed and by plaintiff as beneficiary thereunder to set aside reconveyance executed by trustee denied relief but expressly declared that it was without prejudice to plaintiff to establish his rights in the real property covered by the trust deed, plaintiff was not "estopped" to assert that his interest in the note which the trust deed secured was not paid, so as to resist a defense of accord and satisfaction. Code Civ.Proc. §§ 1908, 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Judgment ⇐576(1)

Where judgment in former action against defendants to set aside reconveyance of land covered by trust deed denied relief to beneficiary who was also trustee without prejudice to rights of plaintiff who was other beneficiary, judgment determined that splitting of causes of action of beneficiaries was proper, and even though it were erroneous, when it became final defendants were bound thereby and could not challenge on that ground plaintiff's separate subsequent action on the note which the trust deed secured.

7. Joint tenancy ⇐8

Joint tenants have an equality of interest in property held under joint tenancy. Civ.Code, § 683.

8. Joint tenancy ⇐12

Statute providing that an obligation in favor of several persons is extinguished by performance rendered to any one of them has no application to an accord and satisfaction made with respect to note and trust deed held in joint tenancy and made with one joint tenant unknown to the other. Civ.Code, § 1475.

9. Joint tenancy ⇐12

One joint tenant has not, by reason of the relationship, any authority to bind his cotenant with respect to the latter's interest in the common property.

10. Joint tenancy ⇐12

Where two persons held note and trust deed securing it as joint tenants, an accord and satisfaction between maker and one joint tenant unknown to the other was not binding on such other joint tenant as to his interest in the common property. Civ. Code, § 683.

11. Limitation of actions ⇐127(11)

A plaintiff may not state a new cause of action by amending his complaint when the statute of limitations has run on the new cause of action.

12. Mortgages ⇐218, 390

There is but one form of action for the recovery of a debt secured by a trust deed, which is one to foreclose the trust deed, and an independent action may not be brought on a note secured by a trust

deed without first exhausting the security or showing that it is valueless. Code Civ. Proc. § 726.

13. Limitation of actions ⇐127(18)

Amendment by which plaintiff altered his action from one to foreclose a trust deed to one for personal judgment on note secured by trust deed because security had become valueless made after a new action on note would have been barred by four-year statute of limitations did not state a "new cause of action" within the rule prohibiting a plaintiff from stating a new cause of action by amending his complaint when the statute of limitations has run thereon. Code Civ.Proc. § 337.

See Words and Phrases, Permanent Edition, for all other definitions of "New Cause of Action".

14. Corporations ⇐1

The determination of whether particular circumstances permit the corporate entity to be disregarded and the corporation regarded as the alter ego of the stockholders is subject to equitable doctrines and particularly within the province of the trial court.

15. Corporations ⇐1

Fiction of "independent corporate existence" will be disregarded where there is such unity of interest and ownership that separate personalities of corporation and individual no longer exist, and where adherence to fiction of separate existence would promote fraud or injustice.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Corporate Existence".

16. Corporations ⇐1

Where at time of renewal of corporate note payable to plaintiff and another, president of corporation declared that he and his wife were the corporation and for several years there had been no corporate activities and president and his wife owned all outstanding shares, and affairs of corporation were conducted by president at his home, in action against president and his wife on note, trial court properly regarded corporation as "alter ego" of defendants and disregarded the "independent corporate existence" and properly imposed personal liability upon such defendants.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter Ego".

17. Corporations ⇐1

Where at time of renewal of corporate debt evidenced by a note secured by a trust deed a new payee was added to the renewal instruments, and payees altered their position by accepting renewal note and forbearing to sue, trial court in determining whether to regard corporation as alter ego of its two stockholders in action on renewal note properly considered evidence of circumstances surrounding corporation at time of execution of renewal note and not at time of original indebtedness.

In Bank.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Emil Stark against John B. Coker and others to foreclose a deed of trust. After amendment of the complaint, the action proceeded as an action on the trust deed note. From a judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 122 P.2d 694.

Monroe & McInnis, of San Diego, for appellants.

Johnson & Johnson, E. L. Johnson, and Carl Alex Johnson, all of San Diego, for respondent.

CARTER, Justice

Defendants John B. Coker and Regina W. Coker, husband and wife, and Southern California Home Building Company, a corporation, appeal from a judgment against them for $6,000, being one-half of a $12,000 indebtedness represented by a promissory note secured by a deed of trust.

Defendant corporation was organized in 1923, issuing 150 shares of capital stock. Defendant John B. Coker then held some of the stock, finally acquiring a majority of it in 1927, and was at all times president of the corporation and managed its affairs. Defendant Regina W. Coker became secretary of the corporation in 1926. The corporation was engaged chiefly in dealing in securities and building and selling houses, its business apparently being lucrative until 1929, when it began to decline. Hilda A. Stark, who married plaintiff in 1925, owned some of the stock, and from 1924 to 1928, loaned various sums to the corporation, some of which were repaid, culminating in an indebtedness owed to her of $12,000, represented by notes secured by a deed of

trust. After 1929, the corporation was chiefly engaged in attempting to liquidate its affairs. After 1930, no directors were elected or functioned or stockholders' meetings held, the affairs being controlled and conducted by defendant John B. Coker. Interest on the indebtedness to Mrs. Stark was paid until 1933, but at a reduced rate with her consent. On January 29, 1934, the corporation, by John B. Coker as president and Regina Coker as secretary, executed its promissory note for $12,000, payable to plaintiff and his wife Hilda as joint tenants on January 1, 1936. That was the first time plaintiff's name appeared in the transaction; however, he had advanced a portion of the funds to Hilda to make up the original loan by her to the corporation. The court found that that note was a renewal of the prior obligation. The note was secured by a trust deed in which the corporation was the trustor, Hilda Stark the trustee and plaintiff and Hilda Stark the beneficiaries in joint tenancy.

Hilda Stark as trustee executed a deed of reconveyance on March 14, 1936, of the property embraced in the trust deed, which thereafter in 1937, she sought to have set aside by an action resulting on November 30, 1938, in a final judgment for the corporation. Plaintiff here was one of the plaintiffs in that action, but was affected by the judgment only to the extent hereinafter appearing.

Thereafter the instant action was commenced by plaintiff to foreclose the trust deed and for a deficiency judgment based upon a claim for one-half the note, or $6,000. He amended his complaint at the trial, alleging the security to be worthless and praying for a personal judgment on the note. He named the corporation and the Cokers as defendants, basing the alleged liability of the latter on the asserted right to have the corporate entity disregarded. The judgment from which this appeal is taken was against all of those defendants and as to the Cokers was based upon that theory. He also named his wife, Hilda, defendant. She claims nothing against the corporation or the Cokers in this action. Defendants raised the general issue and urged several special defenses which will be hereafter considered.

With reference to the judgment of November 30, 1938, various claims are made by the parties. The court found in the instant action that plaintiff was the owner of a one-half interest in the note in question and that plaintiff here was not bound by the reconveyance involved in the above-mentioned judgment. Defendants contend that the judgment in the action against the corporation to set aside the reconveyance which had been made by Hilda Stark as trustee was res judicata and a bar to the present action. In that action plaintiff and Hilda Stark charged that the deed of reconveyance had never been executed by Hilda and that they had never received any consideration therefor, and that the note was unpaid. The court found that Hilda Stark executed the reconveyance as trustee and should take nothing by her action, and in finding VI stated: "That plaintiff, Emil Stark, had no notice or knowledge of the execution, acknowledgment and delivery of said full reconveyance by the plaintiff, Hilda A. Stark, as Trustee." In its conclusions of law it declared: "That by reason of the facts set forth in finding number VI the judgment herein should be without prejudice to the right of the plaintiff, Emil Stark, to establish or determine his rights, if any, in and to the real estate covered by said trust deed, in another action." Judgment was accordingly entered. Nothing is expressly said in either the findings or the judgment as to the status of the liability on the note, and it is not found that the reconveyance was binding upon plaintiff herein. Defendants refer to evidence in the instant action that Coker's contention in the former action was that the reconveyance was made as a part of an accord and satisfaction with Hilda Stark of the debt for $3,000, a part of which is still unpaid by Coker. The same accord and satisfaction was pleaded by defendants in the instant action. Defendants claim that the judgment conclusively determined that an accord and satisfaction occurred and that any and all rights of plaintiff and Hilda Stark in the note and trust deed had been thereby extinguished.

[1-5] While it is true that as a general rule a judgment is a bar as res judicata not only as to a subsequent action on the same matter actually determined, but also as to all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation and every matter coming within its legitimate purview, Code of Civ.Proc. §§ 1908, 1911; 15 Cal.Jur. 142, et seq., it is

also true that that only is adjudged in a former judgment which appears upon its face to have been adjudged or which was actually and necessarily included therein or necessary thereto. Code Civ.Proc. § 1911. And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matters which the court expressly refrains from determining. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; 15 Cal.Jur. 150. It is apparent that the judgment of November 30, 1938, did not determine that plaintiff had no further rights with reference to the property covered by the trust deed giving as its reason that plaintiff had no notice or knowledge of the reconveyance of the property. To argue that the court's judgment was erroneous is idle because the judgment is final and the reservation of plaintiff's rights as well as the other terms of the judgment are binding upon the parties. The judgment expressly stated that it was without prejudice to plaintiff to establish "his rights, if any, in the real property covered by said trust deed." The only reasonable interpretation of the judgment is that the court did not purport to adjudicate that plaintiff was without rights under the note because he would not have any right in the property except such as would be based on the continued existence of the indebtedness, and any interest he had in the property was predicated upon the trust deed which was in turn based upon the indebtedness. Those rights in the property were reserved in the judgment. It further necessarily follows that he is not estopped to assert that his interest in the note has not been paid, and that therefore he may in this action resist any claim of accord and satisfaction made by defendants. Hilda Stark is claiming nothing in this action, and thus, even though she may be estopped to assert that there was not an accord and satisfaction, plaintiff is left free to litigate the matter. In essence it might be said with respect to those matters, as was stated by defendants' counsel at the trial, that nothing was decided as to plaintiff by the judgment of November 30, 1938.

[6] Defendants assert, however, that there has been an improper splitting of actions on the note. Assuming their premise the result is not altered because the judgment of November 30, 1938, was in effect a determination that a splitting of causes of action was proper. The judgment accomplished that very result if it be conceded that it determined Hilda Stark's right but left plaintiff's rights for determination in a future action. That judgment even though erroneous is final and binding upon the parties.

[7-9] If it be said that a narrow interpretation of the judgment of November 30, 1938, be correct, that is, that it determined that an accord and satisfaction occurred and the only thing left to be determined with reference to plaintiff was whether that accord and satisfaction was binding upon him (and there might be some merit to that position since the reason given in the findings for not determining plaintiff's rights in the property was lack of knowledge on his part of the accord and satisfaction), yet the judgment for plaintiff for the $6,000 in the instant action should stand. It cannot be doubted that: "An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the title on deposit." Civ.Code, § 1475. That rule cannot be applied under the circumstances presented here. The note was made payable on its face to plaintiff and Hilda Stark as joint tenants. Likewise, those two persons were named beneficiaries in a joint tenancy capacity. Defendants having executed those instruments will be deemed to have known the authority of those persons as to each other with respect to one of them entering into an accord and satisfaction of the debt. The note was not fully paid. A $12,000 obligation was purportedly discharged for $3,000, only half of which was paid in cash and the balance has not yet been paid. Plaintiff had no knowledge of the purported accord and satisfaction and did not authorize it. The status of the owners of the note being joint tenancy, it is no more than proper under the circumstances that the rules with respect to joint tenancy be applied. One of the characteristics of joint tenancy is the equality of the interest held by the respective tenants; Civ.Code, § 683, and defendants by giving the note and trust deed were advised of that rule. It has been consistently held that one joint tenant has not by reason of the relationship any authority to bind his cotenant with respect to the latter's interest in the common property. See Oberwise v. Poulos, 124 Cal.App. 247,

12 P.2d 156; Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73.

[10] With reference to the alleged accord and satisfaction to which reference has heretofore been made, defendants assert that a settlement of the note was reached with Hilda Stark. That defense cannot avail them on this appeal for two obvious reasons. First, as heretofore determined, under the judgment of November 30, 1938, plaintiff was not estopped to assert that there was no accord and satisfaction, and even if an accord and satisfaction is decreed to have existed as to Hilda Stark by reason of that judgment, she is claiming nothing in this action. Plaintiff may, as he did, claim that no accord and satisfaction occurred. The evidence in the instant action on that subject was conflicting but with that we are not concerned. Hilda Stark testified that there was no accord and satisfaction, and plaintiff testified that the note had not been paid and that he had no knowledge of any such transaction. Second, even if an accord and satisfaction was accomplished by Hilda Stark, it was not under the rules above discussed binding upon plaintiff as to his half interest in the obligation.

[11-13] It is urged that plaintiff was improperly permitted to amend his complaint altering his action from one of foreclosure of the trust deed to one for a personal judgment on the note, and that at the time the amended complaint was filed the action on the note was barred by section 337 of the Code of Civil Procedure. The sole question is whether plaintiff in fact changed his cause of action as contemplated in the rule that a plaintiff may not state a new cause of action by amending his complaint when the statute of limitation has run on the new cause of action. In his amendment plaintiff alleged that the security covered by the trust deed had become valueless. It may be conceded that an independent action may not be brought upon a note secured by a trust deed without first exhausting the security or showing that it is valueless, and that there is but one form of action for the recovery of a debt secured by a trust deed, which is one to foreclose the trust deed. Code Civ. Proc. § 726; Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940. But by his amendment plaintiff did not state a new cause of action. When the security has become valueless, plaintiff does not state a new cause of action where the result of his amendment is to plead a cause of action on the note alone and an abandonment of his claim for the foreclosure of the trust deed securing it as stated in the original complaint. See Commercial Centre R. Co. v. Superior Court, 7 Cal.2d 121, 59 P.2d 978, 107 A.L.R. 714.

[14-16] This brings us to defendants' chief contention, that the evidence was insufficient to justify the trial court in disregarding the corporate entity of defendant corporation and holding defendants Coker individually liable on the note which was executed by the corporation alone. The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance. The basic rule was recently stated by this court in Watson v. Commonwealth Ins. Co., 8 Cal.2d 61, 68, 63 P.2d 295, 298:

"The two requirements are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud, or injustice. On the second score it is sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results." We believe there was sufficient evidence before the lower court to justify it in determining that those requirements were met. There were several pertinent circumstances. Assuming that at the time of the original indebtedness incurred between 1924 and 1928, the evidence indicates that there was no ground for piercing the corporate veil, it appears that from 1931 to 1934, the date of the note in question, and thereafter, there were no officers elected, no board of directors or stockholders' meetings held and no minute entries. At all of those times defendant John B. Coker was president of the corporation, owning 139 of the 150 outstanding shares of stock. His wife, defendant Regina Coker, was secretary of the corporation and owned 1 share of stock. The other 11 shares were held in escrow in a bank, the whereabouts of the owner thereof being unknown and he did not partici-

pate in the corporation's business. The affairs of the corporation were conducted by John B. Coker. The stock had no market value. The affairs of the corporation were conducted at the home of the Cokers. The corporation had no business and at the time of the trial in 1940, it had no assets. In 1934, it had several houses which were encumbered; the holders of the mortgages foreclosed "and took the property and wiped the corporation out." Coker testified that in 1934 the corporation was engaged "in servicing mortgages and trust deeds to be sold" and that he was "handling negotiable paper, mortgages and trust deeds," and such properties as he owned, he was renting out. Coker kept the books of the corporation although his wife was secretary. In negotiating the purported accord and satisfaction Coker claimed he was personally liable for the obligation to pay the $3,000. It appears that he personally was negotiating to purchase the note in question from Hilda Stark. But the checks drawn assertedly in payment on the purported accord and satisfaction agreement were paid from the corporation's bank account, and Coker considered that when the deed of reconveyance was made, the obligation of the corporation would be extinguished. In 1934, Regina Coker was receiving a salary of $25 a week and John B. Coker received $1,100 as salary during that year. He stated that he was paid $75 a week from 1927, as long as the corporation had money to pay him. Hilda Stark testified with reference to conversations with Coker: "At that time (January, 1934) and also at other times, Mr. Johnson, not only that time, Mr. Coker expressed great satisfaction over the fact that now he had gotten all the stock away from the other stockholders and had it himself. Before that, he also expressed satisfaction that he had gotten this stock to himself so that nobody could interfere. For instance, his father could not come in there and look over his books and buy stock certificates from somebody and mislay those books and so on and so forth and so I said, 'Well, then in any corporation, don't you have to be several people? What is the Southern California Home Building Company? How many are in the Southern California Home Building Company?' He says, 'I am the Southern California Home Building Company.' 'I am.' I says, 'Your wife?' 'Yes,' he said, 'my wife.'" Coker had stated to a third person that the plaintiff and Hilda Stark were not good business people and he "intended to beat them out of the money he owed them." This evidence establishes that the Cokers and the corporation were one and the same person. By accepting the note and trust deed here in question, a new party payee, plaintiff, was added, and the time for the payment of the obligation was extended, the note being a renewal. By granting that renewal an action upon the note was delayed. Plaintiff might have been able to recover a substantial portion of the indebtedness if that extension had not been granted. But the extension was granted, and in a transaction in which Coker declared that he and his wife were the corporation. Although there is no direct evidence to that effect, it may well be inferred that the renewal note was accepted under the belief that Coker and his wife were in reality the true parties obligated. These facts would justify the trial court in determining that the corporation was the alter ego of the Cokers and that in order to prevent injustice the corporate entity should be disregarded to the extent of imposing personal liability upon the Coker defendants.

[17] In connection with the claim of insufficiency of the evidence on the alter ego doctrine, defendants contend that error was committed by the trial court in refusing their offer of proof of the circumstances bearing upon that subject in 1924, when the indebtedness was originally incurred, urging that the note here in question was merely a renewal note, that is, an extension of time for payment but not payment of the original debt, and that under such circumstances the evidence bearing on the alter ego doctrine should relate only to the time when the original indebtedness was incurred. Even if defendants' premise be accepted they have suffered no prejudice. In discussing the evidence in support of that doctrine, we assumed that when the indebtedness was originally incurred, there were no grounds for disregarding the corporate entity. Consideration was given for the renewal of the note by plaintiff. The time for payment was extended which in effect was a forbearance of suit or foreclosure on the former note or trust deed. A new party payee was named in the renewal instruments. Plaintiff's position was altered by accepting the renewal note, and therefore the circumstances at the time of the execution of the renewal note became important with relation to the parties liable and the application of the doctrine. In relinquishing the right to collect the indebt-

edness against the corporation by accepting the renewal note, plaintiff had the right to hold the Coker defendants liable, thereby disregarding the corporate entity in order to prevent injustice to him.

Defendant Regina Coker particularly urges that there is no evidence upon which a personal judgment against her could be based, but as we have seen she with her husband were the only officers of the corporation and Coker declared that he and she were the company.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, TRAYNOR, JJ., and PETERS, J., pro tem., concurred.

GIBSON, C. J., concurred in the judgment.



21 Cal.2d 1

BAINE v. CONTINENTAL ASSUR. CO.

L. A. 17565.

Supreme Court of California.

Sept. 30, 1942.

1. Insurance ⇐144(1)

Where life insurance company declined to issue disability benefits with an ordinary life policy and refunded premium difference, acceptance by insured of premium refund without protest did not preclude a later demand for issuance of disability benefits based upon an exchange of policy clause of the original life policy.

2. Insurance ⇐144(1)

"Exchange of policy" clause of life policy permitting issued policy to be exchanged upon conditions set forth therein for another of the same amount, permitted insured to exchange his issued life policy for any other form of life policy issued by the company where the risk involved was identical with the risk assumed in the issued policy, and did not permit an exchange for a life policy plus disability benefits which required a higher premium, since the demanded policy was not in the "same amount" as the issued policy. St.1935, pp. 500, 501, §§ 100, 101, 106.

See Words and Phrases, Permanent Edition, for all other definitions of "Exchange of Policy" and "Same Amount".

3. Insurance ⇐146(3)

All clauses in insurance policy must be interpreted most strongly against the company, and all ambiguities must be resolved in favor of the insured.

4. Insurance ⇐146(3)

Where meaning of clause in insurance policy is clear and intent of parties obvious, rule that all clauses must be interpreted most strongly against company and all ambiguities resolved in favor of insured will not operate to change nature of contract and to cast upon insurance company a liability not assumed.

5. Insurance ⇐146(3)

Rule that all clauses in insurance policy must be interpreted most strongly against company, and all ambiguities must be resolved in favor of insured, does not require strained and unnatural construction of policy.

6. Insurance ⇐146(1)

An insurance policy, like any other contract, must be interpreted according to the intention of the parties as expressed in the instrument.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Harry M. Baine against the Continental Assurance Company, a corporation, for specific performance of an exchange of policy clause contained in an insurance policy. Judgment for defendant, and plaintiff appeals.

Affirmed.

For prior opinion, see Cal.App., 121 P.2d 806.

Isaac Martin Sackin, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

PETERS, Justice pro tem.

Plaintiff, the insured in a policy of life insurance issued by defendant company, brought this action for specific performance to compel the company to exchange the pol-

icy for another of his choice, claiming such right by virtue of an "Exchange of Policy" clause appearing in his policy. From a judgment denying the relief prayed for, plaintiff prosecutes this appeal.

On June 18, 1927, upon receipt of the required premium, the respondent insurance company delivered to appellant a $10,000 ordinary life nonparticipating policy of insurance. Thereafter, appellant performed all conditions required of him under the policy, and, at the commencement of this action, such policy was in full force and effect. During 1937, 1938 and 1939, appellant, purporting to act under the "Exchange of Policy" clause contained in such policy, demanded that respondent exchange the ordinary life policy for another life policy identical with the issued policy except that the demanded policy had attached a rider or supplemental contract providing for disability benefits at the rate of $10 per month for each $1,000 of life insurance provided in the life policy.

The "Exchange of Policy" clause contained in the original policy reads as follows: "At any time while in full force, provided the Insured is then less than sixty years of age, this policy may be changed without medical examination for a policy of the same amount upon any form issued by the Company at the time this policy takes effect and which provides for a higher rate of premium. Such change will be made upon written application therefor on the forms required by the Company and upon payment of a sum equal to the difference between the premium on the new policy and the premium paid on this policy, with interest at the rate of five and one-half per cent per annum from the due date of each payment to the date when the change is made. The new policy shall take effect as of the date of this policy and shall be based upon the same age of the Insured as this policy."

The evidence shows, and the trial court found, that appellant, while the policy was in full force and effect, and while appellant was under sixty years of age, made demand, accompanied by a tender of the proper amount, for a life policy with disability benefits. The court also found that in 1927, when the original life policy was issued, the company had available for issuance at least twelve other forms of life insurance policies, each providing for a premium in excess of that provided for in the issued policy, and, at that time, also had available seven different forms of riders or supplemental contracts which did not constitute separate policies themselves but which could be attached to life policies to provide for additional insurance, such as double indemnity and various forms of disability benefits; that each of such supplemental contracts, or riders, provided for a premium for the benefits therein specified which was separate from, and in addition to, the premium charged for the life insurance provided in the several forms of policies to which such supplemental contracts or riders might be attached.

The trial court's conclusion that appellant was not entitled to exchange his original policy for the one demanded was predicated on two separate theories. In the first place, the trial court concluded that, reasonably construed, the "Exchange of Policy" clause did not permit the exchange of an ordinary life policy for an ordinary life policy with disability benefits. The second theory was predicated upon estoppel. In its answer the respondent pleaded, and the trial court found, that in 1927 appellant, by formal application, applied for an ordinary life policy plus disability and double indemnity benefits, and tendered the premium required for such a policy; that respondent refused to issue the policy with those additional benefits attached, but issued the policy here sought to be exchanged and paid back to appellant the portion of the premium chargeable to the additional benefits that had been deposited by appellant upon making his application; that appellant accepted the limited policy and refund with knowledge that the company refused to issue a life policy with disability benefits.

[1] If it be assumed that these findings are supported by the evidence, which is challenged by appellant, we agree with appellant that such findings would not constitute a defense to this action. If the "Exchange of Policy" clause permits the exchange of an ordinary life policy for one with disability benefits attached, the mere fact that respondent had refused to issue such a policy when the ordinary life policy was issued, in the absence of fraud or misrepresentation, which is not claimed, would not bar appellant from exercising an express right given to him by the terms of his policy.

[2] While we agree with appellant that the findings predicated on the special defense do not support the judgment, nevertheless we are of the opinion that the judg-

ment must be affirmed, for the reason that the "Exchange of Policy" clause, properly interpreted, does not permit the type of exchange here demanded. That clause permits the issued policy to be exchanged upon conditions set forth for another of "the same amount," without further medical examination. The only reasonable interpretation of the clause is that the insured is permitted to exchange his issued life policy for any other form of life policy issued by the company—not that he may exchange it for other types of policies issued by the company. Such clause permits a substitution of policies only where the risk involved is identical with the risk assumed in the first policy. This is made clear by the provision that no further medical examination is required and by the limitation that the new policy must be for the "same amount" as the original policy. The evidence shows without contradiction that the medical examination required by the company for a life policy with disability benefits is different and stricter than that required for the issuance of a life policy. In the instant case the original policy provides for $10,000 life insurance. The policy demanded is for $10,000 life insurance plus disability benefits of $10 per month for each $1,000 of insurance set forth in the life policy. The demanded policy, therefore, is not in the "same amount" as the original policy. The risk assumed in the original policy is entirely different from that involved in the demanded policy. According to the original policy the company agreed to pay $10,000 to a designated beneficiary upon the death of the insured. By the demanded policy appellant requested that the company assume that risk, plus the risk of paying to him $100 a month during all periods that he became disabled. The risk assumed in a liability policy is entirely different from that assumed in a life policy and is predicated upon entirely different factors. Disability insurance is classified by the law as different from life insurance. § 100, Insurance Code; see, also §§ 101 and 106 of the Insurance Code.

[3-6] While it is true that all clauses in insurance policies must be interpreted most strongly against the company, and all ambiguities must be resolved in favor of the insured (see cases collected 14 Cal.Jur., p. 443, § 24), where the meaning of the clause is clear, and the intent of the parties obvious, that salutary rule cannot operate to change the nature of the contract and to cast upon the insurance company a liability obviously not assumed. See cases collected 14 Cal.Jur., p. 446, footnotes 7 and 8; 7 Cal.Jur.Supp., p. 86; 7 Cal.Jur. (Pocket Supp.) p. 35. The rule of construction under discussion does not require the court to give the policy a strained and unnatural construction. Perkins v. Fireman's Fund Indem. Co., 44 Cal.App.2d 427, 112 P.2d 670. The policy, like any other contract, must be interpreted according to the intention of the parties as expressed in the instrument. Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 120 P.2d 31.

The interpretation of the clause urged by appellant would lead to absurd and obviously unintended results. It would mean that an insured, knowing that the physical examination required for a life policy was different and less strict than that required for a policy with disability benefits, could secure the issuance of a strip life policy, and then, immediately, without further medical examination, demand and secure the issuance of a life policy with disability benefits. It would also mean that all persons who have life policies containing such a clause, if they became disabled before attaining the age of sixty, could, upon the conditions set forth in the clause, secure disability insurance, and thus secure a life income after the disability had been incurred. To give the clause such a construction would compel the company to incur a risk never intended or assumed.

The case of Rosenberg v. Equitable Life Assur. Soc., 193 N.C. 126, 136 S.E. 364, interprets a somewhat similar clause contrary to the construction contained in this opinion, and in accordance with the contentions of appellant. That opinion fails to discuss the various arguments set forth in this opinion which we think are conclusive. Certainly, it cannot be contended that any reasonable man would believe that under the clause in question he was entitled to exchange his life policy for one containing a disability clause when that very policy when the life policy was issued had been refused him, or when conceivably, the disability had already been incurred. The reasoning of the cited case, in our opinion, is unsound.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The majority opinion violates every rule applicable to the construction of an insurance policy and is contrary to the only decision by a court of last resort in the United States dealing with the same subject matter.

It is conceded that under recognized rules of construction a policy of insurance, like any other contract, must be interpreted according to the intention of the parties as expressed in the instrument and that a strained and unnatural construction should not be given to words used therein (Blackburn v. Home Life Ins. Co., 19 Cal. 2d 226, 120 P.2d 31; Perkins v. Fireman's Fund Indem. Co., 44 Cal.App.2d 427, 112 P.2d 670); that because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured (Blackburn v. Home Life Ins. Co., supra); and that where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail (Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 731, 117 P.2d 661).

In the light of these rules of construction let us examine the provision of the policy in question. Said provision reads: "At any time while in full force, provided the Insured is then less than sixty years of age, this policy may be changed without medical examination for a policy of the same amount upon any form issued by the company at the time this policy takes effect and which provides for a higher rate of premium. * * *" The question is whether under that provision the insured under an ordinary life policy may have that policy exchanged for a life policy with disability benefits where the premiums are higher, but the amount of the death benefit is the same. In the instant case one of the forms of policies issued by the insurer at the time the original policy was issued was an ordinary life policy with disability benefits. In order that there may be no doubt it should be observed that the policy requested in exchange, a life policy with disability benefits, was nothing more than another policy which is a single policy even though the premiums for the disability benefits may be separately specified. The disability feature is an inseparable part of the life feature and both features in one document constitute one policy of insurance. Blackburn v. Home Life Ins. Co., supra.

To my mind it is perfectly obvious that the proper application of the rules of construction for insurance policies above stated compels the conclusion that plaintiff is entitled to a life policy with disability benefits. The words in the policy are plain and unambiguous. The insured is entitled to a policy in "any form" issued by the company. No qualification or limitation whatever is made. To conclude that a life policy with a disability feature is not included with the phrase "any form" is to do violence to the plain and clear language of the contract. It makes a new contract for the parties. It interpolates words that do not appear therein such as for illustration after the word "from" it inserts the words "or ordinary life policy" or "except those having disability features." Not only does such an interpretation of the policy merely do violence to the rule that the policy must be interpreted most strongly against the insurer, but it accomplishes the very opposite of that rule. It makes a new contract where the language is plain, and makes such new contract distinctly unfavorable to the insured. If the insurer desired to so limit the exchange clause it could have done so as is illustrated in Holzinger v. Prudential Ins. Co. of America, 222 Wis. 456, 269 N.W. 306.

If it be assumed, as is expressed in the majority opinion, that the requirement that the exchange policy be "for the same amount" is susceptible of the construction that disability benefits could not be added because the amount of the policy would then be different, it certainly cannot be said that such is the only reasonable construction. The most that could follow would be that an ambiguity existed, that is that some doubt was cast upon the broadness of the phrase "any form" of policy by the term "of the same amount." But that is only a doubt, and reading the phrases together they may reasonably be interpreted to mean any form of policy where the principal amount of the insurance on the life alone is the same amount. With these two possible interpretations present there is no escape from the application of the rule stated in Blackburn v. Home Ins. Co., supra, 19 Cal.2d 229, 120 P.2d 32:

"Because contracts of insurance are not the result of negotiation and are general

ly drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured." Can it be doubted that the clause here in question falls within the rule that "Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail." Fageol T. & C. Co. v. Pacific Indemnity Co., supra [18 Cal.2d 731, 117 P.2d 669].

The majority opinion states: "The only reasonable interpretation of the clause is that the insured is permitted to exchange his issued life policy for any other form of life policy issued by the company—not that he may exchange it for other types of policies issued by the company. *Such clause permits a substitution of policies only where the risk involved is identical with the risk assumed in the first policy.*" (Emphasis added.) I am unable to find any statement in the clause in question which justifies the above italicized sentence. On the contrary, the provision in the clause providing that the insured may exchange his policy for a policy "which provides for a higher rate of premium" indicates that it was contemplated by the insurer that the insured would be entitled to exchange his policy for one where the risk involved was greater than that assumed under the first policy; that is to say, that one is justified in concluding that a policy providing for a higher rate of premium would involve a greater risk than one providing for a lower rate of premium. Yet, the majority opinion entirely ignores this provision in the clause under consideration.

As pointed out above, the majority opinion not only violates every rule of construction applicable to insurance policies and writes a different contract than that which the parties entered into, but it also disregards the only decision by a court of last resort in the United States dealing with the precise proposition here under consideration. In the case of Rosenberg v. Equitable Life Assur. Soc., 193 N.C. 126, 136 S.E. 364, 365, a clause practically identical with the one here in question, indeed more susceptible to the construction given it by the majority opinion, was judicially construed to mean, as a matter of law, that the insured is entitled thereunder to have issued to him in exchange for a term policy without disability benefits, a life policy with disability benefits. The provisions involved in the Rosenberg case read as follows: "The insured * * * may at any time within seven years from the register date hereof, *without medical re-examination,* exchange this policy for a policy *for the same amount* or any less amount, upon the *ordinary life,* limited payment life, or endowment plan upon any anniversary of this policy, or within the thirty-one days of grace, by surrendering this policy to the society at said home office, with written notice of the election, and by paying the premiums to be fixed by the age on the birthday nearest to the date of such exchange according to the rates of the society then in force." (Emphasis added.) Insured brought an action to specifically enforce that clause claiming that he was entitled thereunder to a life policy with disability benefits in exchange for his term policy. In holding that the plaintiff was entitled to the relief prayed for, the court stated:

"Plaintiff is entitled *not only to a policy upon the ordinary life plan in exchange for* his term policies; he is further entitled, at his election, and upon the payment of the premium charged therefor, to any form of such policy which defendant was issuing and selling both at the date of his application for the term policies and at the date of his request for the exchange. Defendant admits in its answer to the complaint that at both dates it was issuing and selling an ordinary life policy, containing both a disability clause and a double indemnity clause.

"It cannot be held as law that an insurance company which has contracted to issue and deliver a policy described in the contract by a general name, and which at the date of the contract issues such policy in two forms, one affording larger protection than the other, can perform its contract, or be discharged of liability thereon, by issuing a policy affording the less protection, when the person to be insured requests a policy affording the larger protection and offers to pay the premium charged therefor, the only consideration moving the company to issue one form of policy rather than the other being a difference in the premium. In such case, the person to be insured and not the company has the right of election."

The majority opinion further states: "The interpretation of the clause urged by appellant would lead to absurd and obviously unintended results. It would mean

that an insured, knowing that the physical examination required for a life policy was different and less strict than that required for a policy with disability benefits, could secure the issuance of a strip life policy, and then, immediately, without further medical examination, demand and secure the issuance of a life policy with disability benefits. It would also mean that all persons who have life policies containing such a clause, if they became disabled before attaining the age of sixty, could, upon the conditions set forth in the clause, secure disability insurance, and thus secure a life income after the disability had been incurred."

A complete answer to the foregoing discussion contained in the majority opinion is, that the insurance company could by clear and unambiguous language have provided against the eventualities contemplated in such discussion; that it did not do so should not militate against the insured in the case at bar who is entitled to have the policy construed in a manner which affords the greatest measure of protection to him if such construction is equally fair with a contrary interpretation. That a similar provision has been interpreted in favor of the insured by the supreme court of North Carolina should be conclusive on the proposition that the provision in question is susceptible to two interpretations. The fact that an insurance company first refused to issue a policy of insurance to an individual, but did so later, would afford it no ground for denying liability which arose under a policy so issued.

The majority opinion, however, brushes aside the Rosenberg case with the mere assertion that "that opinion fails to discuss the various arguments set forth in this opinion which we think are conclusive," and that "the reasoning of the cited case, in our opinion, is unsound." However, I think it can be said to the credit of the supreme court of North Carolina that in deciding the Rosenberg case it did not ignore settled rules of construction applicable to insurance policies or attempt to write a new contract for the parties. In my humble opinion, the decision in that case excels in sound reasoning and judicial erudition the opinion of the majority of this court in the case at bar.

In my opinion the judgment should be reversed.

INSKEEP et al. v. BEAR CREEK CO. OF CALIFORNIA et al.

Civ. 12094.

District Court of Appeal, First District, Division 1, California.

Oct. 5, 1942.

Rehearing Denied Nov. 4, 1942.

Hearing Denied Dec. 3, 1942.

1. Mortgages ⇐302

Where services rendered by attorneys in behalf of trustee named in deed of trust were in connection with a damage suit to which trustee had been made a party defendant which suit was not filed until after trustee's sale of land covered by deed of trust, fees charged by attorneys could not be considered in determining amount due from trustor on date of sale.

2. Judgment ⇐720

Where trial court, in a prior action to enjoin a sale of land under deed of trust, determined amount due from trustor for purpose of determining sufficiency of trustor's tender, and no allowance was made for special auditor's fee incurred in determining state of debt secured by deed of trust or for attorneys' fees for beneficiary's counsel, and no appeal was taken therefrom, the judgment in prior action precluded the inclusion of such items in determining amount due from trustor on date of trustee's sale.

3. Appeal and error ⇐717

An opinion of the trial judge may be considered for the purpose of discovering the process by which the trial judge arrived at his conclusion, or when the opinion furnishes basis of the court's action in its decision.

4. Mortgages ⇐302

In determining the amount necessary to be tendered by the trustor to satisfy the debt of the trust deed so as to avoid a trustee's sale, an item of attorneys' fees for beneficiary's counsel could not be considered where testimony disclosed that services were rendered in connection with another action, and it was apparent from trial court's written opinion therein that court intended to make no allowance therefor.

5. Mortgages ⇐369(2)

Where sum tendered by trustors on morning of trustee's sale under deed of trust was sufficient to pay amount then

due under trust deed, trustors were entitled to an annulment of trustee's sale.

Appeal from Superior Court, Merced County; B. C. Hawkins, Judge.

Action by I. N. Inskeep and another against the Bear Creek Company of California, R. D. Leuschner and another, to set aside a trustee's sale of certain land, for an accounting and to quiet title to the land, wherein the named defendants filed a cross-complaint to quiet title to the land in the Bear Creek Company of California. From a judgment for the defendants, the plaintiffs appeal.

Reversed.

Adams & Griswold, Claude H. Adams, and Hugh H. Griswold, all of Merced, for appellants.

C. Ray Robinson, Willard B. Treadwell, Loraine B. Rogers, and W. Eugene Craven, all of Merced, for respondents.

KNIGHT, Justice.

In November, 1930, Land Owners Packing Company sold a parcel of land situate in Merced County to the plaintiff I. N. Inskeep, taking as part payment a promissory note for $864.70, secured by a deed of trust covering the land sold. The land was adapted to the growing of figs, and on October 1, 1932, Inskeep leased the land back to the packing company for a term of thirteen years on a crop-sharing basis. Subsequently the packing company assigned the deed of trust and its lease to the Bear Creek Company; Simonson-Harrell Abstract Company, Ltd., was substituted as trustee, and on January 4, 1940, the property was sold at trustee's sale for $400 to R. D. Leuschner, president of the Bear Creek Company. In due time prior to the sale Inskeep made a tender of $321.50, as full payment of the amount due, but the tender was rejected as insufficient. Thereafter Inskeep and Edith H. Stevens, the holder of a conveyance given by Inskeep as security for the payment of money, joined in bringing this action to set aside the trustee's sale, for an accounting, and to quiet title to the land. They named as parties defendant the Bear Creek Company, its president, R. D. Leuschner, and the trustee abstract company; and the first two named defendants filed a cross-complaint to quiet the company's title to the land. The trial court denied the relief asked for by plaintiffs, and gave judgment for defendants, quieting the company's title to the land; and from said judgment plaintiffs appeal. The question presented relates to the sufficiency of Inskeep's tender of $321.50. He had made two previous tenders in lesser amounts, which were likewise rejected, and the determination of the question of the sufficiency of the third tender involves the transactions which took place between the parties before and after the making and rejection of the two previous tenders.

The promissory note secured by the trust deed was dated November 13, 1930, and was made payable in quarterly installments of $100 each, commencing February 1, 1931, with interest at 6 per cent. By the terms of the thirteen-year lease the lessee was to operate the fig orchard, meet all necessary charges and expenditures, and after sale of the figs pay the lessor as rent 75 per cent of the net proceeds of the sales. The Bear Creek Company, after succeeding to the interests of the packing company, continued to operate the property under the lease. On July 13, 1939, notice of default of payment and election to sell the property was recorded; and on October 9, 1939, plaintiff Inskeep tendered to the trustee the sum of $200, which was rejected. On October 14, 1939, the required notice was given for the sale of the property on November 3, 1939, under the deed of trust, but on November 2, 1939, plaintiffs commenced an action, No. 12747, in the superior court, against these same defendants for an accounting and to enjoin the sale under the deed of trust. A restraining order was issued, and the trustee's sale was postponed from time to time until January 4, 1940. Meanwhile the cause was tried on the merits; and on December 21, 1939, the court rendered judgment in favor of the defendants, the restraining order was dissolved, and costs were awarded defendants in the sum of $17.65. The judgment was based on findings to the effect that the $200 tender was "not sufficient to pay the amount owing to the defendant and the costs of the escrow"; that the costs of the title company in connection with the escrow were $35.50; and that "the sum of $241.43 was the amount owing by plaintiff to the defendant under the deed of trust, at the date of the tender of $200.00." No complete accounting was had, but the court had before it the auditor's reports, on which it apparently based its findings. The trust deed provided that the grantor should pay to the beneficiary or trustee the amount of attorneys' fees incurred in any suit com-

menced or pending "affecting said premises, or any part thereof, or the title thereto." In deciding the case the trial judge filed a memorandum opinion, wherein he stated: "The court in making its computation allowed costs of only $35.50 to be assessed against plaintiff, this being the Simonson & Harrell bill. *Nothing was allowed by way of attorney's fee, transfer or recording fees.*" (Italics ours.) No appeal was taken from the judgment in that suit. Thus it will be seen that the total amount found by the court in action No. 12747 to be due was $294.58 ($241.43 principal, plus $35.50 title costs; and $17.65 costs of suit).

On December 26, 1939, plaintiff Inskeep made a second tender of $261. The check therefor was held by defendants until January 3, 1940, when at about 4:30 in the afternoon it was returned to plaintiffs' attorneys' office with the following written statement: "January 3, 1940. Inskeep versus Bear Creek Company. Bear Creek Company—Creditor, Mr. Inskeep—Debtor. Principal, etc., $241.43; Simonson-Harrell Sale costs, $35.50; Costs of Suit, $17.65; *Title search, $45.00; Special auditing, James J. Uhle, $100.00; Attorneys' fees, $100.00; Total $539.58.*" (Italics ours.) The explanation offered for the delay in rejecting the tender was that Leuschner, the president of the Bear Creek Company, had been away over the holidays and did not return until January 3d. However, thereupon and on that same day plaintiffs' attorney delivered the check to the president of the Simonson-Harrell Company, the trustee, with instructions to deliver it to the Bear Creek Company. The sale under the deed of trust was set for 11:20 on the morning of the next day, January 4th; and about 10 o'clock that morning the check was returned to plaintiff's attorney. He then went to the court house steps, where the sale was to be held, and just before the time set for the sale he tendered to Leuschner $321.50 in cash, which Leuschner refused to accept, stating that it was "insufficient." Thereupon the sale took place; Leuschner bid in the property for $400, and the trustee's deed was executed to the Bear Creek Company that same day.

Subsequently plaintiffs brought suit for $50,000 damages, but it was voluntarily dismissed before trial; and on April 10, 1940, plaintiffs brought the present action. It was tried on the issues raised by the complaint and the cross-complaint, before a different judge, and the court in paragraph VIII of its findings found that there was due on the obligation secured by said deed of trust at the date of sale, the sum of $241.43 principal; trustee's fees, $35.50; costs, $17.85; interest, $4.57; also a title fee of $45; an auditing fee of $100; attorneys' fees for the beneficiary, $100; and additional attorneys' fees for the trustee of $250; making a total of $798.71. Judgment was entered accordingly in favor of defendants, and they were adjudged to be the owners of the property.

It appears from the record that at the time of the first tender and at the time of the sale the Bear Creek Company was holding for plaintiff Inskeep's credit over 7,000 pounds of dried figs, 75 per cent of the proceeds from the sale of which, when a sale was made, to be credited to plaintiff under the terms of the lease, but the amount due could not be determined because a sale had not been made. In this regard one of the conclusions of law was "That inasmuch as a portion of the crop grown on the premises described in plaintiffs' complaint, during the year 1939, had not been sold, plaintiff is not entitled to credit for the value of the unsold portion thereof, and if entitled to credit the amount is not enough to make the tender sufficient." However, no attempt has been made to claim that this crop or the amount it represents operates in any way to set off the amount due under the deed of trust. Plaintiffs' attorney testified that he "left the dried fruit out of the deal" because he "didn't know how much it would be." The deed of trust and the lease are treated as entirely separate transactions; but apparently there was some dispute over the amount due plaintiff from the crops on which plaintiff based his suit for an accounting.

It is apparent that the third tender of $321.50 was ample to cover the amount found to be due by the trial court in the first action, with added interest up to the date of sale. That being so, the tender was legally sufficient for all purposes unless the items subsequently added by defendants constituted valid charges under the terms of the trust deed and were incurred subsequent to the rendition of the judgment in the first action and prior to the trustee's sale. It is our conclusion that the trial court's finding in the present action that those added items were properly chargeable against the trustor cannot be sustained.

[1, 2] The challenged items consist of the following: (1) title fees, $45; (2)

auditing fee, $100; (3) beneficiary's attorneys' fees, $100; (4) trustee's attorneys' fees, $250. With respect to the last item, trustee's attorneys' fees $250, the evidence shows that prior to the trial of the present action the attorneys for the trustee rendered a bill to the trustee for $254, and that it was paid by the Bear Creek Company; but the representative of the trustee title company, who was called as a witness by the defendants, testified positively that the services for which that fee was paid were those rendered in behalf of the trustee in the $50,000 damage suit to which the trustee had been made a party defendant; and that no charge whatever was made by the trustee's attorneys for services rendered in action No. 12747. Therefore, since the $50,000 damage suit was not filed until after the trustee's sale, whatever fees were incurred in connection therewith cannot be considered in determining the amount due from the trustor on the date of the sale. It is true that the president of the Bear Creek Company gave testimony to the effect that the legal services for which this fee was paid were rendered in the first action; but it must be presumed that the written demand defendants delivered to plaintiffs' attorney the day preceding the sale was all inclusive of the amounts then claimed to be due the defendants, and no reference whatever was made therein to this fee. The defendants are doubtless concluded by the demand made at that time. As to the first item, title fee, $45, the undisputed evidence of the representative of the trustee title company shows that this was the identical charge covered by the $35 allowance made by the trial court in the first action for "the costs of Simonson-Harrell Company in connection with the escrow"; moreover, that such was the fact is made clear by the statement made by the trial court in that action in its written opinion with reference thereto. The third item, special auditing fee, $100, represents a charge incurred by the Bear Creek Company in auditing its records and those of its assignor, Land Owners Packing Company, over a period of ten years to determine for the purposes of the trial of action No. 12747 just what was the state of the debt secured by the trust deed. The trust deed made no provision, however, for the allowance of such a charge to be made against the trustor, and at the trial of the present action counsel for defendants frankly admitted that it was a "questionable" charge. In any event, no allowance was made therefor by the trial court in the first action, and defendants are concluded thereby with respect to transactions occurring prior to the date of the entry of judgment therein.

[3, 4] The remaining item, $100 attorneys' fees for the beneficiary's counsel, was listed among the items set forth in defendants' written demand delivered to plaintiffs' attorney the day preceding the sale; but the president of the Bear Creek Company testified unequivocally that the services represented by the charge were all rendered in connection with action No. 12747, and prior to the rendition of judgment therein, and none "subsequent" thereto; and it is apparent from the trial court's written opinion therein that it intended to make no allowance therefor. As said by the court in Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 750, 47 P.2d 273, 278, citing In re Estate of Felton, 176 Cal. 663, 667, 169 P. 392, and Coakley v. Ajuria, 209 Cal. 745, 749, 290 P. 33, an "opinion of the trial judge may be considered for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case."

Respondents argue that the court's finding in action No. 12747 is in effect that attorneys' fees were not due at the time of the first tender, but that they were incurred subsequent to that date, in the preparation of action No. 12727, and that the trust deed itself made provision for the allowance of attorneys' fees in an action involving the trust deed; that therefore they were properly added to the amount due, and the trial court's finding in that action did not operate as a bar thereto. However, the opinion filed by the court in that action makes it clear that it was intended that no allowance of attorneys' fees should be made in that action, either as of the date of tender or as of the date of judgment.

[5] It is our conclusion, therefore, that since the sum of $321.50 tendered on the morning of the sale was sufficient to pay the amount then due under the trust deed, plaintiffs were entitled to an annulment of the trustee's sale.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.

SPARKS v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.

Civ. 2733.

District Court of Appeal, Fourth District, California.

Sept. 23, 1942.

Rehearing Denied Oct. 23, 1942.

Hearing Denied Nov. 12, 1942.

1. Jury ⇐19(3)

In mandamus proceeding to require board of dental examiners to reinstate petitioner's license to practice dentistry, trial court's denial of petitioner's motion for jury trial was not abuse of court's statutory discretion. Code Civ.Proc. § 1090.

2. Mandamus ⇐173

In mandamus proceeding to compel board of dental examiners to reinstate petitioner's license to practice dentistry after suspension thereof by board, petitioner is entitled to trial de novo in Superior Court.

3. Trial ⇐56

In mandamus proceeding to require board of dental examiners to reinstate petitioner's license to practice dentistry after board's suspension thereof, where petitioner introduced witness' evidence before board as part of his case in chief and admitted that he did not expect to elicit anything new from such witness, whom he called to stand, exclusion of witness' testimony was not abuse of trial judge's discretion to control course of trial and prevent encumbrance of record with repetitious testimony.

4. Mandamus ⇐173

In mandamus proceeding to require board of dental examiners to reinstate dentist's license, suspended by board on ground of unlicensed person's practice of dentistry in petitioner's office, testimony of petitioner's patient that she knew such person was a technician, not dentist, that he did not attempt to work on witness, and that she did not see him do or attempt to do any work on other patients, was inadmissible, where no part of such testimony was directed to times at which board's witnesses testified that such person practiced dentistry on principal witness against petitioner. St.1935, p. 780, § 13.

5. Trial ⇐56

In mandamus proceeding to require board of dental examiners to reinstate dentist's license, suspended by board on ground of unlicensed person's practice of dentistry in petitioner's office, petitioner's offer to prove general lay-out of office by a patient who testified that she did not see such person work on any patient in such office, was insufficient as too indefinite to add much to descriptions of office already in record.

6. Physicians and surgeons ⇐11(3)

Allegations of accusation, filed with board of dental examiners, against a dentist whose license was sought to be revoked, that advertisement, published at such dentist's request, was contrary to Dental Practice Act as constituting and containing statements tending to deceive or mislead public, were sufficient. St.1935, p. 780, § 13.

7. Physicians and surgeons ⇐11(3)

Testimony before board of dental examiners by representative of manufacturer of materials used in dental plates, made by dentist whose license was sought to be revoked on ground of unprofessional advertising, that material was modified phenol-formaldehyde resin, that it was in semi-experimental stage, and that three other somewhat similar compounds were sold under other trade-names, *held* to show that such dentist's advertisement that his new "porcelite" plate was most comfortable and natural plate possible to be made tended to deceive or mislead public. St.1935, p. 780, § 13.

8. Physicians and surgeons ⇐11(3)

An allegation of accusation, filed with board of dental examiners, against dentist whose license was sought to be revoked on ground of unprofessional advertising, that certain advertisement by him was contrary to Dental Practice Act as advertising free dental work by him, was sufficient. St. 1935, p. 780, § 13.

9. Mandamus ⇐174

A dentist, whose license was suspended by board of dental examiners for one year on count of accusation not supported by sufficient evidence, was not prejudiced because of suspension thereof for five years, commencing on same date and running concurrently, under other counts of two accusations. Const. art. 6, § 4½.

10. Appeal and error ⇐1011(1)

Where there is evidence supporting trial court's findings and judgment, appellate court cannot reverse judgment be-

cause there is much other conflicting evidence.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Mandamus proceeding by P. A. Sparks to compel the Board of Dental Examiners of California to reinstate petitioner's license to practice dentistry. From a judgment dissolving an alternative writ of mandate and refusing to order reinstatement of the license, petitioner appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Ray Miller, of San Diego, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment dissolving an alternative writ of mandate and refusing to order the Board of Dental Examiners of the State of California to reinstate the license of petitioner to practice dentistry.

Petitioner had been duly licensed to practice dentistry in California. He maintained offices in San Diego and employed Archie Bell, an unlicensed person, as technician.

In the fall of 1935 two accusations were filed against petitioner with respondent board. Four counts were based on alleged acts of Archie Bell in practicing dentistry between September 18 and October 31, 1935, in the office of petitioner and with his knowledge, connivance and consent. The other two counts involved unprofessional advertising by petitioner in a daily newspaper in San Diego.

Trials were had before the respondent board which found petitioner guilty on all counts and suspended his license to practice dentistry for five years after any court order affirming the judgment of the board became final.

Petitioner sought to have the judgment of the board reviewed in a certiorari proceeding brought in the superior court. An appeal from the judgment in that proceeding was dismissed. Sparks v. Board of Dental Examiners, 25 Cal.App.2d 341, 77 P.2d 233.

Petitioner then instituted this action in mandamus. He now urges three grounds for a reversal of the judgment against him:

(1) That it was error to deny his motion for a trial by jury.

(2) That he was entitled to a trial de novo in the superior court.

(3) That the counts based on the advertisement are too uncertain to inform him of the charges against him.

[1] Section 1090 of the Code of Civil Procedure provides that in cases of this kind the trial court "may, in its discretion, order the question [of fact] to be tried before a jury." As the statute rests the question of a jury trial in the discretion of the trial court, we can see no abuse of that discretion in exercising it against the request of petitioner that he be given a jury trial. Petitioner argues this question upon the assumption that the trial judge must grant a jury trial when one is requested. The statute does not so provide.

[2] It is now established that in cases of this kind the petitioner is entitled to a trial de novo in the superior court. Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457.

This case is presented on a typewritten clerk's transcript, a short bill of exceptions, together with the clerk's transcript filed in this court on the former appeal. This last document is voluminous and contains a transcript of the evidence taken in the hearings before the board. No question is raised as to the form of the record, so nothing need be said on that subject.

[3] At the opening of the trial petitioner offered and the trial court received in evidence all of the testimony taken in the hearing before the respondent board.

Petitioner called Charlotte Ida Serginson to the witness stand and after two preliminary questions counsel for respondent objected to further testimony from her upon the ground, among others, that "it merely constitutes reiteration or a restatement of the testimony which she had given before the Board, this objection being premised upon the statement by counsel that she would in no way enlarge upon the testimony she had given previously." After considerable discussion the objection was sustained. It affirmatively appears from the discussion that petitioner did not expect to be able to elicit anything from this witness beyond that already in the record and before the court; that his sole purpose in calling this witness was "to enable the Court to see and observe the

manner in which she testified in support of our contention."

We have read the testimony of this witness. She was examined at length by counsel for petitioner and subjected to a searching cross-examination by counsel for and by members of the board. Her testimony was clear and she was not confused during the cross-examination.

While petitioner was entitled to a trial de novo in the lower court, and was entitled to call witnesses in his own behalf and have them testify at the trial, we cannot overlook the fact that he himself introduced the evidence of Miss Serginson, taken before the board as a part of his case in chief and that he admitted that he did not expect to elicit anything new from her. Under these circumstances we cannot regard the ruling of the trial judge an abuse of the discretion vested in him of controlling the course of a trial and preventing encumbering the record with repetitious testimony.

[4] Petitioner then called Mrs. C. Baker as a witness in his behalf. She testified that frequently during the fall of 1935, and between September 18 and October 31, she was in the office of petitioner as a patient. Objection was made to this evidence and a proffer of proof was made in substance as follows: That she was a patient of petitioner who did dental work for her; that she knew Archie Bell and knew that he was a technician and not a dentist; that Archie Bell did not attempt to do any work on her and that she did not see him do or attempt to do any work on any other patient; that the three operating rooms were open.

This summary of the proffered evidence demonstrates its inadmissibility. No part of this evidence was directed to the times when witnesses for the respondent board testified that Archie Bell practiced dentistry on Agnes Davis, the principal witness against petitioner.

[5] Petitioner offered to prove by the same witness "the general lay-out of the office of Dr. Sparks." Objection to this offer was sustained, and we think properly so, as the offer was too indefinite to add much to the descriptions of the office already in the record.

Counsel for petitioner then offered to prove facts of a similar nature by other witnesses. We can see no error in excluding such evidence.

[6] Count three of the first accusation has attached to it a copy of an advertisement published at the request of petitioner. It is alleged "that the said advertisement is contrary to the said Dental Practice Act in that it constitutes and contains advertising statements of a character tending to deceive or mislead the public." These allegations satisfy the requirements for pleadings in cases before administrative boards. Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324; Winning v. Board of Dental Examiners, 114 Cal. App. 658, 300 P. 866; Gustason v. Board of Osteopathic Examiners, 10 Cal.App.2d 436, 51 P.2d 1106.

[7] The advertisement set forth that petitioner was making a new porcelite plate with a new trubyte-mold; that the "new Dr. Sparks 'Porcelite' Plate * * * is the most comfortable and most Natural plate that is Possible to be made", and goes on to describe the plate in the most glowing terms.

A representative of the manufacturer of the materials used in the plate testified that the "material is of the condensite class, being a modified phenol-formaldehyde resin"; that it was in the semi-experimental stage; that there were three other somewhat similar compounds sold under other trade names. The evidence on this subject brings the case within the rule announced in Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992, where a less objectionable advertisement was held to tend to deceive or mislead the public.

[8] The fourth count of the accusation also has a copy of the advertisement attached to it. It is alleged "that the said advertisement is contrary to the said Dental Practice Act, in that it constitutes advertising free dental work by the said P. A. Sparks, as a dentist." This is a sufficient pleading under the authorities already cited.

[9] The sufficiency of the evidence to support these allegations and the findings and judgment under them is open to argument. We find no clear offer of free dental work in the advertisement. At best, such an offer may only be rather vaguely inferred.

However, we do not consider it necessary to pursue this subject further. Petitioner's license to practice was suspended for five years under counts one and two of both

the first and second accusations. It was suspended for one year under counts three and four of the first accusation which involved the advertisement. All suspensions are to commence on the same date and run concurrently. It follows that if the evidence is not sufficient to support the judgment rendered on the fourth count of the first accusation, petitioner is not prejudiced because of the suspension of his license for an additional four years under other counts. See art. VI, § 4½, Const.

[10] The evidence under the four counts concerning petitioner permitting, aiding and assisting Archie Bell to practice dentistry, is sharply conflicting. Evidence offered on behalf of respondent shows acts by Bell with the knowledge and consent of petitioner very similar to those described in Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P. 1006. Those acts were held to be unlawful. Following that decision we must hold that the acts credited to Bell constitute a violation of the provisions of the Dental Practice Act in effect in 1935. § 13, as amended, Stats.1935, p. 780. As there is evidence supporting the findings and judgment we cannot reverse the judgment because there is much other conflicting evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



54 Cal.App.2d 804

PEOPLE v. WILSON et al.

Cr. 3609.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1942.

Criminal law ⇐1182

Where transcripts on appeal had been filed and cause set for hearing, and on hearing date there was no appearance on behalf of appellant, either by brief or otherwise, the judgment of the trial court was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceedings between the People and Orval L. Wilson and others. From an adverse judgment, Claude C. Mason appeals.

Affirmed.

Claude C. Mason in pro. per., for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

June 8, 1942, the transcripts on appeal were filed in this court. Thereafter the cause was set for a hearing on September 23, 1942. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.



EASTMAN OIL WELL SURVEY CORPORATION et al. v. LANE-WELLS CO.*

Civ. 13599.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1942.

As Corrected Nov. 16, 1942.

Hearing Granted Nov. 28, 1942.

1. Contracts ⇐147(1)

Broad general language used in a contract should not be given effect beyond the obvious subject matter of the contract and the expressed mutual intentions of the parties.

2. Patents ⇐218(1)

A license agreement, whereby licensor granted licensee right to use certain patented devices for directional drilling of oil wells in return for royalties, imposed duty on licensee to pay royalties only for use of patented devices, and not for use of other methods for drilling oil wells, notwithstand-

* Subsequent opinion 134 P.2d 564.

ing other provisions concerning royalties for orienting surveys, pipes, or other equipment.

3. Patents ⇐218(1)

The fact that license agreement, whereby licensor granted licensee right to use patented devices for directional drilling of oil wells, required licensee to continue to pay royalties in event of adjudication of invalidity, though other license agreements executed by the parties provided that, if patents were adjudged invalid, licensee might cancel agreement, and obligation to pay royalties should cease, did not evidence intention that licensee should pay royalties for all work done both with patented devices for directional drilling and other devices, but only with patented devices.

4. Evidence ⇐458

Evidence of circumstances surrounding a contract may be received only where on the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said.

5. Appeal and error ⇐1008(3)

The construction placed on an ambiguous contract by the trial court after hearing parol evidence, if appearing to be consistent with intent of the parties, should not be disturbed by the reviewing court, though another interpretation would seem equally tenable.

6. Appeal and error ⇐1010(1)
Contracts ⇐176(3)

Where parol evidence is introduced in aid of interpretation of ambiguous contract, question of its meaning is one of fact, and finding of fact embodying interpretation of doubtful language must stand if not lacking in evidentiary support.

7. Patents ⇐219(5)

Evidence sustained finding that license agreement, which was allegedly ambiguous on its face, whereby licensor granted to licensee the right to use certain patented devices owned or controlled by licensor for directional drilling of oil wells in return for royalties to be paid by licensee to licensor, was not in fact ambiguous and expressed the intentions of the parties to impose on licensee no duty to pay royalty where no use was made of the patented devices, but of other devices.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Eastman Oil Well Survey Corporation, the Eastman Oil Well Survey Company, and H. John Eastman against Lane-Wells Company for a decree construing royalty provisions of a contract by which defendant licensed plaintiffs to manufacture and use certain patented devices for directional drilling of oil wells, as to which royalties the parties were in disagreement, and for a decree declaring that a certain other method for direction drilling of oil wells which was being used by plaintiff was not covered by such patents, and was not an improvement thereon. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for appellant.

Houser & Houser, Swaffield & Swaffield, and Roland G. Swaffield, all of Long Beach, for respondents.

SHINN, Acting Presiding Justice.

In this action plaintiff sought the following relief: (1) A decree construing the royalty provisions of a contract by which defendant licensed plaintiff to manufacture and use certain patented devices for the directional drilling of oil wells, as to which royalties the parties were in disagreement (the patents being referred to as the Anderson patents, except where more specific reference is required), and (2) a decree declaring that a certain other method, which we shall call the magnetic method, for the directional drilling of oil wells which was being used by plaintiff was not covered by said Anderson patents and was not an improvement thereon.

Plaintiff (sometimes herein referred to as "Eastman") prevailed as to each of its contentions. It was decreed that the "magnetic method" was not covered by and was not an improvement upon the methods covered by the Anderson patents. Upon the appeal this portion of the judgment is not challenged by appellant. The attack here made is upon the construction of the license agreement. Defendant contends for a construction under which plaintiff would be required to pay royalties to defendant for all work done under the magnetic method or any other method, whether the same is covered by the Anderson patents, upon the same basis as royalties are paid under the agreement for work done under the

method covered by the Anderson patents. Plaintiff's contention is that no royalties are payable except for work done in which the devices covered by the several described patents are employed. The court gave the agreement his construction and decreed that work done under the magnetic method carries no royalty obligation under the license agreement. It is this construction of the agreement that is claimed to be erroneous. The license agreement reads in part as follows:

"Exhibit 'A'

"License Agreement

"This Agreement made and entered into this 31st day of January, 1938 by and between Lane-Wells Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office at Los Angeles, California, Party of the First Part, hereinafter referred to as Licensor, and Eastman Oil Well Survey Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office at Long Beach, California, Eastman Oil Well Survey Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office at Dallas, Texas, and H. John Eastman of Dallas Texas, Parties of the Second Part, hereinafter referred to as Licensee.

"Witnesseth:

"Whereas, the Licensor is the owner of the following United States Letters Patent and the inventions claimed therein:

"Patent No.	Issued	Inventor	Title
1,770,224	July 8, 1930	Alexander Anderson	Borehole Directional Apparatus and Method of Orientation
1,830,345	November 3, 1931	Alexander Anderson	Borehole Directional Apparatus and Method of Orientation
2,088,539	July 27, 1937	Clyde I. Stokenbury	Means and Method of Orienting Deflecting Tools in Wells

and is also the owner, by agreement with Licensee, of that certain invention of one Willard Opocenski entitled 'Method of Surveying Wells and Apparatus Therefor', for which an application for Letters Patent is about to be filed; and,

"Whereas, the Licensee is desirous of acquiring a license to manufacture for its own use devices embodying the aforesaid inventions, and to use said devices, and to practice the methods described and claimed in said Letters Patent in its business, of orienting surveys, pipe and tools in well bores;

"Now, therefore, in consideration of the mutual covenants and agreements of the parties, and the full, prompt and faithful performance thereof, and the payment of the royalties at the time and in the manner hereinafter provided, and other good and valuable considerations, the parties hereto have and do agree together as follows, to-wit:

"I. For the term and upon the conditions set forth in this Agreement and under said Anderson and Stokenbury Letters Patent, said invention of Willard Opocenski, and any Letters Patent that may be granted therefor, and under any Letters Patent for any improvements on the inventions of the aforesaid Letters Patent, hereafter made or acquired by Licensor, Licensor hereby grants to Licensee a non-exclusive, non-transferable indivisible and personal license, limited to and personal to the business of the Licensee in making orienting surveys in a well bore, orienting pipe positioned for any purpose in a well bore, and of orienting any tools or any other equipment in a well bore, but not extended to any other use or purpose whatsoever, to manufacture devices embodying any or all of the aforesaid inventions, and to practice the methods described and claimed in and by said Letters Patent and in the invention of said Willard Opocenski. This license to so manufacture for its own use and to so use said inventions shall extend to and be limited to the United States of America, its territories and possessions.

"It is specifically understood and agreed that the license herein granted under said invention of said Willard Opocenski is not to become effective until such time as Licensor has obtained the entire right, title

and interest therein by assignment from said Willard Opocenski.

"It is further specifically understood and agreed that the license herein granted is not granted under any other inventions or Letters Patent owned by Licensor and that no license is granted hereunder to manufacture or use or sell, at any time or place, any devices, surveying instruments or other tools, or methods embodying the inventions disclosed and claimed in any other Letters Patent owned by Licensor or under which it is licensed.

"It is further specifically understood and agreed that no license is granted to Licensee to sell at any time or in any place or country, devices or methods embodying the inventions covered by this License, except with the written consent of Licensor.

"II. Licensee covenants and agrees to pay to Licensor, at the times and in the manner as hereinafter provided, the following royalties:

"For each orienting survey of a well bore, a sum equal to sixteen and two-thirds percent (16⅔%) of the total charge made by Licensee for such orienting service, but in no event shall such royalty be less than the sum of Twenty-five Dollars ($25.00);

"For orienting pipe positioned for any purpose in a well bore, for which service a charge is made upon a footage basis, a sum equal to sixteen and two-thirds percent (16⅔%) of the total charge made by Licensee for such orienting service, but in no event shall such royalty be less than the sum of Twenty-five Dollars ($25.00);

"For orienting any tools, or any other equipment in a well bore for which orienting service a flat charge is made by Licensee of One Hundred Seventy-five Dollars ($175.00) or less, the sum of Fifteen Dollars ($15.00);

"For orienting any tools, or any other equipment in a well bore for which service a flat charge is made by Licensee of more than One Hundred Seventy-five Dollars ($175.00), a sum equal to ten percent (10%) of the total charge made by Licensee for such orienting service.

"It is expressly understood and agreed that the royalties herein provided shall be computed from and paid for all orienting services rendered by Licensee from and including January 1, 1938.

"III. Licensee agrees to keep a true and accurate set of books of account, correctly showing the name and address of each customer, the service rendered, and the date and place thereof, the total charge made for such service, and all transactions in connection with all services rendered by Licensee under this license, which books of account shall be open during all usual business hours for the inspection of Licensor or its duly authorized representative; and further agrees to render a statement in writing to the Licensor, on or before the 20th day of each month, during the term of this Agreement, setting forth a true statement of each service rendered hereunder, the date and place where rendered, for whom rendered, the total charge made therefor, during the preceding month, and further covenants and agrees to pay to the Licensor at that time the royalties due for services rendered hereunder by Licensee during the preceding month.

"IV. Licensor covenants and agrees that it will not, during the term of this Agreement, license others under the aforesaid Stokenbury Patent No. 2,088,539 or under the invention of said Willard Opocenski, or any Letters Patent granted therefor, or under any other patents that may be hereafter acquired by Licensor from Licensee, within the United States of America, without the written consent of Licensee.

"VI. Licensee covenants and agrees that it will at no time during the life of this Agreement deny or contest the ownership or validity of the aforesaid Letters Patent, or of any Letters Patent that may issue upon the aforesaid invention of said Willard Opocenski, or upon any improvements of any of the aforesaid Letters Patent, and that it will in no manner set up or induce the setting up of any adverse allegations as to the ownership or validity thereof, and that it will not lend its aid in support of any opposition thereto, or counsel with, aid, abet or encourage any other person or persons contesting the same.

"VII. It is mutually covenanted and agreed that in the event any of the aforesaid Letters Patent, or any Letters Patent granted upon the invention of said Willard Opocenski are finally adjudged by a court of competent jurisdiction to be invalid and no further appeal lies, then, the Licensee shall have the option upon the date of expiration of Anderson Patent No. 1,770,224, to cancel this Agreement by thirty (30) days notice in writing to Licensor, and the obligation of the Licensee to pay royalties

hereunder shall cease at the date of cancellation, without, however, relieving Licensee of the payment of all royalties due up to the date of cancellation, it being the intent of this paragraph that the Licensee is obligated in all events to pay the royalties hereinbefore provided until the date of expiration of said Anderson Patent No. 1,770,224, notwithstanding the fact that any of the aforesaid patents under which Licensee is licensed hereunder may have been declared invalid, but that Licensee in the event any of the Letters Patent have been declared invalid may cancel the agreement if it so desires, at the date of expiration of said Anderson Patent No. 1,770,224, but not sooner, and relieve itself from the obligation to thereafter pay royalties hereunder, and that unless the Licensee so elects to cancel the agreement as above provided, the obligation to pay the royalties shall continue for the full term of the agreement.

"XII. Any improvements made on the inventions which are the subject matter of this Agreement by or through the efforts of Licensee or acquired by it, or coming under its control, during the life of this Agreement, and all Letters Patent therefor, shall be the property of, and properly assigned to Licensor to the full extent of the interest therein by Licensee; the expense of procuring Letters Patent for any such inventions so assigned to Licensor shall be paid by Licensor.

"XIV. The term of this Agreement shall be for the life of the last numbered Letters Patent issued upon any of the inventions covered by this Agreement unless sooner terminated in accordance with the provisions hereof."

Defendant has three approaches which are relied upon as leading to the construction for which it contends: (1) That the agreement standing alone requires the payment of royalties upon all work done by plaintiff, whether under the described patents or through the use of other methods; (2) that if the agreement in and of itself cannot be thus construed, it must be read with two other agreements, executed contemporaneously, and that when so read it must receive the interpretation urged by defendant; and (3) that when the three writings are considered together with the circumstances surrounding their execution, including the negotiations of the parties which culminated in the agreement, it will appear that the parties intended to provide for the payment of royalties upon the broad basis of defendant's claims.

Having explored these several approaches we find that they all lead to the end reached by the trial court.

[1, 2] In support of the first argument attention is called to the provisions for the payment of royalty and specifically to charges specified for each of the following services: "for each orienting survey of a well bore;" "for orienting pipe position for any purpose in a well bore for which a service charge is made on a footage basis;" "for orienting any tools or any other equipment in a well bore for which orienting service a flat charge is made by the licensee;" and a provision "that the royalties herein provided shall be computed from and paid for all orienting services rendered by licensee from January 1, 1938." We find nothing in these phrases or in any of the other terms or provisions of the agreement directly or indirectly purporting to recognize defendant's right to charge or any duty on the part of plaintiff to pay royalties with respect to work to be performed by plaintiff in orienting drilling operations by methods other than those covered by the patents described in the agreement. The subject matter of the contract was the granting by defendant to plaintiff of the right to use certain patented devices owned or controlled by defendant, for which right and the exercise thereof plaintiff obligated itself to pay certain royalties. It is expressly provided in paragraph III of the agreement that Eastman was to keep books of account showing each service rendered, the total charge made for such service "and all transactions in connection with all services rendered by Licensee under this License," was to render monthly statements "of each service hereunder" and "pay to the Licensor at that time the royalties due for services rendered hereunder by Licensee during the preceding month." Nothing in the contract suggests that the parties were contracting with reference to anything other than uses to be made of the described devices. The claims now asserted by defendant, had they been recognized by plaintiff at the time of the contract, would have called for a provision therein conceding not only that, as between the parties, defendant was the owner of, or entitled to charge royalties upon, patent rights in certain devices used in the directional drilling of oil wells, but also that it had an exclusive right to practice the art and to conduct the business of orienting oil well drilling by whatsoever methods. It is obvious that to read into the contract a rec-

ognition of such right would be to extend its operation far beyond its purposes as they are expressly stated therein. Counsel for defendant, with commendable frankness, dwell but lightly upon their first contention. The terms of the agreement will be discussed more fully in connection with defendant's second and third theories of interpretation. It will be sufficient to say here that it is a cardinal rule of construction that broad general language used in a contract should not be given effect beyond the obvious subject matter of the contract and the mutual intentions of the parties which they have undertaken to express in writing. Lemm v. Stillwater Land & Cattle Co., (1933) 217 Cal. 474, 19 P.2d 785; Hollander v. Wilson Estate Co., (1932) 214 Cal. 582, 585, 7 P.2d 177. Under this rule the duty to pay royalties would be limited to those which became due on account of the use of the licensed devices.

The next argument is that on the same day the agreement was entered into, two other license agreements, which we shall refer to as the Lewis and McVicar agreements, were made between the same parties and that from a comparison of certain restrictive provisions of these two agreements with the broader provisions of the primary agreement, it results that the latter must receive the construction urged by defendant. This contention is inextricably involved with defendant's third argument, as will appear as we proceed.

The events that preceded the making of the three agreements, and which were proved under circumstances to be related hereinafter, were the following: Lane-Wells, holding the two Anderson patents described in the agreement, had been awarded an interlocutory judgment in the United States District Court for the Southern District of California, adjudging Eastman to be guilty of infringement of said patents and ordering an accounting to Lane-Wells of damages occasioned thereby. The accounting of damages was to be limited to business done in California, although other like actions were pending in the courts of Oklahoma and Texas, where the Eastman company had also been operating. Without the taking of an accounting, an agreement was reached by the parties compromising all of Lane-Wells' claims for damages for patent infringement for the sum of $30,000. Thereupon stipulations were filed in the courts of California, Texas and Oklahoma, calling for final decrees, which were duly entered, adjudging the Eastman company guilty of patent infringements and awarding Lane-Wells the sum of $30,000 as damages. Contemporaneously with the compromise and the entry of the decrees Eastman paid Lane-Wells in cash $7,500; Eastman also assigned to Lane-Wells the Stokenbury patent and the so-called Opocenski application for patent rights described in said license agreement, and Eastman received a credit therefor on the judgment of an additional $5,000, leaving $17,500 unpaid, which Eastman agreed to pay in fifteen equal installments on the 20th day of each month, commencing February 20, 1938. Thereupon the license agreement was entered into by which plaintiff Eastman was licensed under the two Anderson patents, the Stokenbury patent and the Opocenski application for patent. At the same time Lane-Wells licensed Eastman to manufacture and use two devices invented by and patented to one Lewis, one a straightening tool and the other a deflecting tool to be used in well bores, for the use of which Eastman agreed to pay Lane-Wells $25 for each run of either of said tools in a well, and Eastman licensed Lane-Wells to manufacture and use a patented device for use in directionally drilling oil wells and which tool was described as a "whipstock," for the use of which Lane-Wells was to pay as royalty $15 per run in a well. No separate written agreement of settlement was made.

In its answer defendant alleged that plaintiff and defendant entered into negotiations for the purpose of reaching a compromise settlement of defendant's claims for damages and to obviate an accounting thereof in the patent infringement litigation in the Federal court; that the negotiations culminated in a settlement pursuant to which the three license agreements were executed. It was then alleged "that it was understood and intended between the parties hereto that the license from the defendant to the plaintiffs for orientation surveys of well bores and orientation of pipe or tools or other equipment in a well bore, was to call for royalties on all such orientation operations conducted by the plaintiffs irrespective of whether or not such operations were conducted under the patents owned by the defendant and licensed to the plaintiffs. That it was understood and intended between the parties hereto that such royalty payments as therein provided would provide a medium whereby defendant would thus be reim-

bursed in part for its having waived th accounting for and recovery of a larger sum than the sum of $30,000 in said infringement action and to which defendant was entitled to recover, and for the further consideration of the dismissal of the two actions then pending in the United States District Court of Texas and Oklahoma respectively, which actions were thereupon dismissed by the defendant."

All of defendant's evidence as to circumstances preceding or relating to the negotiations for settlement of defendant's claims of damage was introduced over objection of plaintiff. Defendant introduced the evidence in support of the allegations of its answer and in an effort to show that the three license agreements were executed pursuant to and as a part of a settlement of Lane-Wells' claim for damages for patent infringement; that the underlying consideration for each of the three agreements was the settlement of the litigation; that they were in reality but a single contract and that when they were so considered by the court in connection with evidence of the circumstances under which they were negotiated and executed, it would be established that the parties intended that Lane-Wells should receive royalties upon work done by Eastman under any and all methods. Plaintiff contended and now insists that the principal license agreement was sufficient unto itself; that no questions as to the terms of the settlement are involved; that each agreement expresses its own subject matter and consideration and is to be construed according to its own terms, independently of the others. Plaintiff further contended and here insists that the principal license agreement is unambiguous and that resort may not be had to evidence of other agreements made at the same time or to the surrounding circumstances as an aid in the interpretation thereof.

We shall not undertake to decide whether the three agreements should have been considered by the court as a single instrument. They were so offered by defendant, the court received them in evidence upon the issue tendered by defendant's answer, and no question of error is raised in that behalf. To be sure, defendant contends that the court did not give consideration to the Lewis and McVicar agreements in construing the Anderson agreement, but that appears to be an unwarranted assumption based upon the court's conclusion that the Anderson agreement was unambiguous. Manifestly the single question whether a given document should be read with others executed at the same time and as if they constituted a single writing and the question of ambiguity are unrelated.

The conclusion that the Anderson agreement was unambiguous was responsive to defendant's effort to prove by extraneous evidence certain understandings and intentions of the parties as to Eastman's obligation to pay royalties. In support of its contention that it was the understanding that Lane-Wells should be given the broad rights to exact royalties or other compensation which it now asserts, it is urged that although the principal license agreement by its terms may be construed as calling for royalties only for work done embodying use of the licensed devices and methods, when the three agreements are read together it will become apparent that the royalties payable under the main license agreement were not intended to be limited to Eastman's operations under the Anderson, Stokenbury and Opocenski patents. Defendant relies upon the circumstance that in the Lewis and McVicar license agreements there was the following provision: "It is mutually covenanted and agreed that in the event the aforesaid Letters Patent or any Letters Patent for any improvements on the invention of the aforesaid patent are finally adjudged by a court of competent jurisdiction to be invalid and no further appeal lies, Then the Licensee shall have the option to cancel this Agreement by thirty (30) days notice in writing to Licensor, without, however, relieving Licensee of the payment of royalties due up to the date of such cancellation, and the obligation of the Licensee to pay royalties hereunder shall cease at the date of cancellation, but unless the Licensee so elects to cancel the Agrement as above provided the obligation to pay the royalties shall continue for the full term of this Agreement." In the main license agreement a provision respecting cancellation in case of adjudication of invalidity read as follows: "It is mutually covenanted and agreed that in the event any of the aforesaid Letters Patent, or any Letters Patent granted upon the invention of said Willard Opocenski are finally adjudged by a court of competent jurisdiction to be invalid and no further appeal lies, then, the Licensee shall have the option upon the date of expiration of Anderson Patent No. 1,770,224, to cancel this Agreement by thirty (30) days notice in writing to Licensor, and the obligation of the Licensee to

pay royalties hereunder shall cease at the date of cancellation, without, however, relieving Licensee of the payment of all royalties due up to the date of cancellation, it being the intent of this paragraph that the Licensee is obligated in all events to pay the royalties hereinbefore provided until the date of expiration of said Anderson Patent No. 1,770,224, notwithstanding the fact that any of the aforesaid patents under which Licensee is licensed hereunder may have been declared invalid, but that Licensee in the event any of the Letters Patent have been declared invalid may cancel the agreement if it so desires, at the date of expiration of said Anderson Patent No. 1,770,224, but not sooner, and relieve itself from the obligation to thereafter pay royalties hereunder, and that unless the Licensee so elects to cancel the agreement as above provided, the obligation to pay the royalties shall continue for the full term of the agreement."

[3] It is said that under conventional license agreements, such as the Lewis and McVicar agreements, the payment of royalties may be terminated in the event of an adjudication of invalidity of the patent. The Anderson agreement does not contain this provision and defendant argues from the fact that Eastman cannot terminate its royalty obligation in the event of adjudication of invalidity until the date of expiration of the Anderson patent, but must continue to pay as if the patents were valid, that it must have been the intention by this provision to require Eastman to pay royalties at the stipulated rates for all work done under any and all methods. But keeping in mind the scope of the Anderson agreement, as it can be ascertained from a reading thereof by itself or in connection with the two other agreements, we are unable to see that the obligation to pay royalties in the event of an adjudication of invalidity of said patents or either of them relates to any work other than that done through a continued use of the patented devices. Such a construction of the agreement is consistent with its main purpose, whereas a contrary construction would read into the contract something the parties did not attempt to place there. It would be extremely difficult for us to believe that the parties employed the wholly inadequate language in question with an intention that it would receive the broad construction defendant seeks to place upon it. So far as this provision is concerned, we think the Anderson agreement does not even by implication relate to any work that might be done by Eastman without using the licensed devices. A more logical reason for the provision of the agreement for the payment of royalties in the event of adjudication of invalidity is that Eastman would thereby be discouraged from raising the question of validity.

In comparing the Lewis and McVicar agreements with the Anderson agreement it is pointed out that in the two former agreements there is a provision that royalties shall be paid "for each and every directional changing operation in a well bore (commonly known as a run in the well) in which operation the licensee employs or leases to others to employ a directional changing device embodying the inventions of said (Lewis or McVicar) patent." Defendant insists that this also is a conventional term of licensing agreements, that there is not the same or an equivalent provision in the Anderson agreement, and that this is further proof that Eastman's royalty obligation was wholly unrestricted, since it was not expressly limited to operations by means of devices embodying the inventions of the Anderson patents. The fact that the identical provision found in the Lewis and McVicar agreements was not placed in the Anderson agreement is a circumstance tending but lightly, if at all, to support the affirmative matter pleaded in the answer which we have quoted; it is not at all sufficient to overcome the provisions of paragraph III of the Anderson agreement, which expressly limit the duty of keeping accounts, rendering statements and paying royalty, to the operations of Eastman which involved the use of the patented devices and other provisions which are consistent with that limitation or to supply what is lacking in that agreement and which would have to be read into it in order to establish the validity of defendant's contention. We cannot see that the difference in expression as to the same subject matter in the agreements evidences any difference in meaning; the same argument was made to the trial court and no doubt was fully considered, together with other circumstances which were the subject of proof under the quoted allegations of defendant's answer, to which we shall now refer.

The parties are in entire disagreement as to the theory under which the case was tried. Plaintiff contends that defendant insisted at the trial that written and oral

evidence of the circumstances under which the agreement was made, including the negotiations which preceded and attended its execution, should be received as an aid to the court in its interpretation, and that such evidence was introduced under the theory that the agreement was ambiguous or uncertain. Defendant now insists that it undertook to show only that the three license agreements were executed as a part of a single transaction relating to a single subject matter and should be considered as one instrument, and that the evidence was not offered under the theory that there was any ambiguity or uncertainty in the Anderson agreement when read with the other two. The record amply supports plaintiff's contention as to the theories and motives of defendant in offering the evidence in question. It is true that the parties argued to the trial court at great length their respective theories of construction, plaintiff contending that the Anderson agreement was unambiguous and should be construed from a consideration of its terms alone, and defendant contending that the three agreements read together were unambiguous. But defendant contended also that it had a right to prove all of the conditions and circumstances surrounding the execution of the agreement in order to establish that it was the intention of the parties to place no limitation whatever upon Eastman's obligation to pay royalty for all work done in the directional drilling of oil wells. The law bearing upon the introduction of extrinsic evidence under such circumstances was discussed by counsel and the court at length. Counsel for defendant firmly took the position that they had a right to show by extrinsic evidence and that their evidence would establish that it was understood that Eastman was to pay Lane-Wells tribute on all of its operations in consideration of the remission of a part of the claim for damages, and they cited many authorities in support of their right to make such proof. The court ruled with defendant and received the evidence. We find hundreds of pages of the record devoted to the testimony of the parties and their attorneys, in which were related the versions of the respective witnesses as to numerous and lengthy conversations had in the settlement negotiations and connected with the drafting of the several documents which evidence the terms of the settlement. It is unnecessary for us to do more than state the general scope of those conversations.

An attorney who drafted the documents for defendant, and who was associated with its patent attorneys, testified on defendant's behalf that the president of defendant corporation stated to Eastman, president of plaintiff corporation: "John, we are settling all of our grievances, including this previous suit of Alexander Anderson, and I am going to settle the whole thing now or we are not going to have any deal. You are going to have to pay on everything you do, regardless of patents, because that is a part of the settlement." The same witness testified that he told one of plaintiff's attorneys before the agreement was signed, "that anything Mr. Eastman did in the way of orientation came under that agreement, and he would have to pay a royalty under it" and that plaintiff's said attorney replied, "Well, I think so too." Defendant's president testified that he said to Eastman: "We are settling up a lawsuit in which there is a lot of money involved, and you are going to have to pay a royalty on all orienting at any time, and you are going to have to continue to pay it until the expiration date of the last Anderson patent. If the patents are declared invalid, you will have to pay the royalty anyhow." The witness was unable to recall what, if anything, Eastman said in reply to that statement. Again the witness stated that he had told Eastman: "You are going to pay a royalty on all orienting anyhow * * *." And again he testified that another of his attorneys made the statement to the president and counsel of plaintiff during the settlement negotiations: "And he [Eastman] was to pay us the 16⅔ percent royalty on all orienting of any kind and description on all tools or devices that were run in an oil well." Other statements of similar import were testified to. Plaintiff's witnesses gave entirely different versions of the same conversations, denying any and all discussions as to the payment of royalties except for the exercise of the rights acquired by plaintiff to use the several patented devices described in the agreement. Defendant now relies upon testimony such as we have quoted to prove that the parties intended that the Anderson agreement should, and that they believed that it did, provide for the payment to defendant of all royalties which it now claims. Plaintiff relies upon the testimony of its own witnesses to refute this contention of defendant.

The trial court found the Anderson agreement to be unambiguous and, as we have seen, construed it as obligating Eastman to pay royalties only for use of the patented devices. There is necessarily included in the court's determination an implied finding of fact that the parties did not intend to provide and did not understand that they had provided in their agreement that plaintiff could not engage in the directional drilling of oil wells by any method without paying tribute to defendant. This implied finding of fact must be recognized because defendant could not have prevailed at the trial without convincing the court that the Anderson agreement is ambiguous and that the rights of defendant and the obligations of plaintiff thereunder were understood by the parties to be greater than those which are clearly described and set forth in the agreement or, in other words, that the terms of the agreement should be given a far broader meaning in the light of the extrinsic evidence as to the intentions of the parties.

[4] Upon the trial the court and counsel had fully in mind the rule that evidence of surrounding circumstances may be received "only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said." United Iron Wks. v. Outer H., etc., Co., 1914, 168 Cal. 81, 84, 141 P. 917, 920; Purdy v. Buffums, Inc., 1928, 95 Cal.App. 299, 303, 272 P. 770; Salter v. Ives, 1916, 171 Cal. 790, 155 P. 84; Kunz v. Anglo & London Paris Nat. Bk., 1931, 214 Cal. 341, 347, 5 P.2d 417. We think it cannot be doubted that the court received the extrinsic evidence because there existed in the court's mind a doubt as to the meaning of the agreement and because defendant insisted upon its right to put in such evidence. The case was tried, so far as the scope of the evidence is concerned, exactly as it should and would have been tried had the parties conceded that the agreement was ambiguous. The issue was raised by the affirmative allegations of defendant's answer and was tried because of defendant's insistence. While there is serious doubt in our minds whether the court would have been warranted in accepting the testimony of defendant's witnesses concerning the negotiations as a basis for holding that the contract should be construed as defendant seeks to have it construed, we must say that a complete acceptance of such testimony would inevitably have involved a holding that the contract is ambiguous. Certainly if defendant was to receive royalties upon all of plaintiff's orienting work, that right is but ambiguously or imperfectly expressed in the agreement, if it is expressed at all. Upon the other hand, the testimony of plaintiff's witnesses was entirely consistent with the construction which the court placed upon the contract. We think the court did accept this testimony and concluded therefrom as well as from the language of the contract that it was not ambiguous and expressed the complete intentions of the parties, namely, to impose upon plaintiff no duty to pay royalty where no use was made of the patented devices.

Defendant insisted upon and was given the right to prove the intentions of the parties by extrinsic evidence. The court has found against defendant's contention. Defendant now contends that this court should look solely to the three writings, and from them exclusively give a construction to the Anderson agreement contrary to that given it by the trial court. Having failed to convince the trial court that the contract should be construed so as to conform to the alleged oral agreements testified to by its witnesses, it now insists that all of its extrinsic evidence was offered for the single purpose of showing that the three agreements should be read as one. The truth of the matter is that the court has by implication decided as a matter of fact that the parties did not make, intend to make or understand that they had made the covenants defendant contends for.

The trial court could well have believed from the evidence that there was not involved in the patent litigation any claim by defendant that it had the exclusive right to carry on the art or business of the directional drilling of oil wells or that it possessed anything more than the ownership and control of certain inventions and devices for the directional drilling of oil wells; that during the course of the extensive negotiations for settlement of the patent litigation defendant did not advance the contention that it had those exclusive rights; that no claim or assertion of any such rights was stated in any of the license agreements, and that plaintiff had not been

asked to concede and had not conceded that defendant had any such rights. It is significant to us, and must have been to the trial court, that there was no evidence that at the time the agreements were made there were devices or methods for the directional drilling of oil wells other than those controlled by defendant. The several license agreements were executed for the purpose of settling all disputes between the parties concerning the patents owned by defendant and providing for the use of the patented devices by plaintiff. It may well be that the parties assumed that no other methods would be invented or at least that they did not anticipate such other inventions. In any event, it is quite clear that they had in mind, and that the Anderson agreement refers to, only the devices and methods covered by the patents described in the agreement. And in this connection we will refer again to the provision in that agreement expressly limiting the duty to keep accounts, render statements and pay royalty, to work involving the use of the devices covered by those specific patents. This limitation strongly indicates that the parties had no intention to provide for operations under processes yet to be discovered. The significant and persuasive fact in the case is that there is nothing whatever in the record to prove or even to suggest that it was anticipated that Eastman would operate under newly invented methods. The absence of any provision in the agreement for such possible contingency, and the patent fact that if Lane-Wells had intended the agreement to cover such contingency the agreement no doubt would have contained specific and unequivocal provisions therefor, necessarily lead us to the construction of the agreement which the trial court gave to it. Nothing could be more clear than that it should not be construed so as to cover rights of the parties which were not only not in controversy, not the subject of negotiation or barter, but which apparently were not even in their minds or anticipated by them at the time they contracted. For the court to extend the terms and meaning of the agreement in question so as to require Eastman to pay royalties for orienting work done under the magnetic method which it is now using would be to write a new and different contract for the parties.

[5, 6] We have pointed out that the decision of the trial court that the agreement is unambiguous was likewise a decision against defendant of the alleged fact that the parties intended that it should cover all operations of Eastman, including its use of the magnetic method, which is a new invention. The language of the court in Scott v. Sun-Maid Raisin Growers Ass'n, 1936, 13 Cal.App.2d 353, at page 358, 359, 57 P.2d 148, 151, is so appropriate to this situation that we quote it in part. The court said:

"The record demonstrates that respondents strenuously contended throughout the lengthy trial of the action that there is no ambiguity and uncertainty in the phraseology of the instrument and that parol evidence was therefore unnecessary to aid the court in the task of construction. The court, however, accepted appellant's view and permitted to be admitted all evidence offered by appellant which tended to show the circumstances preceding the execution of the instrument as well as those which followed its execution. The trier of facts was therefore fully informed of all the circumstances and facts surrounding the making of the written agreement and its conclusion intelligently formed on so ample a showing may not lightly be dismissed.

"In the second place, the construction placed upon the language by the trial court under the circumstances disclosed by the record herein, if it appears to be consistent with the intent of the parties, should not be disturbed by a reviewing court even though another interpretation would seem equally tenable from the facts developed by the evidence. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Wilson v. Brown, [5 Cal.2d 425], 55 P.2d 485; Serviss v. Jones, 133 Cal.App. 640, 642, 24 P.2d 881; Hale v. Harbor Petroleum Corp., 139 Cal.App. 455, 462, 33 P.2d 1039. When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact and a finding of fact made by the trier of facts embodying his interpretation of the doubtful language must stand if not lacking in evidentiary support. Thomson v. Leak, 135 Cal.App. 544, 548, 27 P.2d 795; Gallatin v. Markowitz, 139 Cal.App. 10, 13, 33 P.2d 424; Coats v. General Motors Corp., 3 Cal.App.2d 340, 356, 39 P.2d 838."

[7] The rule was applied there as it should be here, where the ruling of the trial court was against the claim of ambiguity We might add that while it is

not contended that the evidence was insufficient to support a finding contrary to the allegations of defendant's answer under which the extrinsic evidence was received, we have found in the record ample evidence to support such a finding. But independently of the extrinsic evidence we are wholly in accord with the construction of the agreement reached by the trial court.

The judgment is affirmed.

PARKER WOOD, J., and SHAW, Justice pro tem., concurred.

54 Cal.App.2d 590

In re MUNSON'S ESTATE.

HALL et al. v. STERRETT et al.

Civ. 13677.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1942.

Hearing Denied Nov. 27, 1942.

1. Wills ⇐439, 440, 441

The paramount rule in the construction of wills is that intention of testator must be given effect as far as possible, and such intention is to be gathered from language of will, and ambiguity in language may be aided by extrinsic facts to help determine testator's intention, but at all times such intention is of supreme importance and other rules of construction must yield to it.

2. Wills ⇐448

In construing a will, the end to be sought is an interpretation which will make the will operative.

3. Wills ⇐514

Where language of will and codicils manifested an intention by testatrix to create a permanent scholarship fund in memory of her deceased husband, and fund was to be placed in hands of governing authority of the University of California, a decree distributing that portion of estate which was covered by such language to the Regents of the University of California was proper. Const. art. 9, § 9; Pol. Code, §§ 1395, 1415, subd. 7.

4. Wills ⇐14

A devise of property for the creation of a permanent scholarship fund to be placed in hands of the governing authority of the University of California was not to a "charitable or benevolent society or corporation" but was within statute excepting devises to the state or any educational institution which is exempt from taxation from statute limiting charitable devises to a share not in excess collectively of one-third of decedent's estate. Const. art. 9, § 9; Pol.Code, §§ 1395, 1415, subd. 7; Probate Code, §§ 41, 42.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable or Benevolent Society or Corporation".

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceedings in the matter of the estate of Nellie A. Munson, deceased, by Howard G. Hall, as executor, etc., and others against Harry C. Sterrett and others, wherein objections were filed to the executor's petition for distribution. From a judgment decreeing distribution of deceased's estate, Harry C. Sterrett and others appeal.

Affirmed.

William Ellis Lady, of Los Angeles, for appellants.

Herlihy & Herlihy, of Los Angeles, and Calkins, Hall, Linforth & Conard, of San Francisco, for respondents.

GOULD, Justice pro tem.

By a will and codicils thereto admitted to probate September 30, 1940, Mrs. Nellie A. Munson devised an estate thereafter appraised at $38,549.09. After numerous specific bequests to friends, relatives and organizations, the will, dated March 23, 1940, contains the following provisions pertinent to this appeal:

"I leave * * * [various stocks, bonds and bank accounts therein enumerated] all the foregoing for a University Permanent Scholarship Fund to be known as the 'Munson (O. F.) Memorial Scholarship Fund, left in his memory by his wife, Nellie A. Munson.' The interest from this fund is to be applied annually on a University Scholarship. The Student is to be chosen by a Committee composed of the Worshipal Master of Wilshire Masonic A. F. & A. M. No. 445; Worthy Patron; Worthy Matron; and an Elementary Teacher from the Wilshire Chapter No. 329 O. E. S. of Los Angeles in cooperation with the City Supt. of Los Angeles City Schools. This student must be one who is deserving and capable and who would not be able to go without some assistance. This Committee is to remain intact and the Elementary Teacher is to be chosen by the committee each year."

The first codicil provides as follows:

"Codicil. In case of my passing or being rendered physically incapable I desire Mr. H. G. Hall to have a conference with Dr. Gordon Sproul of Univ. of Calif., and arrange to have my Scholarship money placed in the hands of the Board of Regents of Univ. of Calif. The interest after my passing for this is to be used for Scholarship or Scholarships. I would like for my before

stated Committee be given preference in selection of one candidate or more should there be perfect cooperation. Signed: Nellie A. Munson Mar. 26, 1940."

The second codicil reads as follows:

"Codicil. By Univ. of Calif. I mean U. C. L. A. Nellie A. Munson April 1, 1940."

When the executor in his petition for distribution asked that there be distributed to the Regents of the University of California the property described in the above quoted portions of the will, amounting to a total appraised valuation of $31,388.29, objections were filed by a surviving brother and sister, heirs-at-law of said deceased and entitled to share in the distribution of said portion of the estate if the bequest for the "scholarship fund" failed. Upon trial the court ruled against objectors and they appeal.

[1] As has been repeatedly held by the Supreme Court of this state (In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; In re Estate of Wilson, 184 Cal. 63, 193 P. 581; In re Estate of Phelps, 182 Cal. 752, 190 P. 17), the paramount rule in the construction of wills is that the intention of the testator must be given effect as far as possible. This intention is to be gathered from the language of the will, and ambiguity in language may be aided by extrinsic facts to help determine the testator's intention. But at all times such intention is of supreme importance, and all other rules of construction must yield to it.

[2, 3] In the instant case it would seem obvious from a reading of the testament under consideration that it was the plain intent of deceased to create a scholarship fund in memory of her deceased husband, and that such fund was to be placed in the hands of the governing authority of the University of California. The assets and funds to create and constitute such fund were set forth in detail and a committee was named to select students to enjoy the scholastic benefits of decedent's generosity. There is no need to seek aid outside the plain and unambiguous words of the will itself to interpret its meaning. The only interpretation of the will to make it operative, which is an end to be sought in the interpretation of wills (In re Estate of McCurdy, 197 Cal. 276, 240 P. 498), is the one adopted by the trial court here—distributing the portion of the estate, as denominated by deceased, to "The Regents of the University of California." Such is the authorized corporate name of the University of California as designated by article IX, section 9, of the California State Constitution; and by the same authority, as well as by codal provision, Pol.Code, § 1415, subd. 7, the regents in their corporate capacity are authorized to receive property by devise and, Pol.Code, § 1395, to establish scholarships founded by private benefaction.

[4] Nor can appellants defeat the testamentary intent of deceased by reliance upon section 41 of the Probate Code, which limits charitable devises and legacies to a share not in excess collectively of one-third of a decedent's estate. The will in this instance was dated March 23, 1940, and the codicils March 26, 1940, and April 1, 1940. The testatrix died September 1, 1940. If the devise to the University of California was to a "charitable or benevolent society or corporation," as appellants contend, it would be limited to one-third of the estate and the excess would pass to appellants and other heirs-at-law. Such contention must, however, be resolved against appellants. Section 42 of the Probate Code provides that devises "to or for the use or benefit of the State * * * or to any educational institution which is exempt from taxation * * * or for the use or benefit of any such educational institution * * *," are excepted from the provisions of section 41, upon which appellants rely. Not only is the disputed devise by testatrix in this instance plainly valid by the provisions of the Probate Code hereinabove cited, but the matter has been settled by a pronouncement of the Supreme Court in Re Estate of Purington, 199 Cal. 661, 250 P. 657, where the court squarely held that a very similar bequest to the regents of the University of California came within the exception to the statute and was therefore valid.

By the plain provisions of the will, fortified by constitutional and statutory law, the distribution ordered by the lower court herein must be confirmed.

Decree and order affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

DOBBINS v. TITLE GUARANTEE & TRUST CO.*

Civ. 13200.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1942.

Hearing Granted Nov. 27, 1942.

1. Executors and administrators ⇐513(9)

A hearing in probate on an executor's account is in nature of a "proceeding in rem", and the order made thereon, due notice of hearing having been given, is conclusive on all persons interested in estate as to all matters, the proper subject of account, necessarily involved in the account or actually included therein and passed upon by the court. Probate Code, § 931.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem".

2. Executors and administrators ⇐498

The statutory provisions that if there are two or more executors, the compensation shall be apportioned among them by the court according to services actually rendered by each and that such further allowances may be made as the court may deem just for extraordinary services empower the probate court, on the hearing of an account in which executors' compensation is claimed, where there are two or more executors, to inquire into services performed by each and to apportion compensation accordingly. Probate Code, §§ 901, 902.

3. Executors and administrators ⇐501

Where plaintiff and defendant, while acting as co-executors, filed a joint final account and report including a petition for allowance of extraordinary fees to defendant for services rendered by it, and due notice by posting was given of hearing of account, and probate court entered an order awarding defendant $15,000 for extraordinary services, such order was conclusive upon plaintiff and the latter could not recover one-half of that amount from defendant under an alleged agreement made before plaintiff and defendant qualified as executors that they would divide fees received by either for services as executor. Probate Code, §§ 900–902, 904, 921, 922, 931.

4. Executors and administrators ⇐498

The power vested in the probate court to apportion compensation among executors is discretionary in its nature, although limited by findings which the court may make as to services rendered by each executor, and such power cannot be controlled by any agreement between executors regarding the apportionment, especially one made in advance of rendition of any services. Probate Code, §§ 900–902, 904, 921, 922, 931.

5. Executors and administrators ⇐91

Executors are "fiduciaries" and are held to a strict and full discharge of their duties.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary".

6. Executors and administrators ⇐498

Executors cannot be permitted, by their own agreement, to subject any one of them to the temptation to ignore or slight the performance of any duty immediately required of him by exigencies of the estate, which might come to him by reason of the fact that such agreement deprived him of any compensation therefor.

7. Executors and administrators ⇐498

An agreement between executors respecting division of their fees cannot serve as the basis of a subsequent action by one executor against another to collect from that other a part of the compensation allowed to him in probate, especially where that compensation has been allowed specifically to one executor for extraordinary services performed by him. Probate Code, §§ 900–902, 904, 921, 922, 931.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Horace M. Dobbins against Title Guarantee and Trust Company, a corporation, to recover half of the sum of $15,000 received by defendant from an estate as fees for extraordinary services as an executor. From a judgment for plaintiff, defendant appeals.

Reversed.

M. J. Rankin and Milo V. Olson, both of Los Angeles, for appellant.

Aaron Sapiro, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The plaintiff and the defendant were co-executors of the estate of Caroline W. Dobbins, deceased, administration of which was

* Subsequent opinion 136 P.2d 572.

completed some time before the present action was brought. Plaintiff sues to recover half of the sum of $15,000 received by the defendant from the estate as extraordinary fees allowed by the probate court, alleging an agreement made by plaintiff and defendant before they qualified as executors that they would divide equally between them all fees received by either for services as executor. Plaintiff had judgment as prayed for, from which defendant appeals.

Defendant pleaded as a defense the order of the probate court awarding these fees to defendant for its services, and now contends that this order is an adjudication which is binding upon plaintiff. We think this contention must be sustained. The co-executors filed a joint final account and report, which included a petition for the allowance of extraordinary fees for defendant for services rendered by it. This was signed by the attorneys who were acting for both executors and by an officer of defendant purporting to act for both plaintiff and defendant, but not by plaintiff personally. It alleged that defendant had performed extraordinary services, specifying them, for which it was entitled to extraordinary commissions, and prayed for an allowance of $15,000 therefor. Plaintiff was requested by the attorneys, before the account was filed, to furnish a statement of any extraordinary services rendered by him, for which he claimed extra fees, but he did not do so. Objections to the allowance requested by defendant and to other matters were made by persons interested in the estate. Due notice by posting was given of the hearing of this account. After a trial the court made findings declaring that defendant had performed extraordinary services for the estate, which were worth $15,000, and gave judgment ordering that this amount be paid to defendant out of the estate as "a reasonable fee for extraordinary services performed by said co-executor for and on behalf of said estate."

[1] A hearing in probate on an account is in the nature of a proceeding in rem, and the order made thereon, due notice of hearing having been given, is binding and conclusive on all persons interested in the estate (Probate Code, § 931; 11B Cal.Jur. 611, 613; Carr v. Bank of America, etc., Ass'n, 1938, 11 Cal.2d 366, 371, 79 P.2d 1096, 116 A.L.R. 1282; In re Estate of Olcese, 1934, 1 Cal.App.2d 72, 80, 36 P.2d 215), as to all matters, the proper subject of account, necessarily involved in the account or actually included therein and passed upon by the court. In re Estate of Wear, 1942, 20 Cal.2d 124, 124 P.2d 12; In re Estate of Clary, 1928, 203 Cal. 335, 340, 264 P. 242; Sontag v. Superior Court, 1934, 1 Cal.App.2d 138, 141, 36 P.2d 140; In re Estate of Hovland, 1940, 38 Cal.App. 2d 439, 446, 101 P.2d 500.

[2, 3] Here it is apparent from the face of the record that the matters now in question were included in the account and were passed upon by the court. That they were a proper matter of account is determined by the provisions of the Probate Code. Sections 900, 901 and 902 provide for compensation to be "allowed" to the executor and sections 921 and 922 clearly require such compensation, if claimed, to be included in an account, except as the matter may be otherwise presented to the court by proceedings under section 904 for a partial allowance of commissions. Section 901, after stating the amounts to be allowed as executors' commissions, provides, "If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each." Section 902 provides that "Such further allowances may be made as the court may deem just and reasonable for any extraordinary services * * *." These two provisions empower the court, on the hearing of an account in which executors' compensation is claimed, where there are two or more executors, to inquire into the services performed by each and to apportion compensation accordingly. This the court did in the present case and its action was authorized by the Probate Code and is binding upon plaintiff.

[4-7] The power thus vested in the court to apportion compensation among executors is discretionary in its nature, although limited by the findings which the court may make as to the services rendered by each executor. It cannot be controlled by any agreement which the executors may make among themselves regarding the apportionment, especially one made in advance of the rendition of any services. They are fiduciaries and are held to a strict and full discharge of their duties. They cannot be permitted, by their own agreement, to subject any one of them to the temptation to ignore or slight the performance of any duty immediately required of him by the

exigencies of the estate, which might come to him by reason of the fact that such agreement deprived him of any compensation therefor. Such an agreement might properly be presented to, and considered by, the court, when the matter of an allowance of compensation was before it. If satisfied with the agreement the court could approve it and apportion the compensation accordingly. We think no further effect than this can be given to such an agreement. It cannot serve as the basis of a subsequent action by one executor against another to collect from that other a part of the compensation allowed to him in probate. Especially is this true where that compensation has been allowed specifically to one executor for extraordinary services performed by him. To give such a controlling effect to the agreement of co-executors would be to nullify the code provisions empowering and requiring the court to make the apportionment of ordinary commissions and the allowance of further compensation for extraordinary services.

On this point plaintiff cites and relies upon In re Estate of Carter, 1901, 132 Cal. 113, 114, 64 P. 123, 124, where the court, speaking of the ordinary commissions of executors and the claim of one executor, on appeal from an order settling an account, that he had a contract with his co-executor whereby he was to receive all the commissions, said, "What particular contracts may have been entered into between these parties as to the apportionment of the executors' commissions is a matter which should be heard in another forum. The hearing of a final account by the probate department of the court is not the place to setttle disputes of this character. These parties are not entitled to litigate a question of that kind upon the hearing of the settlement of a final account." This case was decided in 1901, before the enactment of the above quoted provision now in section 901 of the Probate Code, relating to apportionment of commissions. That provision was taken from section 1618 of the Code of Civil Procedure and appeared in the last mentioned section for the first time in an amendment of 1909. Stats.1909, p. 252. Its enactment removed the whole foundation for the decision in the Carter case, as appears from the part of the opinion in that case just quoted. In re Estate of Carter, supra, was referred to on this point in Kelly v. Conroy, 1928, 91 Cal.App. 350, 352, 266 P. 1022, without any apparent notice of the fact that the statute had been changed since the Carter case was decided. There are statements in Kelly v. Conroy which may be regarded as inconsistent with our holding here; but they appear to be obiter dicta, and at any rate we prefer not to follow them.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 13467.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1942.

Hearing Granted Nov. 27, 1942.

1. Bills and notes ⇐296

As checks payable to bearer are negotiable by mere delivery without endorsement, a bank, with which they are deposited, incurs no liability on its guarantee of prior endorsements thereon. Civ.Code, § 3090, subd. 3; § 3111.

2. Bills and notes ⇐6

A person to whom checks are made payable by one who does not intend that payee shall have any interest therein is a "fictitious payee" within statute declaring instrument payable to order of fictitious person with knowledge of person making it so payable. Civ.Code, § 3090, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Fictitious Payee".

3. Bills and notes ⇐6

The "person making it so payable", within statute declaring instrument payable to bearer when payable to order of fictitious person with knowledge of person making it so payable, is not necessarily the nominal

* Subsequent opinion 137 P.2d 452.

maker of check or other negotiable instrument. Civ.Code, § 3090, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Making It So Payable".

4. Bills and notes ⇐6

Where bank officer, signing its trust department's checks, was not expected to investigate transactions out of which they arose, but acted on assurances of persons authorized to give them, the intent, which determines whether payees' names on such checks are fictitious, is not such signer's but that of officer authorized to write checks, so that such officer, not intending that person to whom he made checks payable should have any interest therein, was "person making it so payable" within statute declaring instrument payable to bearer when payable to fictitious person with knowledge of person making it so payable. Civ.Code, § 3090, subd. 3; § 3111.

5. Bills and notes ⇐6

Where actual signer of checks can have no intent as to payee's identity, as where he signs in blank, merely complies with another's request, or is a mere automaton signing without intent, controlling intent in determining whether payee is fictitious, within statute declaring instrument payable to bearer when payable to order of fictitious person, is that of person who, within scope of his authority, fixes payee's name. Civ. Code, § 3090, subd. 3.

Appeal from Superior Court, Los Angeles County; A. L. Pierovich, Judge.

Action by the Security-First National Bank of Los Angeles against the Bank of America National Trust & Savings Association and another to recover on named defendant's guarantee of all prior endorsements on checks deposited with it. Judgment for plaintiff, and defendant appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

SHAW, Justice pro tem.

There are two defendants in this action, but, since the defendant bank only is before us on this appeal, the word "defendant" where hereinafter used refers to it only, unless otherwise indicated. The plaintiff issued certain checks drawn upon itself, which came to the defendant upon forged indorsements. The defendant impressed its clearing house stamp upon these checks, presented them to plaintiff through the clearing house and obtained payment. This stamp included the words, "all prior endorsements guaranteed," and plaintiff brings this action to recover on that guaranty. Judgment went for plaintiff and defendant appeals.

The checks in question were drawn and signed in plaintiff's trust department, and purported to be made for payments due from trusts held by it, to the order of a person named L. W. Bobbitt. Plaintiff had in its trust department several divisions, including an accounting division, the head of which was the other defendant, Ellis, who had no official title. All of these checks were false and fictitious checks written by Ellis, but not signed by him, he having no authority to sign checks for plaintiff, and none of them represented any actual payment due from plaintiff. After they were signed Ellis obtained possession of them, indorsed the name of L. W. Bobbitt upon them and deposited them in an account he had opened with defendant bank, at one of its Los Angeles branches, in the name of Bobbitt. Ellis then drew the money out of defendant bank, on checks to which he signed Bobbitt's name, and used it himself. In dealing with defendant bank Ellis did not pose as Bobbitt, but as the latter's agent, making all of the signatures except the first indorsement before presenting them to the bank. There was such a person as L. W. Bobbitt known to Ellis, but he did not live in California had nothing to do with these acts of Ellis, knew nothing of them, had no interest in the checks, was not intended by Ellis to have either the checks or the money procured on them, and did not in fact receive either.

The mode in which Ellis accomplished this defalcation is described in much detail in the record, but a brief statement of it here will suffice. In its trust department plaintiff had an assistant trust officer named Hadley, who was also an assistant secretary. He was referred to as a "signing officer" and his sole function was to sign checks and other papers and documents coming

from the trust department. He signed from 800 to 1,500 of these various papers a day, and of course had no time to investigate the various transactions out of which they arose, to see if they were proper, and was not expected to do so, but acted on the assurances of others authorized to give them. When his signature on a check was desired, the check, fully made out, was presented to him, together with a "debit ticket," which showed the name of the payee, the purpose for which the check was drawn, its amount and the number of the trust involved. At the bottom of it were also separate spaces headed respectively by the words "Prepared by," "Authorized by," "Signed by," and "Funds O.K." In these spaces initials or names of certain authorized persons were written by them. When a check and one of these tickets was presented to Hadley his custom, as he testified to it, was to look first to see if one of the authorized persons, of whom he had a list, had signed under "Authorized by," and then "to see if the 'Funds O.K.' was initialed by a person having authority to so initial it; and then I examined the amount set forth in the ticket, and turned it over and examined on the check to see if it was protectographed in that amount; and then I initialed it under 'Signed by' and signed the check." He did not look to see who the payee of the check was or what was the purpose of the payment or the name, purpose or number of the trust. It was physically impossible for him to do that work and the bank did not expect him to do so. Hadley naturally had no recollection of the checks involved here, but Ellis testified that he presented them to Hadley and that in signing them Hadley followed his custom as just stated. Ellis was one of the persons authorized to sign debit tickets in the places looked at by Hadley. Ellis personally wrote the checks in question and the debit tickets for them, initialed the latter and presented the checks to Hadley.

[1] It is defendant's contention that under the circumstances above stated, the checks in question were payable to bearer, within the intent of section 3090 of the Civil Code. If this be so the checks could be negotiated by mere delivery, no indorsement being necessary for that purpose. Civ.Code, § 3111. Defendant's further contention that in such case defendant would incur no liability on its guaranty of indorsements appears to be conceded, and is correct. Union B. & T. Co. v. Security-First Nat. Bk., 1937, 8 Cal.2d 303, 310, 65 P.2d 355.

[2] Section 3090 of the Civil Code, so far as material here, reads as follows: "The instrument is payable to bearer— * * * (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable * * *." There is no doubt that, if Ellis' knowledge and intent are regarded as determinative, all the checks in question were payable to the order of a fictitious person, and this also, plaintiff concedes. While there was such a person as Bobbitt, Ellis did not intend that he should have any interest in the checks and he had in fact no rights in them. This is sufficient to make him a fictitious payee, if Ellis was the person making the checks so payable, within the meaning of section 3090. Union B. & T. Co. v. Security-First Nat. Bk., supra, 1937, 8 Cal.2d 303, 307, 65 P.2d 355. Of course the character of the payee in this respect was known to Ellis, but it was not known to Hadley, who believed all checks signed by him to be regular and genuine in all respects and had no information to the contrary, nor was it known to any person connected with plaintiff, other than Ellis. The question for decision on section 3090 therefore resolves itself into these two questions: Was Ellis the person making these checks "so payable," or if not, was his knowledge on the subject chargeable to plaintiff?

[3] It is now settled that "the person making it so payable," within the meaning of section 3090 above quoted, is not always or necessarily the nominal maker of a check or other negotiable instrument. Union B. & T. Co. v. Security-First Nat. Bk., supra, 1937, 8 Cal.2d 303, 308, 65 P.2d 355; Goodyear Tire, etc., Co. v. Wells Fargo Bank, 1934, 1 Cal.App.2d 694, 702, 37 P.2d 483; Rancho San Carlos v. Bank of Italy, 1932, 123 Cal.App. 291, 295, 11 P.2d 424. In Union B. & T. Co. v. Security-First Nat. Bk., supra, the checks in question were cashier's checks of the plaintiff, issued at the request of an agent of one of plaintiff's depositors, made payable to persons named by him and delivered to him. He forged the payees' indorsements and obtained the money on the checks. It was held that regarding the payees named

in the checks the plaintiff had no intent save that of following the agent's instructions and that since his intent was that fictitious payees be named, the checks were payable to bearer and plaintiff was not liable to the depositor for paying on forged indorsements, nor was defendant, the collecting bank, liable to plaintiff on its guaranty of indorsements. The faithless agent was named Williams and the court said on this point: "The intended fictitious payee was the creature of Williams' mind, and, while the appellant, Union Bank, was the nominal maker of the cashier's checks, still Williams was the person who actually drew the bill and was the person making the cashier's checks payable to a fictitious payee; and, since he acted within the scope of his authority, his act, intent, and knowledge, although adverse to and a fraud upon his principal, are nevertheless binding upon the latter." 8 Cal.2d 309, 65 P.2d 358.

In Union B. & T. Co. v. Security-First Nat. Bk., supra, the court cited with approval Rancho San Carlos v. Bank of Italy, supra, and Goodyear Tire, etc., Co. v. Wells Fargo Bank, supra. In the Rancho San Carlos case the plaintiff delivered to an employee named Harris, who had no authority to sign its checks, several duly signed checks on defendant bank which were blank as to payees' names and amounts. This was done, according to custom, to enable Harris to pay plaintiff's bills. Harris filled out one of these checks for $10,000, naming as payee a real person who had no interest in it and was not intended by Harris to receive it, forged this payee's name and contrived to get the money. It was held that plaintiff, by delivering the blank checks to Harris, gave him authority to fill the blanks, and further, (at 123 Cal. App. 295, 11 P.2d 426): "It has been held that the words, 'the person making it so payable,' refer to the person who actually drew the check, whether he be the nominal maker or not [citing cases]; and in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner." For this reason it was held that the check was payable to bearer, under section 3090 of the Civil Code, and defendant bank was not liable to plaintiff as for payment on a forged indorsement.

In the Goodyear case, supra, 1934, 1 Cal. App.2d 694, 37 P.2d 483, the plaintiff sued to recover money which it had deposited in defendant bank and which the latter had paid out on duly signed checks of plaintiff. The plaintiff required two signatures on its checks, one of the authorized persons, Downs, being also its controller and in charge of its accounts. Downs wrote a number of checks to fictitious payees, representing no obligations of the corporation, and presented each of them to a cosigner, with or without supporting documents, sometimes signing it before and sometimes after the cosigner did. The cosigners signed the checks without investigation, depending on Downs and the system for assurance of their correctness. Downs then stole the checks, forged the payees' signatures and got the money they called for. It was held that these checks were, in contemplation of law, payable to bearer, and defendant was not liable to plaintiff on account of the forged indorsements. The court discussed the matter at great length and among other things said, at 1 Cal.App.2d 709, 37 P.2d 489: "On the facts of this case the cosigners of Downs were mere automatons. Their names on the instruments gave them no more validity than did the corporate name printed thereon. They had just as much general intent with reference to the instruments involved as their corporate employer, and no more. For all practical purposes their names as well as that of the corporation might have been printed upon the checks. It is difficult to understand why any unsurmountable legal barrier is created merely because on the facts in this case cosigners were required to affix and went through the motions of affixing their names at the time the checks were in the process of being drawn. If the cosigners had signed the checks in question in blank, then based upon every rule of reason and on the clear authority of the San Carlos case, supra, the checks were 'bearer' checks. It would be no answer to say that authority to sign in blank was not given, for the act of signing would be within the scope of the authority of the cosigners. The facts in this case establish beyond cavil that the cosigners did, as a practical matter, sign in blank."

[4] Under the facts of the case at bar Hadley was in substantially the same situation as that given to the cosigners of Downs in the case just quoted. Hadley did not even look at the names of the payees

on a check and either he had no actual intent at all regarding them, or if he had any such intent it was, at most, to make the checks payable to the persons intended by Ellis, and was thus like that of the bank which issued the cashier's checks involved in Union B. & T. Co v. Security-First Nat. Bk. supra, 1937, 8 Cal.2d 303, 308, 65 P.2d 355. There must be an intent somewhere as to the payee to be named in a check and if the signer of the check has none that intent must be sought elsewhere. If the plaintiff should use a check writing machine by which signatures were mechanically placed on checks, without any attention to the contents of the checks by the persons whose signatures were thus placed on them, it is obvious that such persons would have no intent whatever in regard to such checks and the intent of those authorized to operate the machine would have to be considered. Here Hadley was, at least as to payees' names, a mere machine, devoid of intent, and the intent which determines the character of the check, on the question whether the payee's name is fictitious, must be that of the one who operated the machine, in this case, Ellis. As in the Goodyear case, supra, 1934, 1 Cal.App.2d 694, 37 P.2d 483, 490, the signature, though made after the payee's name was in the check, was "as a practical matter, * * * in blank," and hence is subject to the rule of the San Carlos case, supra, 1932, 123 Cal.App. 291, 11 P.2d 424.

[5] In opposition to this conclusion plaintiff cites and relies on Los Angeles Inv. Co. v. Home Sav. Bank, 1919, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193. The plaintiff there was a corporation doing an extensive business, with several departments. One of these, in charge of one Emory, as manager, made many disbursements by check. Emory had no authority to sign checks, and to obtain a check he prepared a demand showing the purpose of the payment and the person to whom it was to be made. This demand was sent to the accounting department where it was examined and if found correct a check was prepared and presented with the demand to the officers authorized to sign checks and the signed check was returned to Emory's department for delivery to the payee. Emory, like Ellis in this case, prepared fictitious demands, and one real demand, in favor of named persons, some of whom were fictitious and some real, got possession of the checks signed for these demands, indorsed the payees' names on them and thereby obtained the money payable on them. The checks were drawn on defendant bank and plaintiff sued to recover the amount paid on these forged indorsements. One of the defenses was that the checks were in law payable to bearer, because of Emory's intent regarding them, but the court said, at page 606, of 180 Cal., at page 295 of 182 P., 5 A.L.R. 1193, "Emory did not execute the checks on behalf of the company. It is the intention of the officers who did that must be taken to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself. They intended to pay money to what they believed to be existent persons, and this being so, the checks cannot be considered as made to fictitious payees." This statement, while accurate enough as applied to the facts of that case, does not entirely conform to the later decisions just reviewed, and some limitation must be put upon it to bring it into such conformity. In that case an audit was interposed between Emory, who prepared the demands, and the officers who signed the checks, the purpose of which was to determine whether the checks were proper or not. The signing officers were not mere automatons but acted upon the results of such audit and it was quite proper to regard them as having an intent regarding the checks. But where the actual signer of the check has and in the nature of the operation can have, no intent at all as to the payee, as where he signs in blank (Rancho San Carlos v. Bank of Italy, supra, 1932, 123 Cal.App. 291, 11 P.2d 424) or complies with the request of another, with no intent except to do what is asked (Union B. & T. Co. v. Security-First Nat. Bk., supra, 1937, 8 Cal.2d 303, 65 P.2d 355), or is a mere automaton signing without intent (Goodyear Tire, etc., Co. v. Wells Fargo Bank, supra, 1934, 1 Cal.App.2d 694, 37 P.2d 483), it is obvious that the character of the check cannot be determined on his nonexistent intent, and the controlling intent is that of the person who, within the scope of his authority, fixes the name of the payee. In this case that person was Ellis. It must be understood that our decision is based on the

system, which was so set up by plaintiff as to eliminate from the duty of Hadley, as the actual signer of a check, any consideration of its propriety, and particularly to relieve him from any necessity of even looking at the payee's name. If he had any duty in these respects, but performed it negligently or perfunctorily or even omitted to perform it at all on some particular occasion, a different result might follow.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.



54 Cal.App.2d 804

SCHOENE et al. v. TIRRELL.

Civ. 13848.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1942.

Appeal and error ⇐619

Where appellants failed to file a transcript supported by a certificate of a clerk of the superior court setting forth the facts as required by rules, motion to dismiss the appeal was granted. Rules of the District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Clara Elizabeth Schoene and others against Walter M. Tirrell. From an adverse judgment, the plaintiffs appeal, and the defendant moves to dismiss the appeal.

Appeal dismissed.

John F. Poole and H. E. Gleason, both of Los Angeles, for appellants.

W. I. Gilbert, Jr., of Los Angeles, for respondent.

PER CURIAM.

Respondent having served and filed his motion to dismiss the appeal in the above entitled matter on the ground that appellants have failed to file a transcript as provided in the rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the clerk of the Superior Court setting forth the facts as required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and the authorities cited,

It is hereby ordered that the appeal from the judgment be, and the same hereby is dismissed.



54 Cal.App.2d 803

MAZZONI et al. v. VINETZ et al.

Civ. 13847.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1942.

Appeal and error ⇐619

Where appellants failed to file a transcript as provided in rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of a clerk of the superior court setting forth the facts as required by rule of the District Court of Appeal, motion to dismiss appeal was granted. Rules of the District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by David A. Mazzoni and others against Joseph C. Vinetz and others. From an adverse judgment, the plaintiffs appeal, and the defendants move to dismiss the appeal.

Appeal dismissed.

Marion P. Betty and Henry W. Shaw, both of Los Angeles, for appellants.

W. I. Gilbert, Jr., of Los Angeles, for respondents.

PER CURIAM.

Respondents having served and filed their motion to dismiss the appeal in the above

entitled matter on the ground that appellants have failed to file a transcript as provided in the rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the clerk of the Superior Court setting forth the facts as required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and the authorities cited,

It is hereby ordered that the appeal from the judgment be, and the same hereby is, dismissed.



54 Cal.App.2d 573

WHITE et al. v. HIRSCHMAN et al.

Civ. 12125.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

1. Brokers ⇐43(2)

The express provisions of statute requiring contracts for payment of real estate brokers' commissions to be in writing cannot be avoided by excuses such as oral promise to pay commission, payment for similar services under previous oral contracts, mutual relation of trust and confidence because of such prior transactions, brokers' belief induced thereby that statute would not be invoked, their reliance on such promise, resulting injury to them, and principal's knowledge of all circumstances. Civ.Code § 1624, subd. 5.

2. Appeal and error ⇐917(3)

In brokers' action on oral contract to pay them commission, where record on appeal from judgment for defendants after sustaining demurrer to complaint did not show grounds on which demurrer, which was both general and special, raising bar of statute of frauds, was sustained, appellate court may assume that it was sustained on one or both of alleged grounds that statute could not be avoided by excuses pleaded in complaint and that trial court had no jurisdiction over pleaded cause of action for expenses and advertising under oral contract. Civ.Code § 1624, subd. 5.

3. Brokers ⇐43(2)

As oral contract for payment of real estate brokers' commission is unenforceable under statute of frauds, no part of it can be enforced indirectly by suit for reasonable value of brokers' time or money expended by them under contract, in absence of allegation of any other contract authorizing such expenditures or agreement to reimburse brokers. Civ.Code § 1624, subd. 5.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Willard White and others, as copartners, against Hyman Hirschman and others for a broker's commission. Judgment for defendants and plaintiffs appeal.

Affirmed.

Marvin C. Hix, of San Francisco, for appellants.

H. S. Henion, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs, as copartners doing business as real estate brokers, sued defendants upon an oral contract to pay a broker's commission. A demurrer to their third amended complaint having been sustained, judgment went for defendants from which the appeal is taken.

[1] The complaint pleads that the contract of employment was not in writing, but to avoid the statute of frauds requiring such contracts to be in writing (§ 1624, subd. 5, Civ.Code) seven separate sets of circumstances are pleaded by way of estoppel against defendants' anticipated plea of the statute. These are the oral promise to pay the commission, payment for similar services under previous oral contracts, a mutual relation of trust and confidence because of these prior transactions, plaintiffs' belief induced by this prior conduct that the statute would not be invoked, reliance, injury, and defendants' knowledge of all these circumstances.

The demurrer to the complaint was sustained upon the sound principle that the express provisions of the statute cannot be avoided by excuses such as those pleaded. To hold that the buyer is estopped to rely on the statute because of similar trans-

actions in the past or because the broker relied upon these oral promises to his injury would be to abrogate the statute of frauds. The conduct of the defendants pleaded here has no greater weight than if repeated oral promises were made to pay under the same contract. The allegation that a relation of trust and confidence existed between the parties by reason of a general agency merely pleads the common relation between principal and agent. The reliance of the plaintiffs upon defendants' oral promises is the natural result of any contractual relation, whether based upon an oral or written contract.

A case closely parallel in its facts is Sweeley v. Gordon, 47 Cal.App.2d 381, 118 P.2d 14, except that in the case cited the broker actually produced a buyer and a sale was made to him. In that case a demurrer was sustained to a complaint which pleaded similar circumstances as estopping the owner from pleading the statute of frauds. In affirming the judgment the court said (page 384 of 47 Cal.App.2d, page 15 of 118 P.2d): "The only claim now made by plaintiff is that the judgment should be reversed under the doctrine of estoppel. A plea of this kind is directed to the equity power of the court. Plaintiff is a real estate broker and as such is presumed to know that contracts made by brokers for commissions for the sale of real estate are declared to be invalid by the code and are unenforceable in the courts unless they are put in writing and subscribed by the owners of the property. He nevertheless failed to secure proper written authorization but relied upon the oral promise of defendant. The equitable powers of the court may not be invoked by one in his position. Subdivision 5 of section 1624 was placed in the Civil Code for the protection of owners of real estate and also for the protection of real estate brokers. As pointed out in Hicks v. Post, supra [154 Cal. 22, 96 P. 878], a ruling that plaintiff could recover under the allegations of his complaint would be tantamount to an abrogation of the section of the statute of frauds applicable to sales of real estate by brokers."

[2, 3] Appellants present as their second ground for reversal the question whether the court had jurisdiction over the second cause of action pleaded for expenses and advertising under the oral contract if it is assumed that the demurrer was properly sustained as to the first cause pleaded. The record does not show the grounds upon which the demurrer was sustained, but we may assume, since it was both general and special raising the bar of the statute, that it was sustained on one or both of those grounds. The complaint does not allege any contract with the buyers authorizing such expenditures or any agreement to reimburse appellants—other than the oral contract to pay a broker's commission pleaded in the first cause of action. It would seem manifest that if this contract was unenforceable because of the statute of frauds no part of it could be enforced indirectly by a suit for the reasonable value of time or money laid out under the contract.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



54 Cal.App.2d 805

PEOPLE v. BELCHER.

Cr. 3629.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1942.

Criminal law ⇐1182

Where transcripts on appeal were filed in the District Court of Appeal on July 20, and cause was set for hearing on September 23, but on September 23 there was no appearance on behalf of appellant, either by brief or otherwise, judgment and order denying motion for new trial were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

William R. Belcher appeals.

Affirmed.

Vernon Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

July 20, 1942, the transcripts on appeal were filed in this court. Thereafter the

cause was set for hearing on September 23, 1942. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying the motion for a new trial are, and each of them is, affirmed.



54 Cal.App.2d 514

CAMINETTI, Insurance Commissioner, v. IMPERIAL MUT. LIFE INS. CO.

Civ. 13703.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1942.

1. Appeal and error ⇐76(1)

The character of a judgment as being an "interlocutory" or "final judgment" is not determined by the label attached to it but by the substance and effect of the adjudication thereby made.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Judgment".

2. Appeal and error ⇐76(1)

There can be but one "final judgment" in an action, and that is one which in effect ends the suit in the court in which it is entered and finally determines the rights of the parties in relation to the matter in controversy.

3. Appeal and error ⇐77(1)

A judgment finding that grounds for insurance commissioner's action in taking over insurance company's business did not exist, terminating order appointing insurance commissioner as conservator, dissolving the conservatorship and restoring insurance company to possession of its properties and business was a "final judgment" from which an appeal would lie, notwithstanding court labeled it an interlocutory judgment and attempted by provisions thereof to retain jurisdiction of the proceeding. Code Civ.Proc. § 963; St. 1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

4. Insurance ⇐44

In special proceedings for the appointment of a conservator for an insurance company or for determination of such conservatorship, the jurisdiction of court is limited by terms of the statute under which the proceeding is brought. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

5. Insurance ⇐44

Under statutes providing for special proceedings for appointment of a conservator for insurance company and for application to terminate such conservatorship, superior court was not authorized to retain jurisdiction over insurance company after finding that grounds for appointment of conservator no longer existed and that company was entitled to resume control and operation of its business. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding in the matter of the application of A. Caminetti, Jr., as insurance commissioner, etc., for the appointment of a conservator to take possession of the Imperial Mutual Life Insurance Company, wherein an order was issued appointing the insurance commissioner such conservator and thereafter the insurance company applied to superior court for an order permitting it to resume title and possession of its property and the conduct of its business. From an "interlocutory" judgment terminating the order appointing a conservator and dissolving the conservatorship created by such order, restoring insurance company to possession of its properties and providing for retention of jurisdiction for the purpose of entering a final judgment, the insurance commissioner appeals and insurance company moves to dismiss the appeal.

Motion to dismiss denied.

Earl Warren, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Peery Price, of Los Angeles, for appellant.

Charles R. Thompson and Sherman & Sherman, all of Los Angeles, for respondent.

WHITE, Justice.

Respondent moves to dismiss an appeal taken from what is designated and titled an "interlocutory judgment" rendered against appellant in the above entitled action. The record before us discloses that on June 16, 1941, appellant, acting in his official capacity as insurance commissioner of the state of California, filed an application pursuant to the provisions of section 1011 of the Insurance Code, St.1937, p. 2563, for the appointment of a conservator and directing said insurance commissioner as such conservator to take possession of respondent Imperial Mutual Life Insurance Company, a corporation. Upon issuance of such order, appellant commissioner took possession of the books, records and property of respondent insurance company and proceeded to conduct, as conservator, respondent's insurance business. Thereafter, and pursuant to the provisions of section 1012 of the Insurance Code, St.1935, p. 541, respondent insurance company made application to the superior court for an order permitting it to resume title and possession of its property and the conduct of its business. The last mentioned code section provides that the order granted pursuant to section 1011 of the Insurance Code shall continue in force and effect until an application such as was made by respondent insurance company herein is filed, and "it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

Upon conclusion of such hearing the superior court rendered its judgment, denominated "interlocutory", wherein it was recited that the ground for the commissioner's action in taking over the respondent's business did not exist or had been removed, and that the insurance company could properly resume possession of its property and conduct of its business; that the order issued by the court on June 16, 1941, in accordance with Insurance Code, section 1011, appointing the commissioner as conservator, be terminated and cancelled and the conservatorship created by such order be dissolved; and that the said insurance company take immediate possession of its properties; that the commissioner forthwith restore such properties to respondent. Following the foregoing, the judgment provided:

"The court retains jurisdiction of the matter for the purpose of entering a final judgment, upon motion of either party or on the court's own motion, such final judgment to make final disposition of this proceeding and the property and affairs of the respondent company, and which final judgment may be in accord with the interlocutory judgment or different therefrom, depending upon such further showing as may be made to the court.

"That until such final judgment shall have been entered, this court retains complete jurisdiction in the premises and in these proceedings for all purposes, including the making, upon proper showing, of any other or further appropriate order, and the amending or vacation of this interlocutory judgment.

"The matter is now continued on the court's calendar until February 10, 1943, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, in department 12 of this court, for the presentation of such supplementary evidence, the hearing of of such argument, and the making of such motions as may be meet and proper in the premises, with the right reserved to either party, however, to have set on the court's calendar at any time convenient to the court in the meantime, any matter appropriate to the premises."

[1, 2] In support of its motion to dismiss the appeal herein respondent urges that section 963 of the Code of Civil Procedure authorizes an appeal from only a final judgment in an action unless an appeal from an interlocutory judgment is expressly allowed by statute. If the judgment herein be an interlocutory one, it must be conceded that an appeal therefrom is not authorized by statute. The problem presented, therefore, is whether the judgment may be regarded as an interlocutory or as a final adjudication of the issues presented at the hearing. The character of the judgment is not to be determined by the label attached to it by the court, but by the substance and effect of the adjudication made by it. Howe v. Key System Transit Co., 198 Cal. 525, 531, 246 P. 39; Peterson v. Lightfoot, 47 Cal.App. 646, 648, 191 P. 48. But one final judgment is contemplated by law, and in defining what constitutes a final judgment, our Supreme Court, in the recent case of Bank of

America v. Superior Court, 20 Cal.2d 697, 128 P.2d 357, 360, quotes with approval the following language taken from Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633: "There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy."

[3] We are persuaded that in the instant case the judgment effectively and decisively disposed of every issue tendered between the parties. By instituting the proceeding under section 1011 of the Insurance Code, the commissioner was placed in possession of the property and in control of the business conducted by respondent company. In filing its application under section 1012 of the Insurance Code, issue was joined by respondent as to whether grounds continued to exist warranting the commissioner to remain in control of respondent's business. In other words, the only question before the court was the right of appellant commissioner to operate respondent's insurance business, or whether the control and operation of such business should be withdrawn from the commissioner and restored to respondent. In the precise words contained in section 1012 of the Insurance Code the court expressly found in favor of respondent insurance company and directed dissolution of the conservatorship and ordered the commissioner to restore the property and business to the company. This completely and effectively exhausted the jurisdiction of the court. Every question at issue was settled and determined. Moreover, the judgment or order of the court was not stayed by appeal. Carpenter v. Pacific Mutual Life Ins. Co., 13 Cal.2d 306, 310, 89 P.2d 637. When, therefore, as here, the judgment decided the right to the property and control of the business in contest and directed the commissioner to deliver up the same to respondent insurance company, and the latter was entitled to have such order carried immediately into execution and effect, the judgment must be regarded as a final one, to the extent of allowing an appeal therefrom. Forgay v. Conrad, 6 How. 201, 12 L.Ed. 404, 406; Rossi v. Caire, 174 Cal. 74, 78, 161 P. 1161.

We are not here concerned with a case where the property, books, moneys and business were to be delivered to a receiver or to be held in trust to be delivered to a new custodian or conservator, and where the same would be kept within the control of the court, but are confronted with a situation where, under the law (Ins.Code, § 1012), the insurance commissioner was directed to return the property and business to the insurance company, with plenary power vested in the latter thereafter to control and operate the same as it might see fit. The effect of the judgment now before us was to take the property out of the control of both the commissioner and the court and out of and away from the litigation, so that any subsequent proceeding or order would be futile so far as the subject matter of the controversy was concerned, because the property and business were not thereafter under the court's control. Manifestly, for all practical purposes of disposing of the triable issues, the judgment herein was final; and the question, so far as the right of appeal is concerned, is not what the form of the order may be, but what is its legal effect. If in proceedings such as the one at bar, the court could by inserting in the judgment a provision retaining jurisdiction thereby prevent an appeal, the insurance commissioner in such proceedings could thereby be prevented from obtaining a review of the order ad infinitum.

[4, 5] In special proceedings like this, the jurisdiction of the court is limited by the terms and conditions of the statute under which the proceeding is brought. Smith v. Westerfield, 88 Cal. 374, 26 P. 206. We find in the statute pertinent hereto no authorization for the course adopted by the court in seeking to maintain control over the insurance company after determining that grounds for the proceedings under the statute no longer existed and that the company was entitled to resume control and operation of its business. The statute confers upon the court authority to continue the order of conservation in effect, but the administration of the insurance company's affairs in that event is vested in the insurance commissioner; or the court may conclude that the cause or ground for the commissioner's action in taking over the affairs of the insurance company no longer exists, and thereupon return the business, its property, books and assets, to the control of the company. But nowhere in the statute do we find authority for the court to take over the conservator's duties which are reposed by law in the insurance commissioner.

When pursuant to section 1012 of the Insurance Code, the court made the order herein, it exhausted its jurisdiction; the judgment was a final one in a special proceeding of a civil nature, and an appeal therefrom is therefore authorized.

For the reasons herein stated, the motion to dismiss the appeal is denied.

YORK, P. J., and DORAN, J., concurred.



54 Cal.App.2d 549

MATTHEWS v. ATCHISON, T. & S. F. RY. CO.

Civ. 13347.

District Court of Appeal, Second District, Division 3, California.

Sept. 28, 1942.

Hearing Denied Nov. 27, 1942.

1. Master and servant ⇐87, 265(2)

The liability of a carrier under the Federal Employers' Liability Act is predicated on negligence, and the burden of proving such negligence rests on the plaintiff in an action brought under the act. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

2. Master and servant ⇐278(18, 20)

In switchman's action under Federal Employers' Liability Act for injuries sustained in switching operations, evidence warranted finding that engine foreman was negligent in violating either his duty to inform himself of conditions on tracks to which cars were to be switched or his duty to inform switchman of unusual conditions, which duties conformed to the custom in the particular switchyard. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

3. Master and servant ⇐198(1)

Violation by fellow workman of a known custom or duty constitutes "negligence" for which railroad may be held liable under Federal Employers' Liability Act to an employee injured as a result thereof. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

4. Master and servant ⇐204(1)

"Assumption of risk" is a defense to an action under the Federal Employers' Liability Act subject to certain limitations. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

5. Master and servant ⇐265(13)

In employee's action under Federal Employers' Liability Act, the employer has the burden of proving the defense of assumption of risk. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

6. Master and servant ⇐217(29)

Under Federal Employers' Liability Act, an employee does not "assume the risk" of the negligence of a fellow workman regarding whose careless acts he has no knowledge, unless, as a reasonably prudent person under similar circumstances, he would be presumed to have observed and appreciated such acts. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

7. Master and servant ⇐280

In switchman's action under Federal Employers' Liability Act for injuries sustained in switching operations, jury could properly find that switchman had not "assumed the risk" of foreman's negligent breach of duty to inform himself of conditions on the track and inform switchman of any unusual conditions thereon. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

8. Master and servant ⇐289(32)

In switchman's action under Federal Employers' Liability Act for injuries sustained when car on which he was riding at night, being switched to the track designated by engine foreman, collided with cars already on the track before it had proceeded far enough to admit of free movements on adjacent tracks and just as switchman was setting hand brakes, whether switchman was guilty of contributory negligence was for the jury. Federal Employers' Liability Act §§ 1, 3, 45 U.S.C.A. §§ 51, 53.

9. Master and servant ⇐228(1)
Negligence ⇐101

Contributory negligence of injured employee is not a complete defense to his action under Federal Employers' Liability Act, but only a ground for diminishing the damages under the rule of "comparative negligence". Federal Employers' Liability Act §§ 1, 3, 45 U.S.C.A. §§ 51, 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Comparative Negligence".

10. Appeal and error ⇐930(4)

District Court of Appeal must presume in support of judgment under Federal Employers' Liability Act that jury found that an injured employee was not guilty of contributory negligence if such finding is necessary to support the verdict in amount. Federal Employers' Liability Act §§ 1, 3, 45 U.S.C.A. §§ 51, 53.

11. Appeal and error ⇐1003

Where plaintiff's testimony as to material facts in issue was impeached by his previous statements with respect thereto and contradicted by testimony of other witnesses, question of whether testimony of plaintiff or other witnesses should be believed was a question for the jury upon which District Court of Appeal was bound by jury's decision, where plaintiff's version of the facts was neither impossible nor inherently improbable.

12. Appeal and error ⇐994(2)

A conflict between testimony of a witness and statements previously made by him presents a question for the jury or trier of facts, and it is not the province of the appellate tribunal under ordinary circumstances to interfere therewith.

13. Appeal and error ⇐994(2)

That switchman seeking recovery against railroad under Federal Employers' Liability Act had obtained employment under an assumed name would not warrant rejection of his testimony as to material facts in issue accepted by jury over the conflicting testimony of other witnesses. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

14. Master and servant ⇐88(1)

Concealment of record of discharges from previous railroad employments by obtaining employment under assumed name does not vitiate the contract so as to prevent recovery under the Federal Employers' Liability Act unless there is shown to be a causal connection between the injury and the misstatements in the application for employment. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

15. Master and servant ⇐88(1)

That switchman obtained employment under an assumed name in order to conceal the fact that he had previously been discharged from employer's service and that his age was misstated did not prevent recovery under Federal Employers' Liability Act for injuries sustained in switching operations where switchman had passed a physical examination and his services during two years before injury were admittedly satisfactory. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

16. Master and servant ⇐88(1)

That the effect of switchman's injuries might be more serious because of his age did not establish such a "causal connection" between injuries and misstatements as to the name and age made in obtaining employment as would preclude recovery under Federal Employers' Liability Act for injuries suffered during switching operation, where it did not appear that switchman's age interfered with proper discharge of his duties. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Causal Connection".

17. Release ⇐16, 17(2)

Where railroad switchman, upon being discharged from employer's hospital in reliance on statements of employer's physician that he was cured of his injuries and believing that he would be able to perform the services of his former employment, as a prerequisite to returning to work, signed a release of employer from all claims on account of injuries, whether physician's statement was mistakenly or fraudulently made, employee upon finding himself unable to do the work of a switchman was entitled to rescind the release on the ground either of "mutual mistake" or of 'fraud" thereby destroying its effect as a "release".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud", "Mutual Mistake", and "Release".

18. Release ⇐16, 17(1)

A "release" is a "contract" and as such is subject to rescission for the same reason as other contracts, including fraud and mistake of fact.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

19. Release ⇐16, 17(2)

Statement made to injured employee by employer's physician that employee had recovered was a "statement of fact" which, if mistakenly or fraudulently made, would warrant rescission of release of employer from liability signed by employee in reliance thereon.

See Words and Phrases, Permanent Edition, for all other definitions of "Statement of Fact".

20. Damages ⇐33

That injury to railroad switchman's arm resulting from engine foreman's negligence merely aggravated a pre-existing abnormal condition of the elbow did not preclude recovery against railroad company under Federal Employers' Liability Act of all damages for such aggravation. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

21. Damages ⇐36

In railroad switchman's action under Federal Employers' Liability Act for injuries resulting from engine foreman's negligence, that defendant would not again employ switchman because of disclosure that he had obtained employment under assumed name and by means of false statements as to age and previous employment record did not preclude recovery of damages for loss of future earnings as a railroad man in the absence of proof that switchman would be unable to obtain employment with any other railroad. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

22. Damages ⇐26

To warrant recovery of present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

23. Damages ⇐187

Jury could infer from evidence that 55-year-old railroad switchman was and would be disabled from performing the duties of a railroad brakeman or switchman as result of injury, and, from the fact that he had done no other sort of work, that he could do nothing else and that such disability would be as to him a "total disability".

See Words and Phrases, Permanent Edition, for all other definitions of "Total Disability".

24. Damages ⇐33

Where railroad employee's disability resulted from aggravation of a previous condition, his recovery against railroad under Federal Employers' Liability Act must be limited to such damages only as resulted from the aggravation and he could not recover for damages which would have been caused by the previous condition without the aggravation. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

25. Damages ⇐163(4)

Where railroad employee's disability for which he sought recovery against railroad under the Federal Employers' Liability Act resulted from aggravation of a previous condition, the burden of proving with reasonable certainty that future disability for which he claimed damages would be the result of the aggravation rather than the natural development of the previous condition was on the employee. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

26. Damages ⇐185(3)

In awarding damages for future disability of a railroad switchman resulting from aggravation of a previous condition, in the absence of any showing as to the time at which the previous condition alone would have ended switchman's ability to work, the jury might presume that his ability to work might continue as long as was usual with things of that nature, and, in determining how long that would be, they could consider his history and his apparent physical condition as well as the medical testimony. Code Civil Proc. § 1963, subd. 32; Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

27. Damages ⇐185(3)

In awarding damages for future disability resulting from aggravation of a previous condition, jury was not required to assume the happening of a serious injury such as the medical testimony showed was necessary to aggravate the previous

condition from a quiescent one to an active one resulting in disability.

28. Damages ⇐208(3)

Whether the evidence showed with reasonable certainty that plaintiff's future disability would result from the aggravation of a previous condition by the injuries complained of rather than from the previous condition, so as to warrant recovery of damages under the Federal Employers' Liability Act for future disability, was primarily, a question for the jury. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

29. Appeal and error ⇐1004(1)

The assessment of damages is a matter committed to the discretion and sound judgment of the trier of facts, whose conclusion will not be disturbed unless the sum awarded is so disproportionate to the injury proved as to justify the view that it was given under the influence of passion or prejudice.

30. Damages ⇐132(8)

Award of $9,640 to 55-year-old railroad switchman having a life expectancy of 17.4 years and earning $2,200 per year, for a negligent injury that aggravated abnormal conditions in his elbow so as to permanently disable him from performing duties of a railroad brakeman or switchman, was not excessive. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action under the Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51, by Charles Anderson against the Atchison, Topeka & Santa Fe Railway Company for personal injuries suffered by plaintiff during a switching operation in interstate commerce, alleging that injuries resulted from negligence of plaintiff's foreman in improperly directing a movement of cars. Thomas W. Matthews was substituted as party plaintiff. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, and Wm. F. Brooks, all of Los Angeles, for appellant.

Hildebrand & Bills, of Oakland, Martin & Downey, of Los Angeles, and Goodman & Brownstone, of San Francisco, for respondent.

SHAW, Justice pro tem.

Plaintiff, who was employed by defendant as a switchman in its yard at Barstow, brought this action to recover damages for personal injuries received by him during a switching operation in interstate commerce, alleging that the injuries resulted from negligence of his foreman in improperly directing a movement of cars so that a car on which plaintiff was riding crashed into other cars and plaintiff was thereby violently thrown against the car on which he was riding and injured. The verdict and judgment were for plaintiff, and defendant appeals from the judgment.

The accident occurred at night time on a dark night. Plaintiff was working in a switching crew consisting of himself, another switchman and an engine foreman named Walters who was in charge of the switching crew and directed its operations. On this occasion there were a number of cars to be switched. When this was done, the practice was that the car would be pushed toward the track onto which it was to be switched, then uncoupled from the train and allowed to roll onto the proper track by its own momentum, and that one of the switchman would get on and ride it, using the hand brake to stop it when it got "into the clear" on the track to which it was switched. "Into the clear" means that the car is far enough from the entrance to the track so that it will not interfere with the movement of cars on adjacent tracks. Plaintiff was directed by the engine foreman to ride a car destined for a track designated as No. 3, and as the car passed him at the "divider switch", which was at some distance from the switch leading to Track 3, he got on at its rear end, where the hand brake was located, tried the brake and found it in good condition. Before the car got "into the clear" on Track 3 it ran against other cars which were on that track and stopped suddenly. Plaintiff had just started to set the brakes and the car was going about eight miles per hour at the time of the crash. He had his right hand on the brake and was holding one of the steps of the ladder on the car with his left hand. The sudden impact threw his body against the ladder, with his left arm between his body and

the ladder, and caused injury to the left arm, for which this suit was brought.

[1] This action was brought under the Federal Employers' Liability Act. That act makes every common carrier by railroad engaged in interstate commerce "liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *." 45 U.S.C.A. § 51. The liability of a carrier under this act is predicated on negligence and the burden of proving such negligence rests on the plaintiff in any action brought under the act. Showalter v. Western Pac. R. Co., 1940, 16 Cal. 2d 460, 471, 106 P.2d 895.

[2, 3] The defendant contends that proof of such negligence is lacking here. Walters, the engine foreman under whom plaintiff was working, testified that it was the engine foreman's duty to know the condition of tracks with reference to whether or not they will hold cars that he intends to put into them, and that it was also his duty, if there was any condition he knew of in the tracks that he was going to switch cars into, anything that was unusual or might present some problem to some other movement or some member of the crew who had not had an opportunity to acquaint himself with the facts, to inform such crew member thereof, and that he would do so; and further that "primarily the responsibility of switching operations and the knowledge of the condition of the track into which cars were going is that of the foreman." Plaintiff testified, as to the custom in the Barstow yard, that: "When he [the engine foreman] gives those track numbers to field cars into we got to assume that there is sufficient space in the tracks to hold the number of cars that goes in there, one or many." Plaintiff also testified that: "It was the engine foreman's duty to inform me if there was anything out of the way with the job he had given me, that is, the places where the cars went and the tracks and the data." No one told the plaintiff there was not room on track 3 to allow the car he was riding to go into the clear. It was dark and there were no lights in the yard and objects were difficult to see, and besides, plaintiff's view was obstructed by the body of the car in front of him, so that he could not see the condition of the track ahead of him. The results showed that there was not sufficient room on the track; hence the engine foreman was guilty of a breach either of his duty to inform himself, or of his duty to inform plaintiff of unusual conditions. The context of the testimony above quoted as to the duty of the engine foreman shows that it is also descriptive of a custom in the Barstow yard. Violation of a known custom or duty constitutes negligence in such a case. Showalter v. Western Pac. R. Co., supra, 1940, 16 Cal. 2d 460, 476, 106 P.2d 895; MacDonnell v. Southern Pac. Co., 1936, 17 Cal.App. 2d 432, 435, 62 P.2d 201.

[4-7] Defendant further contends that such accidents as that in which plaintiff was injured were a part of the usual hazard of the work in which plaintiff was employed and therefore he assumed the risk thereof. Assumption of the risk is a defense to an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., but there are limitations to its scope, and the burden of proving it is upon the employer. The employee "does not assume the risk of the negligence of a coworkman regarding whose careless acts he has no knowledge, unless as a reasonably prudent person under similar circumstances he would be presumed to have observed and appreciated them." Crabtree v. Western Pac. R. Co., 1939, 33 Cal.App.2d 35, 42, 43, 90 P.2d 835, 839; to same effect, King v. Schumacher, 1939, 32 Cal.App.2d 172, 177, 89 P.2d 466. Under this rule the jury could properly find that plaintiff did not assume the risk here.

[8-10] In connection with the argument on assumption of the risk, defendant suggests that plaintiff was guilty of contributory negligence because he did not stop the car sooner. But there was testimony that the brake was in good working order and would stop the car at the speed it had when plaintiff was on it within twenty or twenty-five feet, and that to get the car into the clear it should have had forty or fifty feet more of clear space than there was on track 3. Plaintiff was just setting the brakes when the accident happened, so if he had had this additional clear space there would have been no collision. He could be excused from seeing the cars ahead by reason of the darkness and the obstructions

to his vision, as well as his right to rely on the orders given him. The question whether he was guilty of contributory negligence was, under the circumstances, a question of fact for the jury. Such negligence would not be a complete defense, but only a ground for diminishing the damages under the rule of comparative negligence. 45 U.S.C.A. § 53. If necessary to support the verdict in amount we must presume the jury found there was no such negligence.

[11, 12] There is evidence conflicting in many respects with the testimony of plaintiff and others from which we have taken the facts above recited. While plaintiff is corroborated on some points, it may be said that the verdict could not be supported without his testimony. All the other witnesses said the accident happened on track 2, and there is no evidence of a lack of room for the car on that track and no sufficient evidence of any negligence on defendant's part if the car was switched onto track 2. Plaintiff admitted at the trial the making of three statements regarding the accident, in each of which he more than once stated that the accident occurred on track 2, but in his testimony he declared that these were erroneous. This situation, no doubt, has led defendant to make here an insistent argument against the credibility of plaintiff's testimony in this and other respects; an argument which might properly have been, and no doubt was, addressed to the jury, but which cannot prevail on appeal. There is nothing impossible or even inherently improbable about plaintiff's testimony. Everything to which he testified could have happened without doing violence to any of the laws of nature or any invariable pattern of human behavior. He was contradicted by other witnesses in the vital parts of his testimony; but whether he or the others should be believed was a question for the jury, upon which we are bound by their decision. "A conflict between the testimony of a witness and statements previously made by him presents a question to the jury or trier of facts, and it is not the province of the appellate tribunal, under ordinary circumstances, to interfere therewith." Williams v. General Ins. Co., 1936, 8 Cal.2d 1, 4, 63 P.2d 289, 290; to same effect, Keyser v. San Diego Electric R. Co., 1936, 16 Cal.App.2d 48, 51, 60 P.2d 136; Hosman v. Southern Pacific Company, 1938, 28 Cal.App.2d 621, 632, 83 P.2d 88; Smith v. Schwartz, 1939, 35 Cal.App.2d 659, 663, 96 P.2d 816. Defendant cites cases holding that the testimony of a witness may be disregarded where its value is destroyed by impeachment, but they are all cases where the testimony was disregarded in the trial court and such decision was affirmed on appeal. Such cases are not helpful here, where the testimony was accepted in the trial court.

[13-15] It also appeared at the trial and was admitted by plaintiff that he had obtained employment from defendant under an assumed name and that in his written application he had not only used this false name but had set forth the record of the person whose name he used and had stated his age as 41 when it was in fact 53. Defendant urges these facts also against the credibility of plaintiff as a witness, to which argument the answer is that already stated. It further contends that by reason of this use of a false name plaintiff never became its employee and is precluded from maintaining this action against it. Plaintiff did these acts, doubtless, to conceal from defendant the facts that it had, some 25 years before, discharged him for breach of its rules, and that his age was above that at which it would take on new employees. A similar situation arose in Phillips v. Southern Pacific Company, 1936, 14 Cal.App.2d 454, 457, 58 P.2d 688, 690, where the plaintiff suing under the Federal Employers' Liability Act had obtained employment under an assumed name, concealing his record of discharges from previous railroad employments. On these facts the court declared the rule to be "that such concealment does not vitiate the contract of employment and prevent recovery unless there is shown to be a causal connection between the injury and the misstatements in the application for employment." In the present case the plaintiff passed a physical examination before going to work and worked for two years after his employment, and his services were declared to be satisfactory by his superior. The misrepresentation may have furnished reason for rescinding the employment contract, but if so, this was not done. It did not render his employment void. Phillips v. Southern Pacific Company, supra; Minneapolis, St. Paul & S. S. M. R. Co. v. Borum, 1932, 286 U.S. 447, 52 S.Ct. 612, 76 L.Ed. 1218.

[16] Defendant calls our attention to testimony indicating that the effect of plaintiff's injuries may be more serious because of his age than if he were younger and argues that this brings the case within the qualification of the rule above quoted. But the statement there about "a causal connection between the injury and the misstatements" refers to the happening of the injury, not to its effects. It does not appear that plaintiff's age had anything to do with the occurrence of the accident. He was not beyond the age of agility, if that was needed in his employment; nor does it appear that defendant would not permit persons of plaintiff's actual age to do for it the work plaintiff was doing, if they had been previously employed, but merely that they would not be taken on as new employees.

After the injury of which plaintiff complains, he was taken to defendant's hospital and there treated for some time by defendant's physician. Then he went back to work and worked for a short time; but before doing so went to the office of defendant's claim agent, where he was paid $75 and signed a release purporting to release defendant from any and all claims which he had or thereafter might have on account of the injuries in question, including any injuries which might thereafter develop. This release was pleaded as a defense and is now urged as a bar to plaintiff's action. Regarding this release and the circumstances surrounding its execution, plaintiff testified that he was required to sign it before he could go back to work, that he had just been released from defendant's hospital, that defendant's doctors had given him a release to work and told him he was "O.K. to go to work" and had recovered from his injury, and that the claim agent told him "you have been discharged from the hospital all cured up." The defendant's physician, while without a clear memory of his conversation with plaintiff, conceded that "I probably told him I thought he had recovered from this injury." Plaintiff further testified that no one had told him he would not be able to work as a switchman and that when he signed the release he thought he was cured. When plaintiff went back to work his arm was sore and painful at times during his working hours and did not have enough strength to hold his weight on that side—something he had to do in performing the duties of a switchman—and after working for a while he found that he could not perform the duties of a switchman. Before bringing this action plaintiff, through one of his attorneys, offered to return to defendant the amount paid upon the release, but this offer was rejected by the defendant.

[17-19] Under the circumstances thus shown, plaintiff was entitled to rescind the release and by his rescission its effect as a release was destroyed. A release is a contract and as such is subject to rescission for the same reasons as are other contracts, including fraud and mistake of fact. Garcia v. California Truck Co., 1920, 183 Cal. 767, 769, 192 P. 708; Miller v. Brode, 1921, 186 Cal. 409, 416, 417, 199 P. 531; O'Meara v. Haiden, 1928, 204 Cal. 354, 358, 268 P. 334, 60 A.L.R. 1381; Touhy v. Owl Drug Co., 1935, 6 Cal.App.2d 64, 68, 44 P.2d 405; Hudgins v. Standard Oil Co., 1933, 136 Cal.App. 44, 55, 28 P.2d 433; Gambrel v. Duensing, 1932, 127 Cal.App. 593, 604, 16 P.2d 284; Charleville v. Metropolitan Trust Co., 1934, 136 Cal.App. 349, 356, 29 P.2d 241. The statement made to plaintiff by defendant's physicians, that he had recovered, was one of fact. Missouri, K. & T. R. Co. of Texas v. Haven, Tex.Civ.App.1917, 200 S.W. 1152, 1155; Missouri Pac. R. Co. v. Elvins, 1928, 176 Ark. 737, 4 S.W.2d 528, 530; Atchison, Topeka & Santa Fe R. Co. v. Peterson, 1928, 34 Ariz. 292, 271 P. 406, 409; Macklin v. Fogel Const. Co., 1930, 326 Mo. 38, 31 S.W.2d 14, 18. It was believed by plaintiff, and if it was also believed by the physician, the case is one of mutual mistake. If the statement was not believed by the physician, we have a case of fraud. In either case the plaintiff was entitled to rescind, and it is not disputed here that the steps he took were sufficient to accomplish that result. Since there was an effective rescission of the release, we need not inquire whether by its terms it comprehends the damages now sued for, or whether section 1542 of the Civil Code would operate to exclude them from its scope. Hence the case of Berry v. Struble, 1937, 20 Cal.App.2d 299, 66 P.2d 746, which relates to those matters, and on which defendant relies, is not in point here.

Defendant's final contention is that the damages awarded to plaintiff, in the sum of $9,640, are excessive. At the time

of the accident plaintiff was 55 years of age and had a life expectancy of 17.4 years. At that time he was paid at a rate which, if he worked regularly, would have amounted to "between $210 and $215 a month," but his actual earnings were only $2,200 per year. The amount of his prospective earnings at this rate would have a present value of $22,000, and since the verdict is less than half this amount, the jury must have made a considerable allowance for contingencies.

About eighteen months after the accident plaintiff consulted Dr. Spiers, a physician specializing in bone and joint surgery. Dr. Spiers did not treat plaintiff, but examined him for the purpose of diagnosis. From his testimony it appears that plaintiff's trouble was in his left elbow, which had a limited range of motion and was not of normal shape. Dr. Spiers testified that he found several abnormal conditions in plaintiff's left elbow, but that none of these was caused or produced by the accident; they came from some pre-existing injury. Dr. Spiers expressed this opinion: "this man suffered an injury some time prior, probably long prior to the injury of which he is complaining, and had a disabled elbow. That at the time of the accident he exacerbated * * * a pre-existing injury, and that he is suffering from osteoarthritis of the elbow, exacerbated by the injury he received." Plaintiff testified that previous to the accident he had had no trouble with this elbow and had always been able to do his work as a switchman; and to a question reciting these facts and plaintiff's present disability, Dr. Spiers answered: "That this joint was apparently functioning all right until he had his injury, and the injury was sufficient to light up and produce a series of symptoms which has made that joint not usable as a working member since." He also testified that plaintiff is not able to do the work of a railroad brakeman or switchman. Being asked if plaintiff's condition were permanent he answered: "If he were younger, there is a possibility he might be able to get back. But these things are very long prolonged. At this man's age, my opinion is that he will never be able to go back to a job as a switchman." He further testified: "Q. Now, Doctor, as to the factor of age and time in a condition of this kind, assuming that this condition as disclosed by the X-rays of an old existing injury were quiescent or quiet, if the man was going about doing manual work, railroad work, working as a switchman, performing his work comfortably with no complaint, and doing the work required of him, do you have any opinion as to how long he might be able to continue in his occupation, assuming that he never suffered any trauma or any injury by an external violent means to that member which had the long existing condition which you have described and which is now quiescent? A. I do not know how long he had gone on. He might have gone on for years all his natural life without having the symptoms, and then an injury or a violent nature light it up—he could have gone on maybe two years, five years, or ten years, I don't know." He also said that before plaintiff's injury the condition existing in his elbow was quiet and the injury aroused it from a quiescent condition to an active one; that such a change is usually started by some rather serious injury, usually by something more than a mere bump; and that it must be something which tears the ligaments a little and disturbs the joint.

[20] Analyzing this medical testimony we notice that the accident merely aggravated a pre-existing condition. This, however, does not prevent plaintiff from recovering. "An accident which aggravates a preexisting disease may constitute a cause of action for damages. In such a case plaintiff may recover all damages for such aggravation." Smith v. Schumacker, 1938, 30 Cal.App.2d 251, 263, 85 P.2d 967, 973.

[21] It is apparent that very little could properly be awarded plaintiff for pain and suffering. He testified to pain only during the first night and "at times" while he worked after the accident. The award must be regarded as one given mainly for loss of earning power, and as such it is defended. Defendant contends that plaintiff is not entitled to recover anything for loss of future earnings as a railroad man because after the disclosure of his falsification of his record in his application for employment he could no longer obtain employment with any railroad. We find no evidence of the fact on which this argument is based. While there is testimony that defendant would not employ him by reason of his falsification, as well as his age, we find no showing that he could not get railroad employ-

ment anywhere. We cannot say, without evidence, that other railroads would not view plaintiff's case more leniently than does defendant.

[22–25] In Bellman v. San Francisco H. S. Dist., 1938, 11 Cal.2d 576, 588, 81 P.2d 894, 900, a personal injury case where plaintiff's physician testified only to a probability of permanent injury, the court reduced the damages by two-thirds, saying: "The jury may not consider consequences which are only likely to occur. 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' Silvester v. Scanlan, 136 Cal.App. 107, 28 P.2d 97, 99; Bailey v. Yosemite Portland Cement Corp., 136 Cal. App. 111, 28 P.2d 65. No such certainty is shown in the evidence in this case." In the present case it is shown that plaintiff is and will be disabled from performing the duties of a railroad brakeman or switchman, and from the fact that he has done no other sort of work during his active life of thirty years or more the jury might infer that he could do nothing else, and that a disability in this occupation is as to him a total disability. But, since his case is one of aggravation of a previous condition, he can recover only such damages as result from the aggravation; not those which would have been caused by the previous condition without the aggravation. And he has the burden of proving with reasonable certainty that his future disability for which he claims damages will be the result of the aggravation rather than the natural development of the previous condition.

[26, 27] Here it appears that, in spite of his previous injury, the plaintiff was doing his work successfully and had been doing so for many years. The medical testimony shows that, in the absence of some further physical injury to plaintiff's elbow, he could have continued to use it in his work for an indefinite time. In other words, no time at which the previous injury would have ended plaintiff's ability to work at his occupation appears. In the absence of such a showing the jury might presume that his ability to work would continue as long as is usual with things of that nature, Code Civ.Proc. § 1963, subd. 32, and in determining how long this would be they could consider plaintiff's history, as related to them, and his apparent physical condition, as well as the medical testimony. That testimony showed that the injury necessary to aggravate the condition in plaintiff's elbow from a quiescent one to an active one would be some rather serious injury—something more than a mere bump. In estimating the damages they were not required to assume the happening of any such injury.

[28-30] The question whether the evidence does show with reasonable certainty that plaintiff's future disability will result from the aggravation of his previous condition by his injuries rather than from the previous condition alone is primarily one for the jury. "It is elementary that the assessment of damages is a matter committed to the discretion and sound judgment of the trier of facts, whose conclusion will not be disturbed by an appellate court unless the sum awarded is so disproportionate to the injury proved as to justify the view that it was given under the influence of passion or prejudice." Bechtold v. Bishop & Co., Inc., 1940, 16 Cal.2d 285, 293, 105 P.2d 984, 989. "An appellate court may not interfere unless the amount of the damages finally allowed is so 'outrageously excessive as to suggest, at the first blush, passion or prejudice. * * *'" Hicks v. Ocean Shore Railroad, Inc., 1941, 18 Cal.2d 773, 785, 117 P.2d 850, 857. Under the rules thus established we may not interfere with the amount of the verdict here.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.

54 Cal.App.2d 506

EIGNER v. RACE et al.

Civ. 13712.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1942.

1. Trial ⇐165

In considering motion for nonsuit, evidence must be interpreted most strongly against defendant.

2. Trial ⇐165

In ruling on motion for nonsuit, trial court had duty to assume truth of all evidence adduced on behalf of plaintiff, and without regard to conflicts appearing therein, to adopt only those inferences reasonably and fairly deducible therefrom which were most favorable to plaintiff.

3. Animals ⇐71

Where plaintiff who was proceeding toward her place of business spoke to child with whom plaintiff was acquainted, and remarked that child was accompanied by a beautiful dog, plaintiff who did nothing that should tend to excite, alarm or disturb the dog was not guilty of contributory negligence which would bar recovery for injuries sustained by plaintiff when the dog suddenly brushed against plaintiff, and knocked her down.

4. Animals ⇐74(2)

In action based on negligence of owners of large dog in permitting child to take dog on street in defiance of ordinance prohibiting one from permitting dog to be on street unless dog is on leash in hands of responsible person capable of controlling the dog, ordinance was only evidence of negligence of the owners and was admissible without being specially pleaded.

5. Appeal and error ⇐927(2)

Trial court's statement that rather than take time to read ordinance, the court would reverse ruling excluding ordinance and let it be received in evidence, and that in any event the court did not think it had any weight, although indicating intention of court not to read ordinance before receiving it in evidence did not foreclose, in absence of a showing, and in view of presumption that official duty was performed by the court, the assumption that court gave ordinance consideration with all the other evidence in the case when ruling on motion for nonsuit.

6. Appeal and error ⇐1170(6)

Where evidence failed to show any causal connection between alleged violation of ordinance and injuries sustained by plaintiff who fell when large dog which accompanied child on street of city allegedly in violation of the ordinance, brushed against plaintiff, any error of trial court in stating that rather than take time to read the ordinance the court would receive it in evidence, and that the court did not think the ordinance had any weight in any event, did not authorize reversal. Const. art. 6, § 4½.

7. Negligence ⇐56(3)

"Negligence per se" can only be predicated on a violation of a local ordinance when accident is proximately contributed to by such violation.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

8. Trial ⇐139(1)

In order to warrant denial of motion for a nonsuit, the evidence must be sufficient to raise more than a mere conjecture that the facts are as alleged, and it must establish a situation on which reasonable minds might be expected to, would, or could differ.

9. Negligence ⇐63

An "unavoidable accident" is not one which would be physically impossible in the nature of things for defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the thing that did happen.

See Words and Phrases, Permanent Edition, for all other definitions of "Unavoidable Accident".

10. Negligence ⇐63

An "unavoidable accident" is an accident which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of everyone under the circumstances, and which is not occasioned by want of such care and skill and which the law holds every person bound to exercise, and is an unexpected catastrophe or happening which occurs without any one being to blame for it.

11. Animals ⇐68

Where plaintiff who was proceeding toward her place of business came up behind large dog and spoke to child having custody of the dog and the dog turned around and in so doing brushed against the plaintiff and knocked her down, the plaintiff's injuries resulted from an "unavoidable accident" and the owners of the dog were not liable therefor on theory that there was a "causal connection" between act of owners in permitting child to have custody of large dog on public street, allegedly in violation of a city ordinance.

See Words and Phrases, Permanent Edition, for all other definitions of "Causal Connection".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Vera Eigner against William S. Race and wife for injuries allegedly sustained when defendants' dog violently jumped upon and against the plaintiff, knocking her off her feet and on the sidewalk. From judgment of nonsuit rendered on defendants' motion made at close of the plaintiff's case, the plaintiff appeals.

Affirmed.

Bartlett & Kearney and Wm. B. Gilroy, all of Los Angeles, for appellant.

Ezra Neff, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff appeals from a judgment of nonsuit rendered upon defendants' motion made at the close of plaintiff's case.

The complaint herein contained two causes of action, the first of which charged that defendants were in control of a large, active and powerful Great Dane dog, which prior to the time of the accident here in question was accustomed to violently jump upon and against children and adults and to "fawn violently upon them and knock them off their feet"; that defendants were acquainted with and knew of these facts. It was then alleged that upon the date of the accident, in the city of Beverly Hills, while plaintiff was lawfully upon a public sidewalk, the above mentioned dog violently jumped upon and against her, knocked her off her feet and upon the sidewalk, as the result of which she suffered serious injuries. This cause of action was based upon the theory set forth in the Restatement of the Law of Torts, volume III, page 20, to the effect that the keeper of a large dog, who while knowing the animal is not vicious, is nevertheless cognizant of the animal's propensities to "fawn violently upon people," is liable for harm which results by reason of the playfulness or overdemonstrative friendliness of such dog.

In her second cause of action plaintiff repleaded the foregoing allegations of the first, and then charged that "on or about November 9, 1939, at and near the intersection of Wilshire Boulevard and Santa Monica Boulevard, public streets in the city of Beverly Hills * * *, defendants and each of them so negligently kept, maintained and controlled said dog that he violently jumped upon and against plaintiff and knocked plaintiff to the sidewalk."

By their amended answer defendants set up a general denial of the averments contained in the complaint and by way of special defenses pleaded contributory negligence, inevitable and unavoidable accident, and the statute of limitations. Code Civ. Proc., § 340.

Upon this appeal plaintiff does not challenge the correctness of the trial court's ruling granting a nonsuit as to the first cause of action, for the reason that no evidence was introduced to support the allegations thereof, and the sole question presented to us is the correctness of the court's ruling granting a nonsuit as to the second cause of action.

There is little if any dispute concerning the factual background surrounding this litigation. Briefly, the facts are that on November 9, 1939, the defendants, husband and wife, were living with their minor daughter, Nancy Race, in the city of Beverly Hills. Upon the premises occupied by them the defendants owned and housed a Great Dane dog called "Mark." At all times pertinent hereto the plaintiff also resided in Beverly Hills, where she owned and operated a shop located on Wilshire Boulevard, wherein she sold children's garments and clothes. About the middle of the afternoon of the date last mentioned, plaintiff alighted from an automobile in front of her place of business. She was returning from a shopping tour in the city of Los Angeles, and her arms were filled with small packages, while her purse was hanging from one of her arms. When plaintiff stepped from the automobile and

walked toward the entrance to her store, she encountered the child Nancy and the aforesaid dog. At this time the dog was directly in front of the store entrance, looking through the front door of the store, while the little girl was attempting to tie the dog's leash to the awning rail. According to the testimony, plaintiff was 5 feet 2½ inches tall and weighed about 125 pounds, while the dog weighed 120 pounds. Plaintiff testified that she was unacquainted with dogs of the size of the Great Dane and totally unfamiliar with their habits. She further testified: "The dog at the time I came up was facing the door as if he was looking in, and was right in front of the door." Standing behind the dog, and being acquainted with the little girl, Nancy Race, plaintiff said to her, "Hello, Nancy, what a beautiful dog you have," when, according to plaintiff, "All of a sudden the dog sprung against me and knocked me over on the sidewalk. I fell backward on the sidewalk." When asked what part of the dog's body came in contact with her, plaintiff testified, "I am not sure what part of the dog came in contact with me. It seems like it was the side of the dog." At the time plaintiff spoke to the little girl, she was standing "Quite close to the dog, maybe a foot or so away. It would not be less than a foot. I was within reach, I would say, about a foot or a foot and a half. The dog was not facing me." Plaintiff further testified: "The dog did not bite me and never attempted to bite me. He didn't raise up on his hind paws and come at me with his front paws. * * * The dog did not either spring at me or leap at me. He just came against me with great force."

Following the incidents just narrated, and after plaintiff had been assisted into her store and placed upon a davenport, the child Nancy, who was in charge of the dog, entered and said, "Oh, Miss Eigner, I am so sorry that Mark (the dog) knocked you over. He has a habit of leaning against people."

There was introduced in evidence at the trial an ordinance of the city of Beverly Hills reading in part as follows: "Section 3. It is hereby declared to be unlawful for any person, firm or corporation owning, controlling or having in his or its care or custody any dog, whether licensed or unlicensed, to suffer or permit such dog to be at large upon any public street, alley or public place, or upon any vacant, unoccupied or unenclosed lot, lands or premises other than vacant and closed premises owned by such person, firm or corporation, and provided for such purpose, within the city of Beverly Hills, except when said dog is upon a leash in the hands of a responsible person capable of controlling said dog."

It was stipulated that at the time in question the child Nancy was about twelve years of age, approximately five feet tall, and weighed some ninety-five pounds.

[1, 2] It is unnecessary to here refer to the oft-repeated rules governing the limitations and duties devolving upon trial courts in passing upon a motion for a nonsuit. Suffice it to say that the evidence must be interpreted most strongly against the defendant when the court has under consideration a motion for a nonsuit. It was the duty of the court, for the purpose of the motion, to assume the truth of all the evidence adduced on behalf of plaintiff's case, and without regard to the conflicts, if any, appearing therein, to adopt only those inferences reasonably and fairly deducible therefrom which are to the plaintiff most favorable. Estate of Flood, 217 Cal. 763, 21 P.2d 579; Estate of Lances, 216 Cal. 397, 14 P.2d 768.

[3] In the light of the rules just enunciated, appellant contends that the evidence conclusively established that she was free from any contributory negligence. We are in accord with this claim. Certainly there was no negligence upon the part of appellant in alighting from the automobile in front of her place of business and entering therein under the circumstances here present. She was at a place where she had a right to be and where it was necessary for her to be in order to enter her store, and there is no evidence that she said or did anything that would or should tend to excite, alarm or disturb the dog.

[4] One of the grounds upon which the motion for nonsuit was made was that there was no showing that the defendants or either of them were guilty of any negligence contributing proximately to the injuries sustained by plaintiff. In this regard, plaintiff urges that respondents were guilty of negligence in permitting a child 12 years of age, weighing 95 pounds, to have the custody of a 120-pound Great Dane dog upon a busy boulevard, when the city ordinance above quoted prohibited any person from permitting a dog to be upon the public streets of the municipality un-

less the animal "is upon a leash in the hands of a responsible person capable of controlling the dog." It is manifest that if by permitting their minor child to have custody of the dog in a public thoroughfare the parents violated the provisions of the ordinance and such violation contributed directly and proximately to the injuries of plaintiff, then respondent parents were guilty of negligence as a matter of law. And if the negligence which was the proximate cause of the accident consisted of the violation of a municipal ordinance prescribing the conditions under which a dog might be permitted upon a public highway, plaintiff was entitled to clothe the court with knowledge of the existence of such ordinance, and this she was entitled to do without having specially pleaded it, because the cause of action was not for a violation of the ordinance, but for the negligence of respondents in permitting the child to take the animal upon the highway in defiance of the ordinance; and the ordinance was therefore only evidence of such negligence. Szopieray v. West Berkeley, etc., Co., 194 Cal. 106, 112, 227 P. 720; Scragg v. Sallee, 24 Cal.App. 133, 140, 140 P. 706.

[5] After sustaining an objection to the introduction of the ordinance in evidence on the ground that the same had not been pleaded, the court later reversed its ruling, with the statement: "Rather than to take the time to read it, I will reverse the ruling. Let it be received in evidence. I do not think it has any weight in any event." It is now contended by appellant that the attitude of the court expressed in the statement just quoted precluded her from having the benefit of this evidence. However, we cannot assume, in the absence of a clear showing to that effect, that the court did not consider the ordinance in ruling upon the motion for a nonsuit. While the statement made by the court indicates an intention upon his part not to read the ordinance before receiving it in evidence, it does not foreclose, in the absence of a showing, and in view of the presumption that official duty was performed, the assumption that the trial court gave the ordinance consideration with all the other evidence in the case when making his decision on the motion for a nonsuit.

[6–11] However, even though we concede error upon the part of the trial court in making the statement in question, nevertheless we cannot reverse the judgment, because of the provisions of section 4½ of article VI of our state Constitution. The evidence adduced at the trial herein points unerringly to the conclusion that the injuries sustained by appellant were the result of an unavoidable accident. Even though it be admitted that respondents violated the ordinance, we fail to perceive how, under the evidence in the case at bar, such violation can aid appellant, for the reason that the evidence fails to show any causal connection between the alleged violation of the ordinance and the injuries sustained by appellant. Under the doctrine laid down in the California cases, it is the settled rule that negligence per se can only be predicated upon the violation of a local ordinance when the accident is proximately contributed to by such violation. Connell v. Harris, 23 Cal.App. 537, 541, 138 P. 949. Without here repeating the evidence which we have hereinbefore set forth, we are irresistibly driven to the conclusion that no rational well constructed mind can reasonably draw from it the conclusion that the accident would not have occurred had the dog been in charge of a much older, larger, more robust or alert person than the child here involved. To warrant the denial of a motion for a nonsuit the evidence must be sufficient to raise more than a mere conjecture or surmise that the facts are as alleged. It must establish a situation upon which reasonable minds might be expected to, would, or could differ. When we refer to an unavoidable accident, we do not mean one which it was physically impossible in the nature of things for the defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the thing that did happen; in other words, that what occurred happened unexpectedly and without fault and not because of negligence. The term "unavoidable accident" has been defined as meaning an accident which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of everyone under the circumstances of the particular case, and which is not occasioned in any degree by want of such care and skill as the law holds every person bound to exercise. In short, an unexpected catastrophe or happening which occurs without anyone being to blame for it; that is, without being guilty of negligence in doing or permitting to be done, or omitting to do, a particular thing, which act or omission caused plaintiff's injury. The evidence here, without contradiction, shows

that appellant came up behind the dog; spoke to the child having custody of the dog; that the animal turned around, and in so doing brushed against appellant and knocked her down. We cannot see where the conduct or behavior of the holder of the dog's leash, however careful, prudent or circumspect it might be, could or would have prevented the accident from occurring in the manner it did. It must therefore be held that the trial court was justified in granting a nonsuit upon the ground that the accident here in question was an unavoidable one.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



54 Cal.App.2d 502

POLLARD v. FOSTER et al.

Civ. 2956.

District Court of Appeal, Fourth District, California.

Sept. 23, 1942.

Hearing Denied Nov. 12, 1942.

1. Automobiles ⇐245(70)

Where subcontractor was directing another subcontractor's truck crane operator from a sitting position on a wall near the crane and was injured when truck suddenly backed into him, subcontractor was not guilty of contributory negligence as a matter of law in that he assumed a "position of danger", where the position had not been a position of danger during all previous operations of the crane.

See Words and Phrases, Permanent Edition, for all other definitions of "Position of Danger".

2. Negligence ⇐67

Generally, a person cannot place himself in a position of danger and then recover damages resulting from injuries received when in that position.

3. Automobiles ⇐246(58)

In action for injuries sustained by subcontractor when a truck crane owned by another subcontractor backed into him as he sat on a wall from where he had directed the operator in all previous movements of the crane, refusal to give an instruction on "assumption of risk" was not error where subcontractor would not have been in a dangerous position had it not been for operator's negligence of which subcontractor had no previous warning.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

4. Automobiles ⇐242(2)

In action for injuries sustained by subcontractor when another subcontractor's truck crane backed into him without warning as he sat on a wall from which position he had directed crane operator in all previous movements of crane, the doctrine of "res ipsa loquitur" had no application where the accident was caused by negligence of the crane operator.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Appeal and error ⇐930(2)
Trial ⇐296(7)

In action for injuries sustained by subcontractor when a truck crane owned by another subcontractor backed into him without warning as he sat on a wall from which position he had directed all previous movements of the crane, the giving of an instruction on the doctrine of res ipsa loquitur was not prejudicial error, even though the doctrine did not apply, where court further instructed as to circumstances under which the doctrine would not apply as it would be assumed that the jury followed instruction.

6. Appeal and error ⇐1170(7)

In action for injuries sustained by subcontractor when a truck crane owned by another subcontractor backed into him without warning as he sat on a wall from which position he had directed operator in all previous movements of crane, where subcontractor was permitted to answer in response to a question that he placed himself in that position because it was the only position in which crane operator had a full and unobstructed view, the error, if any, would not furnish ground for reversal of a judgment for plaintiff in view of the clear evidence of operator's negligence. Const. art. 6, § 4½.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by Harry E. Pollard against A. L. Foster and others to recover for personal injuries sustained by plaintiff when a truck crane was backed into him. From a judgment for plaintiff, defendants appeal.

Affirmed.

Tripp, Penny & Callaway and Hulen C. Callaway, all of Los Angeles, and S. B. Kaufman, of Anaheim, for appellants.

Forgy, Reinhaus & Forgy and Fred Forgy, all of Santa Ana, and Robert E. Ford, of Hollywood, for respondent.

MARKS, Justice.

This is an appeal from a judgment for personal injuries suffered by plaintiff when a truck crane was backed into him.

The accident occurred on September 11, 1940, when the parties were working on the Fullerton Dam, which was being constructed near the city of Fullerton in Orange County. The truck crane belonged to A. L. Foster, doing business under the name of Foster Sand and Gravel Company, and the crane was being operated by Hollis McPherson, Foster's employee.

Plaintiff and his partner had the subcontract of placing quarried rock in the outlet structure of the dam to prevent its banks from scouring. The various rocks weighed between five hundred and three thousand pounds. They were lowered into a trench at the foot of a concrete wall by means of the crane.

The truck was twenty-two feet long, and the crane, with its operating machinery, occupied the body of the truck. The crane had a twenty-five-foot boom.

The rocks to be lowered into the trench at the bottom of the cement wall were piled about fifteen feet northerly from the wall. The crane truck was backed into position alongside this rock pile with its rear north of the concrete wall. The rocks had to be carefully selected and each lowered into a position so that all pieces fitted closely in order to conform to the specifications prepared by engineers supervising the job. Plaintiff selected each rock to be taken from the pile. He then returned to a position south of the crane truck and sat on the wall with his feet hanging on the north side. From this position he directed Foster's employee just where to lower each rock into position. He did this by hand signals visible to the crane operator. During the operation plaintiff watched each rock being lowered into place directly below him. When one rock had been placed in position he would designate the next to be lifted from the pile and lowered into place. The accident happened after sixty-two rocks had been lowered into position and while the last was being placed.

The crane truck had two of Foster's employees on it. Besides the crane operator there was a driver who sat in the cab. This driver was facing north during the operations. The movements of the truck by the driver were controlled by the crane operator signalling him.

The lowering of each rock into proper position could be controlled by movement of the crane and also by movement of the truck, forward and backward and sideways. During the operations the truck had made all four movements, though it had not approached closer than seven feet to the wall on which plaintiff was sitting. The crane operator knew of plaintiff's position on the wall and could see plaintiff's hand giving the signals. This witness testified that he could not see plaintiff, other than his hand, without "inconveniencing" himself.

During the operation of lowering the last rock into place the crane truck was backed against the concrete wall on which plaintiff was sitting and one of his legs was badly crushed.

[1] Defendants do not argue that evidence of their negligence is insufficient to support the judgment. They strenuously urge that plaintiff was guilty of contributory negligence as a matter of law in sitting on the wall with his legs hanging down on the side towards the moving truck and in not watching the movements of the truck. They maintain that plaintiff voluntarily assumed a position of danger when there were several other safe positions he could have chosen in which he would have been safe from injury.

[2] Of course the law is well settled that a person cannot place himself in a position of danger and then recover damages resulting from injuries received when in that position. However, we do not believe the facts of this case bring it within that rule. During sixty-two separate operations the crane truck had not approached closer than seven feet to the wall. During those operations plaintiff's position was

not one of danger. During the last operation his position became one of danger solely because defendants negligently drove the crane truck against him.

As said in Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800, 802: "The plaintiff * * * was not required, either under the common law or any statutory enactment of this state, to refrain from occupying a position that could only become a place of danger by reason of the negligence." See, also, Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Devecchio v. Ricketts, 66 Cal.App. 334, 226 P. 11; Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575; Albania v. Kovacevich, 44 Cal.App.2d 925, 113 P.2d 251.

[3] Defendants requested an instruction on assumption of risk which the trial court refused to give. This is now urged as reversible error. We cannot regard this ruling as error. Plaintiff would not have been in a dangerous position and therefore there would have been no dangerous risk for him to have assumed had it not been for the negligence of defendants, of which plaintiff had no previous warning.

[4, 5] Plaintiff proposed and the trial court gave an instruction setting forth in general terms the doctrine of res ipsa loquitur. We do not believe that doctrine applicable to the facts of this case because the cause of the accident is clear to anyone reading the record. It was caused by defendants negligently driving the truck into the wall and crushing plaintiff's leg.

The instruction informed the jury that the doctrine could only be applied if "the fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident."

We must presume that the jury followed the instructions given. As the cause of the accident was clearly established in the evidence we must assume that the jury followed the quoted part of the instruction and did not apply the doctrine of res ipsa loquitur here. The giving of the instruction, while erroneous, constituted harmless error.

[6] Plaintiff was asked by his counsel why he placed himself behind the truck and in front of the crane. Over defendants' objection he was permitted to give the following answer: "I placed myself approximately directly behind the truck and in front of the crane and operator because that is the only position in a vehicle or a piece of equipment of this kind in which the operator has a full and unobstructed view." This ruling is now urged as error.

The same subject had been covered in different forms without objection in both direct and cross-examinations, although the witness then gave different reasons for his position. There was no motion made to strike the answer.

If we should assume, without holding, error in this regard, we cannot believe the answer had any bearing on the final result in view of the clear evidence of the negligence of defendants being the sole and proximate cause of the accident. Such an error, if any, cannot furnish a ground for reversal of the judgment. § 4½, art. VI, Const.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



54 Cal.App.2d 524

MILLER v. CRISWELL.

Civ. 13778.

District Court of Appeal, Second District, Division 2, California.

Sept. 25, 1942.

1. Contracts ⇐111

Agreement, as consideration for deed, that grantee spouse shall procure a divorce is illegal as against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Deeds ⇐211(3)

Where wife, who was inexperienced in business matters, executed conveyance to husband without advice from independent attorney or other person and without counsel except husband and his attorney and consideration if any was the procurement

of a divorce, evidence sustained finding that conveyance was procured by fraud, warranting rescission, notwithstanding presumptions attendant upon the execution and delivery of a written instrument and numerous appropriate statutory presumptions. Code Civ.Proc. §§ 1962, 1963; Civ.Code, § 1689.

3. Appeal and error ⇐1011(1)

Appellate court will not disturb finding of trial court on conflicting evidence.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Action by Hazel Criswell Miller against Frank A. Criswell to rescind a conveyance of realty wherein defendant filed a cross complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Redmond & Redmond and Joseph M. Bernstein, all of Los Angeles, for appellant.

William H. Hodges and Paul R. Matthews, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

By this action plaintiff sues her former husband to rescind her conveyance to him of certain realty alleged to have been procured by means of his fraud.

Between December 20, 1921, the date of their marriage in Michigan, and June 13, 1938, when a final decree of divorce was signed and entered by the Superior Court of Los Angeles County, plaintiff and defendant were husband and wife. After the divorce each married again. Their married life was a turbulent one. A separation occurred in 1925, another in 1931. In 1932 or 1933 the wife came to Los Angeles and, she testified, bought the two lots which are the subject of the within action, giving as payment therefor a $200 diamond bracelet, a gift to her by her husband some years previously, and a $2,500 diamond bracelet, given to her as a present in 1927 or 1928 by a "fine, elderly gentleman." Defendant (the husband) also came to Los Angeles a few months later, and after a small house was moved upon the lots which the wife had purchased the couple moved into the place, occupied it as their home and resumed their marital relationship, a status which continued until the interlocutory decree of divorce in 1937.

Defendant established himself in business in the operation of a "beer parlor," plaintiff busied herself as a housewife and in the physical improvement of their home, both husband and wife contributing to the work and financial outlay in upbuilding the property. Originally the deed vested title to the property in plaintiff's name. Subsequently, about July 8, 1935, a double transfer made plaintiff and defendant owners as joint tenants.

Incidents culminating May 12, 1937, provide the background for the litigation now before us. Apparently the marital affairs of plaintiff and defendant had encountered such difficulties that they decided to terminate their marriage by divorce. It was agreed between themselves that the husband should seek a divorce, and together they set out on the 12th of May to effectuate their purpose. On their way to the office of an attorney who had been recommended to them plaintiff claims that defendant plied her with intoxicating liquors to such an extent that she became "dizzy and did not realize what I was doing." Defendant denies that plaintiff at the time of the visit to the attorney's office was inebriated, and the attorney himself, called as a witness, testified he noticed no sign of intoxication.

Be that as it may, and it becomes more or less immaterial in view of the trial court's findings on other points, plaintiff and defendant consulted the attorney about the contemplated divorce and about their property. A divorce complaint was made out that day, filed in the superior court and summons issued thereon and was served upon plaintiff in the office of the attorney, who appeared as attorney for the husband in the suit. At the same time a deed was made out conveying the real property in question from the wife to the husband, signed by the wife and delivered to the husband, who at the same time gave the wife a check for $200. The husband claims that the $200 was consideration for conveyance to him of the real property, but it is significant that no United States revenue stamp was attached to the deed, which bore the notation, placed upon it by the attorney, "The consideration for this deed is less than $100 and no revenue stamps are affixed for said reason." The wife testified that the $200 check was given to her to pay doctors' and other outstanding bills.

On the same 12th day of May the attorney took data which formed the basis of a property settlement agreement between the husband and wife, which was thereafter drawn up, sent by mail to the husband and signed by both spouses May 17, 1937. This agreement, which purports to "finally settle all property rights between themselves forever", makes no mention of the $200 nor of the real property in question here, although it does assign to the husband the "family automobile", the household furnishings and the beer parlor.

It is the contention of the wife, as amplified by her in her testimony at the trial, that when she went with her husband to the attorney's office it was for the purpose of arranging for a divorce and for placing the real property, at that time owned by them jointly, in such shape that their respective interests in the home place would be protected "in case anything happened", and to avoid expense of probate proceedings; that she at no time intended to divest herself of her interest in the property, and that the actions and conduct of her husband in obtaining the grant deed from her where fraudulent and based on false representations on his part. She also testified that her experience previous to the giving of the deed, as a chorus girl, an unsuccessful milliner and as a housewife, unfitted her for business transactions, and that she was inexperienced in business matters—a contention with which her husband agreed. Plaintiff also alleged and testified that she did not discover the fraud until May 23, 1941, when she learned that her former husband was trying to sell the property without consulting her; that she obtained legal counsel within forty-eight hours, consulted the records of the county recorder's office and learned the truth as to the deed of May 12, 1937; that she immediately made demand upon defendant for a reconveyance of her interest in the property, and upon his refusal within seven days of discovery of the fraud filed suit to compel restitution.

Upon the trial plaintiff prevailed, the court ordering the grant deed of May 12, 1937, rescinded and annulled, and that plaintiff be restored to her former status as a joint tenant with defendant in said property. Relief was denied defendant upon a cross-complaint, in which he sought to quiet title in himself as against plaintiff's claims.

[1] Defendant appeals. But he looks in vain to this tribunal for any succor, comfort or relief. The entire transaction, not only as to the collusive divorce suit, but also as to the property transfer, is tainted with fraud to such a degree that the mere statement of the case is sufficient to defeat appellant's claims. Whether or not respondent was stupefied by intoxicants at the time she gave the deed, whether or not her lack of business experience made it impossible for her to comprehend the nature and import of the document she signed, the court must frown upon a transaction such as is disclosed by the undisputed evidence in this case, where a wife, without benefit or advice from an independent attorney or any other person, is divested of her valuable interest in property where she has no counsel except her adversary husband and his legal adviser. If it may be said, under any construction of the evidence, that there was consideration for the deed, that consideration could only be that the husband procure a divorce; and such consideration is illegal and universally condemned by the courts as against public policy.

[2, 3] The evidence submitted to the trial court was ample and sufficient to sustain its findings and judgment. At the most, appellant can urge that there was a conflict in evidence; and under the rule, many times reiterated, an appellate court will not disturb the determination of the trial court upon such conflict.

Appellant urges that at the trial the burden of proof was upon the plaintiff (respondent); that the plaintiff was required to overcome the presumptions attendant upon the execution and delivery of a written instrument, as well as numerous appropriate presumptions set forth in sections 1962 and 1963 of the Code of Civil Procedure, and that the allegations of the complaint should have been proved with reasonable certainty. With none of these fundamental legal propositions do we quarrel, but merely observe that by proving the case of fraud, as alleged, respondent met every test required by law, and the court's findings and judgment are fully supported. Rescission under the circumstances was the proper remedy upon the allegations and proof of fraud. § 1689, Civ.Code.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

54 Cal.App.2d 621

PEOPLE v. NOVELL.

Cr. 3599.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1942.

1. Criminal law ⇐241

In passing on a motion to set aside an information on ground that accused has been committed without reasonable or probable cause, court is not guided by the rule for trials in criminal cases that defendant must be shown to be guilty beyond a reasonable doubt, but the test is whether the evidence received by the committing magistrate failed to show reasonable or probable cause for believing the defendant to be guilty.

"Reasonable cause" or "probable cause" for believing accused to be guilty is such state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion that accused is guilty. The word "probable" means having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves no room for doubt.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable", "Probable Cause", and "Reasonable Cause".

2. Criminal law ⇐238

Deputy sheriff's testimony that when he went to defendant's residence voices on telephone asked for defendant several times, that on some of those occasions voices asked for results of a certain horse race, that someone over the radio at defendant's residence was announcing results of a certain horse race, that he took from defendant a notebook and a paper customarily used by bookmakers, and that defendant admitted making records on the paper, was sufficient to show "reasonable cause" or "probable cause" for filing an order of commitment and subsequently charging defendant with bookmaking. Pen.Code, §§ 337a, subd. 2, 995.

3. Criminal law ⇐1069(6)

Phonographic reporter's failure to file his transcript properly did not deprive District Court of Appeal of jurisdiction of people's appeal from an order granting defendant's motion to set aside information. Pen.Code § 1239.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Clarence Joseph Novell was charged by information with unlawfully keeping and occupying certain premises with books, papers and paraphernalia for the purpose of recording and registering wagers from the results of horse races. From an order granting defendant's motion to set aside the information, the People appeal, and defendant moves to dismiss the appeal.

Motion to dismiss the appeal denied, and order reversed.

Earl Warren, Atty. Gen., Frank Richards Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for appellant.

Robert A. Neeb, Jr., of Los Angeles, for respondent.

W. J. WOOD, Justice.

The People have appealed from an order of the superior court granting defendant's motion made under section 995 of the Penal Code to set aside the information which had been filed against him on the ground that he had been committed without reasonable or probable cause.

In a complaint filed in the court of the justice of the peace of Monrovia defendant was accused of the violation of subdivision 2 of section 337a of the Penal Code, in that on February 10, 1942, he unlawfully kept and occupied certain premises therein named with books, papers and paraphernalia for the purpose of recording and registering wagers upon the results of horse races. After receiving evidence at the hearing defendant was held to answer by the justice of the peace.

At the hearing before the committing magistrate C. H. Connor, a deputy sheriff, testified that he arrested defendant at his residence, 73 E. Palm Avenue in Monrovia, where he found utility bills from the gas and light companies made out to defendant at this address; that defendant admitted that he had lived there for over three years; that the witness was at defendant's residence for about an hour, during which time the telephone rang at least six times. On several occasions the voices on the tele-

phone asked for "Clarence," the first name of defendant; that on several of these occasions a man's voice asked for the results of the sixth race at the fairgrounds. One of the telephone callers asked the witness to give him "two to place on parlay to Lady Listo." During the presence of the witness at defendant's residence someone over the radio was announcing the results of the seventh horse race at Hialeah Park, giving the amounts which were to be paid on the winners. The witness qualified as an expert on the customs and usages of bookmakers and testified that he took from defendant a notebook of the kind customarily used by bookmakers in operating their business, giving information for book making on all races being run on that day at the various race tracks; that he also took from the person of defendant a paper bearing on its face "Metropolitan Scratch Sheet," a paper which was customarily used by bookmakers and containing information concerning races running on that day at the various race tracks. Concerning the finding of this paper the witness testified: "Well, it was in the—this was crumpled in the hand of Mr. Novell as he raced from the breakfast room—in the hallway there,—I took it from his hand when I grabbed him." Concerning a conversation with defendant Officer Connor testified: "Well, at first, I said to him 'At least, you tried to do away with these records,' and he said, 'Yes.' I said, 'Are these all the records of today's events?' And he said, 'Yes.' I asked him, did he make all these records? And he said, 'Yes.' I asked him if his wife made any of the records, and he said that she did not make any of the records, 'she tried to get me to quit.' I said to him, 'then you are the only one who made these records?' He said, 'Yes,' she did not know much about this."

[1] In passing upon a motion of the character of the motion by defendant the superior court is not to be guided by the rule for trials in criminal cases, that the defendant must be shown to be guilty beyond reasonable doubt; but rather the test is whether the evidence received by the committing magistrate fails to show reasonable or probable cause for believing the defendant to be guilty. The term, reasonable or probable cause, has been defined: "By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77.

[2] A mere statement of the testimony of Officer Connor compels the conclusion that defendant was not committed without reasonable or probable cause. No reasonable conclusion could have been reached by the committing magistrate other than that defendant should be held to answer and it was the duty of the superior court to place him upon trial. When compared with the evidence in other cases which have been passed upon by the reviewing courts of California arising from the violation of section 337a of the Penal Code, it must be held that the testimony of Officer Connor, if duly credited by a jury, would be sufficient to sustain a judgment of conviction. People v. Shapiro, 40 Cal.App.2d 321, 104 P.2d 688; People v. Manning, 37 Cal.App.2d 41, 98 P.2d 748; People v. Mason, 37 Cal.App.2d 407, 99 P.2d 567; People v. Ryan, 15 Cal.2d 492, 102 P.2d 320; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[3] At the time of the oral argument defendant presented a belated oral motion to dismiss the appeal, contending that the order should be affirmed for the reason that the phonographic reporter did not file a transcript of his notes within the time prescribed by the rules of the court and for the further reason that defendant was not served with a copy of the notice of appeal. The failure of the phonographic reporter to properly file his transcript does not deprive the court of jurisdiction of the appeal. People v. Megugorac, 12 Cal.2d 208, 82 P.2d 1108. Section 1239 of the Penal Code sets forth the steps to be taken by an appellant in a criminal case. The section does not make it the duty of the appellant to serve a copy of written notice of appeal. Defendant has not been prejudiced by the omission to serve him with a copy of the notice of appeal.

The motion to dismiss the appeal is denied. The order is reversed.

MOORE, P. J., and McCOMB, J., concurred.

54 Cal.App.2d 519

CONSOLIDATED ROCK PRODUCTS CO. v. CARTER, Director of Motor Vehicles, et al.

Civ. 13775.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1942.

1. Automobiles ⇐46

Statute imposing license fee on actual market value of motor vehicles confers general power on department of motor vehicles as to classification of vehicles, determination of their market value, and items to be included in computing the amount of the license fee. Gen.Laws Supp.1939, Act 5135, § 2.

2. Evidence ⇐5(2)

The great variety of motor vehicles is a matter of common knowledge.

3. Automobiles ⇐46

Under statute imposing license fee on actual market value of motor vehicles, the department of motor vehicles is charged with the duty of determining the facts from which the actual market value of such vehicles can be fixed and then applying the law for the collection of such fees and no discretion is involved. Gen.Laws Supp.1939, Act 5135, § 2.

4. Automobiles ⇐46

In the absence of evidence that determination of department of motor vehicles of actual market value of motor vehicles for purpose of fixing vehicle license fees was the product of arbitrary action or clearly unreasonable judicial interference is unwarranted.

5. Pleading ⇐214(1)

On demurrer to complaint, facts as alleged in complaint are assumed to be true.

6. Automobiles ⇐46

In determining for license fee purposes actual market value of trucks to which cement mixers were bolted and used for purpose of mixing cement in the process of transportation, department of motor vehicles reasonably concluded that a cement mixer so assembled on a truck amounted to a "body" or "addition" thereto or a "vehicle" within the contemplation of vehicle license fee act and that its function as a mixer did not affect its identity as a "container for the transportation and delivery of a product" and properly included value of mixers in actual market value of trucks. Gen.Laws Supp.1939, Act 5135, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Addition", "Body" and "Vehicle".

7. Automobiles ⇐51

In suit to restrain department of motor vehicles from seizing and selling trucks for nonpayment of license fee for alleged improper assessment of fee, complaint which contained no allegation tending to show that action of department in determining facts upon which actual market value of trucks was fixed was arbitrary or the conclusion unreasonable was insufficient. Gen.Laws Supp.1939, Act 5135, § 2.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Consolidated Rock Products Company against James M. Carter, as Director of Motor Vehicles, and others to restrain defendants from seizing and selling certain trucks for delinquent motor vehicle license fees. From a judgment for defendants following an order sustaining their demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Latham & Watkins, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal by plaintiff from a judgment entered following an order sustaining the defendants' demurrer without leave to amend. Leave to amend was not requested.

The action was brought to restrain officers of the Department of Motor Vehicles from seizing and selling nine motor vehicles, referred to by respondents as transit-mix trucks, for delinquent 1942 motor vehicle license fees. The fees in question are those provided for in the Vehicle License Fee Act Stats.1935, Chap. 362, p. 1312, as amended; Deering's Gen.Laws,

1939 Supp., Act 5135. The pertinent part of section 2 thereof is as follows: "A license fee is hereby imposed for the privilege of operating in this State any vehicle of a type subject to registration under the Vehicle Code. The annual amount of such license fee shall be a sum equal to one and three-quarters per cent of the actual market value of such vehicle, as determined by the department. The department annually shall compile and publish a list showing the market values as determined by it of each class of vehicles subject to the license fee hereby imposed, such vehicles being classified by make, type and date first sold. In computing the amount of the license fee, the department shall include the actual market value of alterations and additions made to the chassis, engines or bodies of such vehicles."

The action is based on the following facts as alleged in the complaint and admitted by the demurrer. "Plaintiff is engaged in the rock, sand and gravel business in and around Los Angeles county, California; a substantial part of plaintiff's business is the processing and selling of ready mixed concrete; for use in processing and selling ready mixed concrete plaintiff has in its possession, along with other equipment, nine motor trucks upon which are mounted portable cement mixers; the said portable cement mixers contain their own power unit and are entirely separate from and independent of the said motor trucks and are attached to the said motor trucks by bolts holding the said portable cement mixers to the chassis of the said trucks; the said portable cement mixers can be removed from the chassis quite easily and speedily and without in any way injuring the said portable cement mixers or the said chassis, and, in fact, the said portable cement mixers frequently are removed from the said chassis for repairs and frequently are replaced upon a different chassis; the said portable cement mixers can be placed upon the chassis of any modern truck; the said mixers are used for mixing concrete while it is being transported from a central storage place for the ingredients to the particular job where the concrete is being poured and during the waiting period at the particular job before the concrete is poured; and that the said portable cement mixers can be dismounted from the said chassis and satisfactorily used as a stationary cement mixer. Attached hereto as Exhibit 'A' and made a part hereof by this reference thereto is a full, true and accurate reproduction of a photograph of one of the said motor trucks with one of the said portable cement mixers mounted on the chassis thereof.

"The said motor trucks are vehicles of a type subject to registration under the California Vehicle Code [St.1935, p. 93 et seq.]; section 2 of the California Vehicle License Fee Act imposes for the privilege of operating such type of vehicles in the state a license fee of one and three-quarters per cent of the actual market value of the vehicle, as determined by the Department of Motor Vehicles.

"Defendants, and each of them, in determining the actual market value of the said motor trucks for the purpose of arriving at a basis for computing the license fee imposed with respect to the said motor trucks for the year 1942 by section 2 of the said act, have erroneously and unlawfully included the actual market value of the said portable cement mixers; * * *."

In substance and effect, it is appellants' contention that the "mixer" is no part of the "vehicle" nor is it an "addition" to the "chassis" or "body" as defined in section 2 of the Vehicle License Fee Act (supra). In that connection, it is argued, quoting from appellant's brief that, "accordingly, the sole issue in this case is whether or not the mixers and the trucks upon which they are mounted have become single units of equipment. Unless they have become single units of equipment, the 'actual market value' of the trucks within the meaning of the language of the statute should not include the values of the mixers. Appellant respectfully submits that the admitted facts clearly show that the mixers and the trucks have not become single units of equipment.

"Here the mixers are separate units in themselves. They have their separate power units and can be removed and operated quite satisfactorily as stationary cement mixers. They will fit conveniently on the chassis of any modern truck and in fact they are often dismounted for repairs and frequently remounted on the chassis of another truck. These mixers are independent units of equipment, the function of which is to mix concrete while it is being carried to a particular job where it is to be poured and while it is waiting to be poured at that particular

job. These mixers can serve their function on one truck as well as on another and in fact they often do so.

"It is true that while they are mounted on the chassis of the truck, they are held in place by bolts, but that fact cannot make them a part of the particular truck upon which they are mounted at the particular moment. The fact that they are temporarily anchored to particular truck chassis to hold them firmly in place while they are temporarily being used on chassis of particular trucks certainly doesn't make them a part of the truck and certainly not such a part of the truck as to permit the inclusion of the value of the mixer with the value of the truck for the purpose of the license fee here involved."

Respondents' argument in part is devoted to the contention that the so-called "mixer" is an "addition" to the chassis; "that the truck and mixer is an integral whole" and that "as a matter of fact, the mixers are nothing more nor less than a specialized type of truck body."

[1, 2] As will be seen from the foregoing, appellant does not deny the liability for a tax but disputes the method by which it was computed. In this connection it should be noted that the statute conferring power on the "department" for this purpose is general in character, not only as to the classification of vehicles and the determination of their market value but also as to what shall be included in computing the amount of the license fee. And the reason therefor is obvious, for the great variety of vehicles is a matter of common knowledge.

[3, 4] Manifestly, the determination of such facts and the enforcement of the law in question was addressed to the judgment of the responsible department in the first instance, which, in the circumstances here presented, is the Department of Motor Vehicles. With regard to its duty and responsibility in that respect, it was necessary to first determine the fact and then apply the law. As an administrative fact finding body several questions were presented, notably, was this so-called "cement mixer" as assembled, a vehicle; was the assembled product an alteration or addition made to the chassis or body of such vehicle, or both; if alterations or additions, the value thereof. No discretion was involved. It was the department's plain duty to determine the facts and apply the law. Unless it can be shown that, in the performance of such duty, the method employed was the product of arbitrary action, or clearly was unreasonable, judicial interference would be unwarranted. Manifestly, in the absence of evidence of facts tending to support such conclusions, any action of the department would be both arbitrary and unreasonable.

[5] It must be assumed that the facts upon which the "department" acted are substantially the same as alleged in plaintiff's complaint. This being true, there is nothing alleged in the complaint from which it might be concluded that the action of the department was either arbitrary or unreasonable. It is noteworthy in that regard that, although it is alleged that the "mixer" can be dismounted from the chassis and satisfactorily used as a stationary cement mixer, it is not further alleged that it was ever so used. It is also alleged that the cement mixers "can be placed upon the chassis of any modern truck," but, it is not further alleged that they ever were so placed and used.

[6] So far as the record reveals, the Department of Motor Vehicles reasonably could have concluded that in the light of the law, although the "cement mixer" was a fabricated device and designed for a specific purpose, nevertheless, when assembled it amounted to a "body," or an "addition" thereto, or a "vehicle" within the intent, purpose and contemplation of the statute. Also, that its function as a "mixer" did not affect its identity as a container for the transportation and delivery of the product, the sale of which it is alleged, constitutes a substantial part of appellant's business.

[7] The allegations of the complaint show affirmatively the facts upon which the department based its conclusions and determined the amount of the license fee. The complaint contains no allegation of fact, either directly or inferentially, even remotely tending to show that the action of the department was arbitrary or the conclusion unreasonable.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

54 Cal.App.2d 543

ALTMAN v. BAUTZER.

Civ. 13708.

District Court of Appeal, Second District, Division 1, California.

Sept. 28, 1942.

Hearing Denied Nov. 27, 1942.

1. Contracts ⇐249

One who has a right to rescind a contract need not turn to the courts but may effect rescission by his own act. Civ.Code § 1689.

2. Master and servant ⇐7

Where salesman who had been employed by corporation, against which involuntary petition in bankruptcy was filed, entered into contract with president of corporation, but salesman thereafter on discovering that contract was not a binding contract of employment as sales agent and representative of corporation for fixed term rescinded contract in accordance with statute, salesman could not thereafter recover amount of note which was provided for in contract but never delivered. Civ. Code, § 1689.

3. Master and servant ⇐7

Party to employment contract who served notices of rescission as authorized by statute could not by invoking the doctrine of "laches" in his favor avoid effect of such notices on ground that they were not served promptly, especially where other party was in position to pay the obligation of the rescinded agreement but refrained from doing so in reliance on the notices. Civ.Code, § 1689.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Guaranty ⇐64

Where salesman for corporation against which petition in involuntary bankruptcy had been filed entered into written agreement with president of corporation providing, among other things, for the execution of a note of the corporation guaranteed by the president and payable to salesman, salesman, after serving notices of rescission of contract as authorized by statute could not hold president as guarantor. Civ.Code, § 1689.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Jules Altman against Gregson Bautzer to recover $4,000 claimed to be due under a contract. Judgment for defendant and plaintiff appeals.

Attempted appeal from order denying motion for new trial dismissed. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Bautzer & Ryan and Robert E. Ford, all of Hollywood, for respondent.

WHITE, Justice.

This is an appeal by plaintiff from an adverse judgment rendered in an action brought to recover the sum of $4,000 and interest thereon.

The factual situation leading up to and forming the basis of this litigation may be thus epitomized: Maier Brewing Company, a corporation doing business in the city of Los Angeles, employed plaintiff over a period of years. In 1936 an involuntary bankruptcy proceeding was filed in the United States District Court for the Southern District of California, Central Division, against the brewing company. This proceeding was pending for some time, including the year 1938. In such bankruptcy proceeding plaintiff had filed a claim in the amount of $196,709.05, which claim, it was stipulated at the trial, was on January 15, 1938, disallowed for the sum claimed, but allowed as a general claim in the bankruptcy proceeding in the sum of $4,500. It was further stipulated that during the year 1941 plaintiff filed a claim against the brewing company for said sum of $4,500.

During the year 1938, defendant was president of Maier Brewing Company. Following negotiations between plaintiff and defendant looking toward a settlement of the former's claim against the brewery, a written agreement was entered into between the parties to this litigation on January 6, 1938, wherein it was recited that defendant had purchased all of the stock of Maier Brewing Company from the receiver of the estate of Edwin R. Maier, alleged bankrupt, then also being administered in the United States District Court aforesaid. The agreement between the parties also provided that plaintiff agreed to sell to defendant and the latter agreed to buy plaintiff's claim filed in the brewing company bankruptcy proceeding, as well as all other claims plaintiff might have against such concern. In consideration therefor, defendant agreed to deliver to

plaintiff a promissory note of Maier Brewing Company in the sum of $4,000, payable on or before three years from the date of its execution, a copy of the note to be so executed and delivered being attached to the agreement and marked "Exhibit A." There also appears on the proposed note the following: "I hereby guarantee payment of the within note and waive presentment and notice of protest of nonpayment. (Signed) Gregson Bautzer." The note, however, was never executed or delivered. By the terms of the aforesaid agreement, defendant further contracted to and did pay to plaintiff's attorney the sum of $500 on account of professional services rendered by such attorney to plaintiff. The agreement further contained certain provisions, not here pertinent, by which the note might be liquidated otherwise than by payment of the amount thereof. The contract also contained the provision that defendant would deliver to plaintiff "at the time of the delivery of said promissory note referred to in par. 2(a) hereof, a resolution of the board of directors of Maier Brewing Company authorizing the execution and delivery of said note."

There was also attached to the above mentioned contract another agreement, marked "Exhibit B," in which Maier Brewing Company as first party agreed to employ plaintiff, named in such contract as second party, in the capacity of sales agent and representative for a period of five years from and after the date of the termination of the bankruptcy proceedings then pending against the brewery and the discharge of the receiver thereof. It was further stipulated that the brewing company would pay to plaintiff herein a salary of $125 weekly. The contract further provided that the brewing company should have the right to terminate said employment upon payment of certain sums of money according to the length of time elapsing between the execution of the contract and the date of such cancellation thereof. This agreement, marked "Exhibit B," further provided: "The execution and delivery of this agreement shall ipso facto release and discharge first party of any and all claims of second party against it, based upon the promissory note for Four Thousand ($4,000) Dollars of even date herewith, executed and delivered by first party to second party, and said promissory note shall concurrently with the execution hereof, be surrendered and delivered up to first party by second party and duly cancelled."

Upon sufficient, competent and material evidence, the trial court found that it was intended by the parties that the promissory note mentioned in the agreement of January 6, 1938, would be executed and delivered within a reasonable time after the execution of the contract; that said promissory note was never at any time delivered to plaintiff by the Maier Brewing Company nor by defendant, nor by any other person or corporation on behalf of either; that said agreement of January 6, 1938, did not express the agreement which plaintiff intended to sign and believed at the time he was signing. The court found that it was the understanding and belief of plaintiff, at the time he executed the last mentioned agreement, that such document constituted an agreement of employment, when in truth and in fact the same was but a form of agreement which, according to the terms of the same, might or might not have been executed at a future time, in the discretion of the brewing company. It was also found that had plaintiff realized or been apprised of the fact that the agreement of January 6, 1938, made no binding provision for his employment according to the terms of said document attached and marked "Exhibit B," he would not have entered into or signed the January 6 agreement. The court found, and it was stipulated and conceded at the trial, that in the month of October, 1938, some nine months after the execution of the January agreement, plaintiff caused to be prepared and served upon defendant a notice of rescission, a copy of which was introduced into evidence at the trial. It was further found that such notice of rescission was served by plaintiff when for the first time he learned that the agreement was not a contract of employment as "contemplated by him and understood by him" at the time of its execution. It was further found that thereafter, on or about December 5, 1938, plaintiff caused to be prepared and served upon the defendant and upon the brewing company a second notice of rescission, which was identical in words and figures with the notice of rescission filed in October of the same year.

The court found that during the period from January 6, 1938, to and including approximately December of 1940, or January of 1941, defendant was president of the brewing company; that during such period

he was in a position to provide for the full and complete performance of the agreement made with plaintiff on January 6, 1938, but that upon receipt of the notice of rescission dated October 14, 1938, which among other things contained implied charges on the part of plaintiff that defendant and plaintiff's attorney were guilty of fraud, deceit, duress and undue influence, defendant considered the agreement as being fully rescinded and terminated, and thereafter of no force or effect whatsoever; that thereafter neither said defendant nor said Maier Brewing Company did anything or made any provision for the performance of said rescinded agreement, nor did they or either of them oppose in any way the action of plaintiff in asserting ownership "of his original claim in the sum of $196,709.05." In short, therefore, the court found and concluded that subsequent to the action of plaintiff in serving notices of rescission upon defendant as president of the brewing company, the latter was in a position to provide for the full and complete performance of the agreement of January 6, 1938, but that by reason of the notice of rescission defendant treated the contract of January 6, 1938, as a nullity and did nothing whatever to provide for the performance thereof; that the note provided for in the agreement of January 6, 1938, was neither executed nor delivered to plaintiff, and that the contract of guaranty on the part of defendant contemplated by the agreement of January 6 was never executed.

From the aforesaid findings the court concluded as a matter of law not only that the note contemplated by the agreement of January 6, 1938, was never delivered, but that such agreement was rescinded and terminated by plaintiff under the provisions of section 1689 of the Civil Code, and "that by mutual consent of plaintiff and defendant the agreement of January 6, 1938, was abandoned and rescinded." Further, "that plaintiff is estopped to deny that said agreement of January 6, 1938, was rescinded by him and abandoned by mutual consent."

[1, 2] The evidence supporting as it does the conclusion reached by the trial court that appellant rescinded the agreement of January 6, 1938, and that respondent acted upon such rescission, it follows that the agreement upon which this action is founded became a nullity. Under the law, it is not necessary that one who has a right to rescind must turn to the courts to accomplish the rescission. He may effect such rescission by his own act, as did appellant here. Philpott v. Superior Court, 1 Cal.2d 512, 524, 36 P.2d 635, 95 A.L.R. 990. When appellant elected to rescind the contract of January 6, 1938, such contract and each of its terms and provisions ceased to be a subsisting or enforceable obligation against Maier Brewing Company or respondent. If the parties with whom appellant contracted breached their contract or secured its execution through fraud, then after rescission by him there remained to appellant only the right of action for damages for such breach or fraud. By his action in rescinding and terminating the contract, appellant was foreclosed from seeking the fruits of such contract.

[3] However, appellant seeks to avert the consequences ensuing from his rescission upon the ground that he failed to give the notices thereof promptly, and that they were therefore ineffectual. In other words, appellant attempts to invoke the doctrine of laches when he alone was guilty thereof. This he cannot do; and especially when, as here, at the time appellant elected to and did rescind, and subsequent thereto, respondent as president of the brewing company was in a position to and could have provided for payment of the obligation contained in the rescinded agreement, but did not do so because of reliance placed by him on the notice of rescission.

[4] Concluding as we do that appellant's conduct in rescinding the agreement terminated his right of action under the terms and provisions of such agreement, it becomes unnecessary to discuss the question raised as to the responsibility of respondent in his capacity as a guarantor. Whatever obligation was imposed upon respondent as a guarantor on the note was extinguished by appellant's action in rescinding the contract which alone gave legal vitality to the note, even though it be assumed that the latter was lawfully and legally executed and delivered.

The attempted appeal from the order denying the motion for a new trial is dismissed, and for the reasons herein stated the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

54 Cal.App.2d 571

HELLE et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12076.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

1. Appeal and error ⇐979(2)

Where new trial is granted on ground that the evidence is insufficient to support the verdict, the order must be affirmed unless a manifest abuse of discretion is shown.

2. New trial ⇐70, 71

The trial court cannot be held to have abused its discretion in granting motion for new trial on ground of insufficiency of evidence where there is a conflict in the evidence or where there is evidence which would support a judgment in favor of the moving party.

3. New trial ⇐70

In action against city for injuries sustained from a fall on stairs maintained by city, granting of new trial on ground of insufficiency of evidence to support verdict for plaintiff was not an abuse of discretion where defense of contributory negligence was developed from plaintiffs' evidence, and if jury had found plaintiff contributorily negligent, evidence would have supported verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Alli Helle and another against the City and County of San Francisco, a municipal corporation for personal injuries sustained by named plaintiff, from a fall while named plaintiff was walking down stairs maintained by defendant. From an order granting defendant's motion for new trial, plaintiffs appeal.

Affirmed.

Carl A. Onkka, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Edmund P. Bergerot, Deputy City Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued for personal injuries and had a verdict for $5,000. The trial court granted defendant's motion for a new trial on the ground that the evidence was insufficient to support the verdict.

Mrs. Helle was on her way home at about 7:30 p. m. when she slipped and fell while walking down some wooden stairs maintained by the defendant. These stairs were in a dilapidated condition—some boards were loose and some were broken. It had been raining and the stairs were slippery from water and mud. Mrs. Helle had used the stairs almost daily and knew of their dilapidated and dangerous condition. The city authorities had been notified of this condition, but had made no repairs. The location of the stairs was upon a steep hill and they had been constructed by the city to enable pedestrians to pass between two parallel streets on the hill. These streets were paved and in good condition, with paved sidewalks for pedestrians, but to follow this route Mrs. Helle would have been required to walk about one hundred and twenty feet further than she did in taking the route down the stairs.

One of the defenses raised by respondent was that Mrs. Helle was guilty of contributory negligence, when, with full knowledge of the dangerous and unsafe condition of the stairs, she chose that way instead of the safe way provided by respondent and that this factor has emphasis in the admitted knowledge that the stairs presented an extra hazard because of the rain and mud. These circumstances were all developed from appellants' evidence, and it must be apparent that if the jury had found that Mrs. Helle was guilty of contributory negligence there would have been sufficient evidence to support a verdict for respondent.

[1-3] For these reasons we are confronted with the rule that when a new trial is granted upon the ground that the evidence is insufficient the order must be affirmed unless it is shown that there was a manifest or unmistakable abuse of discretion. 20 Cal.Jur. 27, 28. This rule is well stated in Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010, 1012, as follows: "When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co., 92 Cal.App. 230, 232, 268 P. 385. It cannot be held that

a trial court has abused its discretion where there is a conflict in the evidence *or where there is any evidence which would support a judgment, in favor of the moving party.* Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029; Roma Wine Co. v. Hardware Mutual Fire Ins. Co. [31 Cal. App.2d 455], 88 P.2d 260; Prout v. Perkins, 21 Cal.App.2d 343, 69 P.2d 194; Taylor v. Rodriquez, 10 Cal.App.2d 608, 52 P. 2d 494; Peri v. Culley, 119 Cal.App. 117, 6 P.2d 86." (Emphasis ours.)

For these reasons the order is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



54 Cal.App.2d 630

COBB v. LAWRENCE.

Civ. 13488.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1942.

1. Trial ⇐165

The evidence must be viewed most favorably to plaintiff in considering motion for nonsuit.

2. Action ⇐66

The law of the forum determines whether a fact issue shall be tried by court or by jury.

3. Trial ⇐139(1)

If jury's verdict for plaintiff would be set aside by court as against evidence, viewed in light most favorable to plaintiff and disregarding conflicting evidence, court may grant defendant's motion for nonsuit.

4. Negligence ⇐13

"Gross negligence" is relative term, meaning greater want of care than is implied by term "ordinary negligence", but circumstances of each particular case must be considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence" and "Ordinary Negligence".

5. Negligence ⇐13

The common concept of "gross negligence", which has been defined as entire absence of care or very great negligence, is an extreme degree of negligence.

6. Automobiles ⇐245(24)

In action for injuries to guest passenger in defendant's automobile as result of wheel thereof going into chuck hole in road, evidence *held* insufficient to take to jury question whether defendant was guilty of gross negligence or wilful and wanton misconduct, within Florida automobile guest statute, in driving automobile at speed of 50 miles per hour. Acts Fla.1937, c. 18033, § 1.

7. Automobiles ⇐181(1)

A motorist's failure to exercise same degree of caution as ordinary prudent man would have exercised does not constitute "gross negligence" within Florida automobile guest statute. Acts Fla.1937, c. 18033, § 1.

8. Automobiles ⇐245(24)

Whether reckless driving of automobile in violation of Florida speed statute amounts to gross negligence within Florida automobile guest statute is question to be determined by court, not jury. Comp. Gen.Laws Fla.1927, § 1318; Acts Fla.1937, c. 18033, § 1.

9. Automobiles ⇐181(1)

Reckless driving of automobile does not necessarily amount to "gross negligence" within Florida automobile guest statute. Acts Fla.1937, c. 18033, § 1.

10. Automobiles ⇐244(20)

In action for injuries to guest passenger in defendant's automobile as result of wheel thereof going into chuck hole in road, evidence *held* to establish defendant's "ordinary negligence," consisting of failure to exercise degree of care, precaution and vigilance which ordinarily prudent man would exercise, so that he was not guilty of "gross negligence" within Florida automobile guest statute as matter of law because of his violation of speed laws of such state. Comp.Gen.Laws Fla. 1927, § 1318; Acts Fla.1937, c. 18033, § 1.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Louise Cobb against Franklin Lawrence for personal injuries. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

T. H. Canfield and A. D. Haines, both of Santa Barbara, for appellant.

Griffith & Thornburgh, of Santa Barbara, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment of nonsuit "entered in the Minute Book" in an action for damages for personal injuries.

Plaintiff and defendant, sister and brother, were residents of Santa Barbara, California, and were motoring in Florida at the time of the accident here involved.

Plaintiff contends that the evidence was sufficient to establish a prima facie case and that the trial court erred in granting a motion for nonsuit.

[1] Viewing the evidence most favorably to plaintiff, as the court is required to do in considering a motion for nonsuit, the record discloses the following: that plaintiff was a guest passenger in defendant's automobile on September 27, 1939, with his consent and without remuneration; that the automobile was a 1929 Rolls Royce Sedan which weighed 6,200 pounds empty and carried a load of 700 to 800 pounds, including the occupants; that the automobile was being operated by the defendant who was wearing smoked glasses; that it was a bright day and early in the afternoon; that there were few trees along the road and the highway was distinctly visible at all times; that they were proceeding from Miami Beach to Daytona Beach, on the Dixie Highway in Florida; that it was a two-lane highway with no dividing line in the center; that it was paved with coquina, a white substance which made it more difficult to detect holes in the pavement, and the shoulders on either side were of soft sand; that there were many small villages along the highway but no houses within several hundred feet of the place of the accident; that they passed a sign about 4 feet in width by the side of the road, freshly painted with large red letters, which read, "Danger—Road Under Construction—Drive at Your Own Risk"; that they both observed the sign and defendant thereupon slowed his speed to 25 miles an hour and continued at this speed for a mile or more during which distance the parties saw no evidence of construction work or road equipment; that the road was level and the defendant increased his speed to approximately 50 miles an hour, to which plaintiff objected; that they passed at least two other warning signs, each of the same size and carrying substantially the same warning as the first; that each sign was observed by defendant, and plaintiff remonstrated with him repeatedly, stating that the signs were there for "some purpose" and insisted that defendant reduce his speed; that defendant told plaintiff she could look after her dog (which was in the car) and he would look after the driving; that plaintiff and defendant were not aware of having seen any construction work, equipment or men along the road at any time; that suddenly they were confronted with a group of "chuck holes" in the road and defendant "threw the car over" to avoid them but a wheel went into one of the holes, threw the car onto the sandy shoulder and tossed plaintiff out of the car onto the ground, as a result of which she sustained a broken arm and injuries to her neck and teeth.

Appellant and respondent agree, the injury having occurred in Florida, that the law of that state governs as to the degree of negligence on the part of defendant which plaintiff was bound to establish to prove a prima facie case. Loranger v. Nadeau, 1932, 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264; Code Civ.Proc. sec. 1875, subd. 3.

Florida's automobile guest statute, Chapter 18033, section 1, Laws of Florida, Acts of 1937, read in part: "That no person, transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct was the proximate cause of the injury, * * * provided that the question or issue of negligence, gross negligence, and wilful or wanton misconduct, and the question of proximate cause * * * shall in all such cases be solely for the jury."

[2, 3] Appellant urges that under the "mandate" of this statute the issue of neg

ligence was solely for the jury and the trial court was precluded from passing upon the sufficiency of the evidence in the first instance. The Florida cases seem to construe the statute as not depriving the courts of their power to weigh and pass upon the evidence (O'Reilly v. Sattler, 1940, 141 Fla. 770, 193 So. 817; Koger v. Hollahan, 1940, 144 Fla. 779, 198 So. 685, 131 A.L.R. 886); however, it is unnecessary to determine what interpretation is to be put upon the phrase "solely for the jury" as used in the Florida statute, since the law of the forum determines whether an issue of fact shall be tried by the court or by a jury. Rest., Confl.Law, § 594. Therefore, the law of California is controlling in this particular and it is the rule in California that if the jury's verdict in favor of plaintiff would be set aside by the court as against the evidence, after viewing the evidence in the light most favorable to plaintiff and disregarding conflicting evidence, the court may grant a motion for a nonsuit.

[4-7] The trial court had the power to grant the motion for nonsuit. The question is whether that power was exercised properly; that is, did plaintiff make a prima facie showing that defendant was guilty of "gross negligence" or "wilful and wanton misconduct"?

The construction that Florida has placed upon the terms "gross negligence" and "wilful and wanton misconduct," as employed in its statute, is not clear. The Supreme Court of that state has held that the terms "are synonymous" (Juhasz v. Barton, 1941, 146 Fla. 484, 1 So.2d 476; O'Reilly v. Sattler, 1940, 141 Fla. 770, 193 So. 817; Koger v. Hollahan, 1940, 144 Fla. 779, 198 So. 685), 131 A.L.R. 886, and it has also held the contrary (Jackson v. Edwards, 1940, 144 Fla. 187, 197 So. 833; Winthrop v. Carinhas, 1940, 142 Fla. 588, 195 So. 399), but the cases agree that a mere showing of ordinary negligence is not sufficient to create liability under the statute. In Jackson v. Edwards, supra, 144 Fla. at page 192, 197 So. at page 835, which held the terms were not synonymous, the court said: "It thus appears that gross negligence, as defined in our previous decisions, is made to appear when the defendant's conduct shows a reckless disregard for human life, or that entire want of care which would raise the presumption of a conscious indifference to consequences, or shows such wanton and reckless indifference to the rights of others as may be equivalent to an intentional violation of them,—which is the character of negligence we have held to be necessary to justify the infliction of punitive damages." In Winthrop v. Carinhas, supra, 142 Fla. at page 594, 195 So. at page 401, it was stated, "There is no liability for damages under the statute if the degree of negligence is less than 'gross negligence', which is greater degree of negligence than ordinary negligence or mere lack of the care ordinarily exercised by a prudent man." Gross negligence is a relative term which is to be understood as meaning "a greater want of care than is implied by the term ordinary negligence; but the circumstances of each particular case are to be taken into consideration, and what might merely be ordinary negligence under one set of circumstances or conditions might constitute gross negligence under other conditions or circumstances." 45 C. J., 669. Gross negligence has been defined as the "entire absence of care" or "very great negligence." 45 C.J., 667, 668. Certain it is that the common concept of gross negligence is an extreme degree of negligence. In the light of the foregoing, an examination of the evidence favorable to plaintiff, as set forth above, impels the conclusion that defendant was not guilty of gross negligence or wilful and wanton misconduct. The highway was open, it appeared level, there was no construction work, it was a bright day and the road was plainly visible at all times; the trial court may well have concluded as a matter of law that the speed of 50 miles an hour was not so excessive, under the circumstances, as to constitute evidence of gross negligence. The ordinary prudent man may have exercised a greater degree of caution; however, defendant's failure to exercise that same degree of caution does not measure up to gross negligence.

[8-10] Appellant further contends that under the Florida speed statute a prima facie case of reckless driving was established as to defendant, which constituted gross negligence as a matter of law. That statute, § 1318, Comp.Gen.Laws of Fla., 1927, provided in part, "* * * a rate of speed in excess of forty-five miles per hour on any public highway * * * of motor driven vehicles weighing less than five thousand pounds shall be deemed prima facie evidence of reckless driving; * * * and a rate of speed in excess of thirty miles per hour on any public highway outside of the corporate limits of any

city or town, of motor driven vehicles weighing more than five thousand pounds * * * shall be deemed a violation of this section; * * *." Consequently, according to the weight of defendant's automobile and its location at the time of the accident, defendant was limited to a speed of 30 miles an hour.

In Koger v. Hollahan, supra, 144 Fla. at page 786, 198 So. at page 688, 131 A.L.R. 886, which involved an automobile accident, the court said, "The statement that the car was traveling at a high rate of speed seems to us to be little more than the use of a relative term. One rate of speed may well be reckless under some circumstances, while the same rate under other circumstances may not fall within that category. The averment that there was not sufficient time and space to pass the car in front proceeding in the same direction in order to avoid the one approaching is hardly more than the charge of an error in judgment * * *." In O'Reilly v. Sattler, supra, 141 Fla. at page 773, 193 So. at page 818, it was stated, in referring to liability under the Florida automobile guest statute, "We might assume that the accident was caused by excessive speed, misjudgment, or some momentary lapse of the driver but this would not bring it within the statute quoted." Winthrop v. Carinhas, supra, was an action for damages, under the Florida automobile guest statute, for injuries suffered as the result of an automobile accident, where the driver at about 9 p. m. mounted the incline of a well lighted bridge at a rate of about 30 to 40 miles an hour; lighted signs reading "Slow" and "15 miles per hour" were in front of the driver, and the guest passenger called his attention to the high speed; there was also a red light burning on top of the "safety island" (where ticket takers were stationed) into which he crashed, and the court said at page 595 of 142 Fla., at page 401 of 195 So., "As against the verdict [for defendants], the evidence does not as a matter of law clearly show either 'gross negligence', or 'wilful and wanton misconduct' of the driver of the motor vehicle, within the intendments of the controlling statute." It does not appear that the speed statute is considered in these cases in determining civil liability under the Florida automobile guest statute. However, assuming that the statute is applicable and defendant is guilty of reckless driving, the question of whether such recklessness amounts to gross negligence is one to be determined by the court. Reckless driving does not necessarily amount to gross negligence. Jackson v. Edwards, supra, 144 Fla. at page 192, 197 So. at page 835, declared, "'* * * to authorize the recovery of exemplary or punitive damages, the negligence complained of must be of "a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."'" Juhasz v. Barton, supra. In Hollander v. Davis, 5 Cir., 1941, 120 F. 2d 131, 132, plaintiff appealed from a judgment dismissing the complaint in which the allegations were that defendant was driving 70 miles an hour while approaching a curve; he attempted to pass other cars traveling in the same direction, usurping the way of on-coming cars and thereby causing the accident and injuries complained of. The Circuit Court of Appeals, in reversing the judgment, held that this set of circumstances may measure to gross negligence or wilful and wanton misconduct and presented a question to be heard on its merits. The case under consideration presented no such aggravated set of circumstances as the case just cited. The record, in the light of all of the circumstances, discloses that defendant's conduct amounted to ordinary negligence, a "failure to exercise that degree of care, precaution, and vigilance which an ordinarily prudent man would exercise * * *." Hollander v. Davis, supra. It follows that plaintiff's contention that defendant was guilty of gross negligence as a matter of law in that he violated the speed laws of Florida should not be sustained.

The evidence most favorable to plaintiff and the inferences reasonably deducible therefrom sustain the court's ruling.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.

54 Cal.App.2d 688

CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. BROWN et al.

Civ. 13600.

District Court of Appeal, Second District, Division 3, California.

Oct. 2, 1942.

1. Judgment ⇐563(1)

Where minute order, in action to quiet title to realty on ground that defendant's tax deed was invalid, ordered that plaintiff should have judgment on condition of payment to defendant of amount of taxes paid by defendant, and thereafter bank as substituted defendant moved for a judgment in its favor on a showing that plaintiff had not complied with the minute order, court's order denying that motion and directing a dismissal of the action was not "res judicata" of a subsequent action against that plaintiff by the bank to quiet title to the realty. Code Civ.Proc. § 1908, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⇐563(1)

To establish a plea of former adjudication, the prime essential is an adjudication of the matter in question.

3. Judgment ⇐951(1)

The statute declaring that a judicial order creates a presumption according to the matter directly determined is not operative where there is no determination. Code Civ.Proc. § 1909.

4. Judgment ⇐570(5)

Portion of judgment dismissing action was not an adjudication of the merits of the action.

5. Taxation ⇐765, 767

Under the statutes, a tax collector may properly sign and acknowledge a tax deed on the date of sale, after date of sale, or at any later date, but must withhold delivery of the deed until redemption has been made by the purchaser as required. Pol.Code, §§ 3785d, 3764, 3771a.

6. Taxation ⇐766, 788(1)

A tax deed is not required to be acknowledged, and hence it is valid without a certificate of acknowledgment or with a defective one, but, unless the deed is duly acknowledged or proved, it is not evidence of the regularity of the proceedings on which it was based. Pol.Code, §§ 3786, 3787.

7. Taxation ⇐765, 766, 788(1)

Acknowledgment of tax deed was valid, though it appeared that the deed was drawn up, signed, and acknowledged prior to the date written into it, where the date appearing in the deed was one which would have been proper if it had been the true date, since there was "due acknowledgment" within meaning of statute making a duly acknowledged tax deed conclusive evidence of the regularity proceedings up to time of execution of the deed. Pol.Code, §§ 3786, 3787.

"Due" means legal, proper and according to law.

See Words and Phrases, Permanent Edition, for all other definitions of "Due" and "Due Acknowledgment".

8. Taxation ⇐766

The date of the certificate of acknowledgment of a tax deed controls the date of the deed.

9. Evidence ⇐333(1)
Taxation ⇐788(3, 9)

Where tax deed relied on by plaintiff in action to quiet title was valid and duly acknowledged, it was properly admitted in evidence, and after being admitted raised the presumptions of the regularity of the proceedings on which it was founded, and, in absence of evidence to controvert those presumptions, court should have found for plaintiff in accordance with presumptions. Code Civ.Proc. § 1961.

SHINN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title to realty by the Citizens National Trust & Savings Bank of Los Angeles against Martha F. Brown and others. From an adverse judgment, the plaintiff appeals.

Judgment reversed.

Cosgrove & O'Neil and J. J. Brandlin, all of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles, for respondents Brown.

Faries & McDowell, of Los Angeles, for respondents Palmer Conner and Helen Conner.

SHAW, Justice pro tem.

Plaintiff appeals from a judgment adverse to it in an action to quiet its title to real property. The only evidence of title produced by plaintiff was a tax deed of the property to Olivia Duer, and a grant deed of the property by her to plaintiff. The defendants did not plead title in themselves, but merely denied plaintiff's title. They now undertake to support the judgment in their favor on the grounds that by a former adjudication binding on plaintiff its tax title was determined to be invalid, and that on the proof here the tax deed was void.

Taking up first the claim of former adjudication, it appears that after plaintiff's tax deed was made, an action to quiet title to the property in question was brought in the Superior Court by the personal representative of the owner of the property, whose title was divested by the tax deed, if valid, against Olivia Duer, who was then the holder of title under the tax deed. Martha F. Brown, one of the defendants herein, was substituted as plaintiff in that action and it then went to trial, with the result that on April 6, 1931, the court made a minute order reading as follows: "Cause having been heard heretofore and submitted, whereupon it is now ordered that plaintiff have judgment on condition of payment to defendants of $420.56, taxes paid." It does not appear that findings were waived and no findings were ever made, nor was any judgment entered until the proceedings next stated were had. On May 2, 1940, an order substituting the plaintiff in the present action as defendant in that action was made. The substituted defendant there then made a motion for judgment in its favor on a showing that the plaintiff there had not complied with the minute order of April 6, 1931, above set forth. The court made an order denying this motion and directing a dismissal of the action and thereafter, on September 16, 1940, a judgment was rendered which, after its preliminary recitals, was as follows: "Now, therefore, it is ordered, adjudged and decreed that the motion of the substituted defendant for an order that it take judgment quieting its title to that certain parcel of real property described as: [describing the property now in question] is denied, and the action is dismissed, each party to bear his or its own costs."

[1-4] Defendants rely on the judgment just quoted as an adjudication that plaintiff's tax title is invalid. This contention cannot be upheld. To establish a plea of former adjudication the prime essential is an adjudication of the matter in question; or, as subdivision 2 of section 1908 of the Code of Civil Procedure, on which defendants rely, states it, "the judgment or order is, in respect to the matter directly adjudged, conclusive" etc. The particular part of the judgment on which defendants' contention rests is the statement that "the motion of the substituted defendant for an order that it take judgment quieting its title" to the property here in question "is denied." This does not constitute an adjudication regarding the title of the substituted defendant, but a mere refusal to make such an adjudication. From an opinion filed by the trial judge in the former action is appears that the motion for judgment was based on plaintiff's failure to comply with the minute order above quoted, and that the court's action upon it was taken on the authority of Newcomb v. City of Newport Beach, 1938, 12 Cal.2d 235, 83 P.2d 21. That case holds that an owner who fails to comply with a condition that he reimburse the purchaser before he can have a judgment quieting title against a tax sale does not thereby forfeit his title, and a judgment quieting title cannot for that reason be entered against him but the proper judgment is one denying him any relief, usually a dismissal. The judgment here in question purports to comply with that decision; but if its meaning were at all doubtful it should not be extended by implication so as to grant relief which should have been denied. Defendants also cite section 1909 of the Code of Civil Procedure in support of their contention in this respect, but it declares that a judicial order creates a presumption, "according to the matter directly determined," a provision no stronger than that of section 1908 and inoperative where, as here, there is no determination. The remaining part of the judgment is a mere dismissal of the action, and this, of course, is not an adjudication of the merits of the action. Goddard v. Security Title, etc., Co., 1939, 14 Cal.2d 47, 53, 92 P.2d 804.

[5] The tax deed here was in the statutory form provided by section 3785b

of the Political Code. The defect in it on which defendants rely is simply that the deed is dated July 31, 1922, and the County Clerk's certificate of its acknowledgment by the Tax Collector is dated July 3, 1922. The deed recites that the sale was made on July 3, 1922. The deed might, therefore, properly have been signed and acknowledged on that day. Indeed, section 3785b of the Political Code, as it stood at the time of sale (Stats.1913, p. 558), provided that when a tax sale has been made to a purchaser other than the State the tax collector "must forthwith" execute a deed to such purchaser. To this provision was appended a proviso that "no deed shall be delivered in any event until redemption has been made of such property and all taxes, penalties, interest and charges have been paid which may have been accrued by reason of any previous tax sale or delinquency." Sections 3764 and 3771a (Stats.1921, pp. 108, 110) authorized and required the purchaser to make such redemption, and section 3771a provided that if he failed to do so within thirty days after the sale the property should be deeded to the state. Taking all these provisions together, it is clear that the tax collector could properly sign and acknowledge his deed on the date of, and after, the sale, or at any later date, but must withhold the delivery of it until and unless redemption has been made by the purchaser as required. Hence if, in this case, both deed and acknowledgment had been dated on July 3, 1922, no defect in the deed would appear.

The effect of a conflict between the date of a deed and that of the certificate of its acknowledgment was considered in Merle v. Meagher, 1870, 1 Cal.Unrep. 644. There the deed was dated July 21, 1851, but the date of the certificate of acknowledgment was July 4, 1851. The court held that the date of the certificate of acknowledgment was controlling, in the absence of other evidence, saying: "The date mentioned in a deed as the date of its execution is only presumptively the true date, when there is no evidence that it was really executed at a different time. The statute makes the certificate of acknowledgment prima facie evidence of the genuineness of the deed—that is, that it had been executed at the time the certificate was made, and there can be no doubt that the date upon which the certificate purports to be made is prima facie the true date of the certificate. It is one of the very facts which the officer is required to certify. This is at least sufficient to overcome the presumption, raised by the date which the deed bears, that it was not executed until the 21st of July * * *."

[6, 7] It therefore appears here that the tax deed was both signed and acknowledged on July 3, 1922. It may be noted that the code did not require the tax deed to be acknowledged at all, and hence it would have been valid without any certificate of acknowledgment or with a defective one. But unless the deed was "duly acknowledged or proved," it would not be evidence of the regularity of the proceedings on which it was based, of which section 3786 of the Political Code made it "primary evidence" as to some, and section 3787 made it "conclusive evidence" as to all others, but only, in each case, if it was "duly acknowledged or proved." No proof of the deed other than the acknowledgment was attempted here, nor was there sufficient evidence, other than the deed, to show the regularity of the prior proceedings. Hence if the deed was not "duly acknowledged" plaintiff must fail in this action and the judgment must be affirmed. But we find nothing in the evidence to show that the acknowledgment was not "due," that is, legal, proper and according to law. The form of the certificate of acknowledgment is not attacked and it appears to be in accord with the statutory provision therefor. Civil Code, sec. 1189. The acknowledgment was made before a proper officer and at a time when it could lawfully be made.

[8] In view of the decision in Merle v. Meagher, supra, 1870, 1 Cal.Unrep. 644, that the date of the certificate of acknowledgment controls that of the deed, it appears that the deed was drawn up, signed and acknowledged prior to the date written into it. This reduces the supposed defect in the deed down to the fact that it is not truly dated, although the date appearing in it is one which would have been proper if it had been the true date. This does not appear to us to be such a defect as to render even a tax deed void. Not every fly speck on a tax deed has that effect. The rule, as stated in the syllabus to Shipman v. Forbes, 1893, 97 Cal. 572, 32 P. 599, cited by defendants, is that: "In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of bene-

fit to the owner must be complied with." Many other authorities might be cited for this rule. Since the statutory form of deed provided for by Political Code, section 3785d, contains a space for a date, it may be that the statute inferentially directs the deed to be truly dated; but as far as any such requirement concerns a variance between one date and another, on either of which the deed could lawfully have been made, it has no semblance of benefit to the property owner and a failure to comply with it in that respect does not invalidate the deed.

[9] Since the tax deed was valid and duly acknowledged, it was properly admitted in evidence and being so admitted, it raised presumptions under sections 3786 and 3787 of the Political Code of the regularity of the proceedings upon which it was founded. No evidence was introduced to controvert even the rebuttable part of these presumptions and the court therefore erred in not finding in accordance with them. Code Civ.Proc. § 1961.

The judgment is reversed.

SCHAUER, P. J., concurred.

SHINN, Justice (dissenting).

A disagree with the holding of the main opinion as to the effect of the certificate of acknowledgment but concur in the judgment of reversal. The deed had to be duly acknowledged or proved before it could be given effect as proof of the validity of the assessment and the proceedings that followed, including the execution of the deed itself. I think it was not duly acknowledged within the meaning of section 3787 of the Political Code.

The general rule is that where an instrument appears on its face to be so defectively acknowledged that it is not entitled to registration, its record is not constructive notice to subsequent creditors or purchasers in good faith. 1 C.J.S., Acknowledgments, § 18, p. 799. And it was held in Waskey v. Chambers, 1912, 224 U.S. 564, 32 S.Ct. 597, 56 L.Ed. 885, Ann.Cas.1913D, 998 (opinion by Mr. Justice Holmes), that a deed which required two attesting witnesses but bore the signature of only one at the time of its acknowledgment and which had thereafter been altered with the consent of the parties in the matter of description, was not entitled to be registered and did not constitute constructive notice to the holder of a later conveyance. I can find no holding to the contrary.

The deed and the certificate of acknowlment read together proved that the deed was mistakenly dated or intentionally postdated at the time of the acknowledgment or that it was undated then and dated later. The trial court evidently believed the latter to be the fact and held the deed to be void upon the theory that due acknowledgment was essential to its validity. So far as the question of fact is concerned it was much more reasonable to believe that the county clerk affixed his certificate on July 3rd to an undated deed than to one that then bore a date of July 31st. The deed was evidently executed and acknowledged with the intention of dating it on the day of delivery. This undoubtedly is the inference which the trial judge drew from the facts in evidence; it is a reasonable inference and we should accept it as an established fact.

Certificates of acknowledgment oftentimes furnish proof of a high character and they should. In the present situation due acknowledgment, evidenced by the certificate, would furnish the highest degree of proof; it would be conclusive. Where could there be found in the law a situation calling for more punctilious care to make a document speak the truth? I do not think it was necessary that the deed be acknowledged for it to be valid; that was not a requirement of the law. Neither do I believe that the signing or acknowledgment of the deed on July 3rd, before the redemption had been made, affected its validity. It had to have a date because that was required by statute; it was dated before delivery, which was sufficient. But it had no date at the time of the acknowledgment and it was not then a valid tax deed—no more a valid deed than if it had not described the property or had not named a grantee. Had it not been dated before delivery it would have remained void because the law required it to be dated. This uncompleted instrument was the one that was acknowledged and certified, not the deed that was delivered and upon which plaintiff relies. That deed has never been duly acknowledged or acknowledged at all. If the owner of land is to be deprived of his right to prove the invalidity of tax proceedings by a mere certificate of acknowledgment, that certificate should be regu-

lar in every respect and should speak the truth. The law should not be severe to penalize one man for his mistakes or misfortune and lenient toward his adversary. Let those who rely upon a statute as harsh and unyielding as any to be found on the books bring themselves within the letter of the law or suffer the consequences of failure. The courts should not encourage loose practices in so important a matter as the regularity of tax deeds, especially practices which would logically lead to the acknowledgment of deeds in blank.

The deed in question, not having been duly acknowledged, was not conclusive evidence of the regularity of the tax proceedings and plaintiff offered no other evidence. Nevertheless I think the judgment should be reversed, but for reasons other than those of the main opinion. The court admitted the deed in evidence. Neither party offered evidence as to the validity or invalidity of the prior proceedings. Had the court made a preliminary ruling during the trial, the record could have been completed and all of the facts would now be before us. As that was not done and as plaintiff's title depends upon the validity of the proceedings antedating the deed, that issue should be tried.



54 Cal.App.2d 695

DABNEY v. DABNEY.

Civ. 13604.

District Court of Appeal, Second District, Division 3, California.

Oct. 2, 1942.

Hearing Denied Nov. 30, 1942.

1. Executors and administrators ⇐271

Though the title to all property of a deceased person passes to his heirs or the beneficiaries of his will at once on his death, all of such property is subject to administration and chargeable with payment of the debts of such person, subject to some statutory exceptions. Probate Code, § 300.

2. Executors and administrators ⇐421

In addition to a suit on a claim against an estate, the holder of the claim may bring an action in equity to protect his rights in a claim contingent or not due.

3. Executors and administrators ⇐285

The section of the Probate Code providing that if there is any claim not due, or any contingent or disputed claim against an estate, the amount thereof must be paid into court, and the remainder to be paid over to the claimant when he becomes entitled thereto, gives a court authority to exercise such power while sitting in probate, even though the claim is of such a nature that the court cannot determine what the segregated amount would be if absolute. Probate Code, § 953.

4. Executors and administrators ⇐285

The court, on hearing a petition for the final distribution of an estate, must determine whether all debts have been paid, and if they have not, the court may, on a proper showing by a creditor whose contingent or not yet due debt is unpaid, make provision for such debt under the section of the probate code dealing with contingent claims, and then proceed with the distribution. Probate Code, § 953.

5. Executors and administrators ⇐285

If there was error of court in setting aside an insufficient amount under the section of the Probate Code relating to payment into court of amount on a contingent claim against an estate, the claimant's remedy was an appeal from the decree of distribution. Probate Code, § 953.

6. Executors and administrators ⇐285

Where one whom deceased contracted to pay certain sums each month for life obtained judgment therefor and court set aside a certain sum for payment of amounts accruing each month to claimant, and claimant appealed because court allegedly set aside an insufficient sum, but later dismissed appeal, so that decree became final, such determination was conclusive on claimant, in absence of grounds for setting aside a judgment in equity, and claimant could not recover the unpaid amount of her claim from principal distributee of estate. Probate Code, §§ 300, 700, 701, 707, 714, 730, 953, 1020.

PARKER WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Action by Anna W. Dabney against Louise E. Dabney to recover from defendant, as principal distributee of the estate of Joseph B. Dabney, deceased, a claim which was established by plaintiff by a judgment against the administrators of the estate during administration, but which was not paid in full on distribution of the estate. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Pease & Dolley, of Los Angeles, for appellant.

Newby & Newby, of Los Angeles, for respondent.

SHAW, Justice pro tem.

Defendant appeals from a judgment in favor of plaintiff, entered after a trial by the court. Plaintiff sues as the holder of a claim against the estate of Joseph B. Dabney, deceased, which was established by a judgment against the administrators of that estate during administration. The estate of said decedent was distributed without payment of plaintiff's claim in full, she claims, and she seeks to recover from defendant, as principal distributee of said estate, the unpaid amount of her claim and to impress and enforce a lien therefor on the property distributed to the defendant. There is little dispute over the actual facts of the case, but much disagreement about the interpretation of those facts and the law applicable to them.

Joseph B. Dabney, during his lifetime, made two contracts with plaintiff, by each of which he agreed to make her monthly payments during her life, one being for $100 per month and the other for $350 per month. After his death plaintiff presented a claim against his estate on these contracts, and upon its rejection she brought suit against his administrators, of whom the defendant here was one, and obtained a judgment which, in addition to awarding to plaintiff there the amount then due her upon these two contracts, provided that said plaintiff recover from the defendant administrators the sums of one hundred dollars ($100) per month and three hundred fifty dollars ($350) per month respectively accruing under the terms of the contracts, during the life of the plaintiff, and "(4) That the defendants Louise E. Dabney, M. H. Philleo and A. S. Johnston, as administrators of the estate of Joseph B. Dabney, deceased, before the distribution of said estate deposit in court under the terms of section 953 of the Probate Code of the state of California, the sum of forty thousand seven hundred sixteen ($40,716) dollars, for the purpose of paying to the plaintiff the said installments of $100 per month and $350 per month respectively, during the remainder of plaintiff's life, when and as said installments accrue, * * *."

An appeal was taken from his judgment and it was affirmed. Dabney v. Dabney, 1935, 9 Cal.App.2d 665, 51 P.2d 108. After the decision of the appeal the defendants in that action made all the payments which had accrued while the appeal was pending and deposited with the clerk the remainder of the sum required as a deposit by paragraph (4) of the judgment. Distribution of the estate was then made on November 2, 1936. The amount so deposited was applied by the clerk to payments as provided for in the judgment until February 17, 1941. At this date there remained only $216 in the fund and this sum was paid to plaintiff. She has received nothing since. Defendant was the principal distributee of the estate of Joseph B. Dabney, receiving therefrom certain corporate stock valued at $1,300,000, which she still has. By the judgment herein the court below awarded to plaintiff a recovery against the defendant personally of the sums found to be then accrued and unpaid under the judgment in the former action and of such sums as might thereafter accrue under said former judgment, and also impressed a trust on the stock above mentioned which defendant received on distribution of the Dabney estate, to secure all of said sums, and directed defendant to deposit with the clerk the certificates therefor duly endorsed by her. Provision was also made for selling this stock if any of the payments were not made as required.

Defendant contends that the decree of distribution of the estate of Joseph B. Dabney constitutes an adjudication which bars plaintiff's action. This contention we regard as well taken; but, going somewhat farther, we hold that, under our probate system and in the circumstances appearing in this case, an action such as plaintiff has brought, to subject property in the hands of the distributee of an estate to the claim of a creditor of the estate after final distribution has been had, cannot be maintained. The authorities cited by plaintiff

as sanctioning such an action, and others which have come to our notice, appear to fall mainly in one of three classes; first, those applying to land or other property which, under the probate system of the jurisdiction, was not subject to administration; second, those involving contingent claims which could not, under the applicable provisions of law, be presented to the personal representative before distribution of the estate; and third, those based on a special statute authorizing such an action. See cases cited in note, L.R.A.1916A, 1185. Chitty v. Gillett, 1915, 46 Okl. 724, 148 P. 1048, L.R.A.1916A, 1181, appears to rest on the proposition that the heirs obtained distribution while plaintiff's action was pending, which was done without complying with a statute substantially the same as section 953 of our Probate Code, hereinafter quoted.

[1, 2] Under our probate system, while the title to all property, real and personal, of a deceased person passes to his heirs or the beneficiaries of his will at once on his death, all of such property is subject to administration and chargeable with payment of the debts of such person, subject to some statutory exceptions. Prob.Code, § 300. The personal representative must publish a notice to creditors to present their claims. Prob.Code, §§ 700, 701. All claims arising upon contract, whether they are due, not due or contingent, must be presented within the time fixed by law and if not so presented are barred forever, saving as to persons out of the state and without notice, who may present their claims before a decree of distribution is rendered. Prob.Code, § 707; Verdier v. Roach, 1892, 96 Cal. 467, 31 P. 554. Suit must be brought on a rejected claim within three months after notice of its rejection if it is due, or if not, within two months after it becomes due. Prob.Code, § 714. Judgment on a claim for money must be that it be paid in due course of administration. Prob.Code, § 730. In addition to a suit on the claim, the holder may bring an action in equity to protect his rights in a claim contingent or not due. Dabney v. Dabney, supra, 1935, 9 Cal.App.2d 665, 51 P.2d 108, and cases therein cited; State of Ohio v. Citizens Nat. T. & S. Bk., 1937, 20 Cal.App. 2d 486, 489, 67 P.2d 355. Final distribution of an estate is authorized only "if all of the debts have been paid." Prob.Code, § 956; Estate of Washburn, 1905, 148 Cal. 64, 67, 82 P. 671.

[3] However, if there is a claim not due, contingent or disputed, "the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require." Prob.Code, § 953. Compliance with this section is, for the purposes of distribution, equivalent to payment of the claim. This section has been referred to (either by its present designation or as section 1648, Code Civ.Proc., its former designation) as one of the sources of the power of the court, in an action in equity, to make a decree requiring the sequestration of property as security for a claim not due, or contingent. Dabney v. Dabney, supra, 1935, 9 Cal.App.2d 665, 672, 51 P.2d 108; Newman v. Burwell, 1932, 216 Cal. 608, 615, 15 P.2d 511; Sime v. Hunter, 1920, 50 Cal.App. 629, 633, 195 P. 935. It is now settled that the court may also exercise this power while sitting in probate, even though the claim is of such a nature (as is the claim here) that the court cannot "determine what the segregated amount would be, if absolute." Estate of Cornaz, 1937, 8 Cal.2d 347, 359, 65 P.2d 784, 790.

[4] The court, on hearing a petition for final distribution, must determine whether all the debts have been paid. If they have not, it may, on a proper showing by a creditor whose contingent or not yet due debt is unpaid, make provision for such debt under section 953 of the Probate Code and then proceed with the distribution. Estate of Cornaz, supra. In view of the mandatory language of section 953, perhaps the petitioner for distribution would be under a duty to ask for such provision, and his default in this duty might, as held in Chitty v. Gillett, supra, 1915, 46 Okl. 724, 148 P. 1048, L.R.A.1916A, 1181, afford ground for a suit in equity (see, also, Platnauer v. Forni, 1933, 131 Cal.App. 393, 399, 21 P.2d 638); but no such duty could be imposed on such petitioner where the creditor appeared in response to the petition for distribution and raised the question (as plaintiff did here by the proceedings next to be mentioned).

[5] In this case, the petition for distribution filed in the Dabney estate alleged that "all claims filed and allowed herein, and the judgment founded on the rejected

claim of Anna W. Dabney, have been fully paid." The plaintiff in this case filed objections to the petition, in which she set up her judgment and stated that it had not been paid in full, and that the defendant here would receive from the estate property appraised at $1,322,500. Defendant made a motion to strike these objections on the ground that plaintiff's rights had been adjudicated in the former action and that the judgment therein had been complied with, and this motion was granted, after which the decree of distribution was made. Defendant's mode of proceeding to dispose of plaintiff's objection was approved as proper in Bauer v. Superior Court, 1929, 208 Cal. 193, 281 P. 61. We have no record of the showing made to the court in support of the defendant's motion, but whatever it was, it led the court to grant the motion, and if there was error in that action plaintiff's remedy for it was an appeal from the decree of distribution. An appeal from the decree, it appears, was taken by plaintiff, but she later dismissed it without waiting for a decision, thereby allowing the decree to become final.

[6] When a petition for distribution is filed, any person interested in the estate may appear and resist it. Prob.Code, § 1020. Plaintiff, as a creditor, was such a person. Estate of Mailhebuau, 1933, 218 Cal. 202, 204, 22 P.2d 514; Estate of Washburn, supra, 1905, 148 Cal. 64, 82 P. 671. Plaintiff was therefore within her rights in filing the objections above mentioned, and the court hearing the proceedings on the petition had jurisdiction to dispose of them. By the objections plaintiff stated all the facts necessary to obtain the relief she now seeks, if she was not barred by the former judgment, and the court, in passing on the objections and the petition, had power, proceeding under section 953 of the Probate Code, to grant her that relief. Estate of Cornaz, supra, 1937, 8 Cal.2d 347, 359, 65 P.2d 784; see, also, Title Ins., etc., Co. v. Miller & Lux, 1920, 183 Cal. 71, 89, 190 P. 433. The decree of distribution, which accorded her no such relief, but distributed the estate to defendant without condition or qualification, was in effect an adjudication that plaintiff should have no lien for her judgment on the property distributed to defendant, and thus determined the very question which she raises in the present action. Compare Carr v. Bank of America, 1938, 11 Cal.2d 366, 374, 79 P.2d 1096, 116 A.L.R. 1282. Such determination, whether right or wrong, is conclusive upon plaintiff here, in the absence of any of the grounds for setting aside a judgment in equity, none of which is claimed to exist here. McLellan v. McLellan, 1941, 17 Cal.2d 552, 110 P.2d 1034; Cook v. Cook, 1941, 17 Cal.2d 639, 652, 653, 111 P.2d 322; Carr v. Bank of America, supra; Gladding v. Superior Court, 1936, 7 Cal.2d 408, 416, 60 P.2d 857; Estate of Gardiner, 1941, 45 Cal.App.2d 559, 564, 114 P.2d 643. Indeed the decree would have been equally determinative and conclusive on the point, had plaintiff not appeared or filed objections to the petition for distribution, because the petition itself raised the whole question of the distribution to be made and the terms and conditions on which it should be made. "The jurisdiction of the probate court is a jurisdiction in rem, the res being the estate of the decedent which is to be administered and distributed with regard to the rights of creditors, devisees, legatees, and all the world. Warren v. Ellis, 39 Cal.App. 542, 179 P. 544; Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965, 155 P. 98. By giving the notice prescribed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, '"subject only to be(ing) reversed, set aside, or modified on appeal"'. The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court. William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Hanley v. Hanley, supra [114 Cal. 690, 46 P. 736]. * * *

"A person who is interested in the estate of a deceased person, who has had the notice required by law, becomes in point of law an actor in the proceedings, and is bound by the result. Estate of Allen, 176 Cal. 632, 169 P. 364; Nicholson v. Leatham, supra." Abels v. Frey, 1932, 126 Cal.App. 48, 53, 54, 14 P.2d 594, 596; see, also Estate of McLellan, 1936, 8 Cal.2d 49, 52, 63 P.2d 1120; Smith v. Vandepeer, 1906, 3 Cal. App. 300, 302, 85 P. 136; William Hill Co. v. Lawler, 1897, 116 Cal. 359, 362, 48 P. 323.

Of course, we again except from this statement the case of one who has ground for an equitable action to set aside the decree.

We feel that we should not overlook statements in appellant's brief which impugn the motives of the trial judge and imply in an obnoxious manner that his decision was wholly arbitrary and was influenced if not controlled by his sympathy for plaintiff. The quotations from a book on Justice under dictatorship were improper and wholly out of place in a brief. There is nothing in the record which lends the slightest support to or excuses the attack upon the trial judge.

The judgment is reversed.

SHINN, Acting P. J., concurs.

PARKER WOOD, Justice (dissenting).

I dissent, except as to the statements in the last paragraph relating to comments in appellant's brief. Plaintiff had a final judgment, based upon written contracts, that she was entitled to $450 a month during her life from the estate of Joseph B. Dabney, husband of defendant. One of the contracts, the one for $350 a month, was signed also by this defendant. The $40,716, required to be deposited, was security for the payment of the monthly installments as they accrued. Any part of the deposit remaining at the death of plaintiff was to be paid to the beneficiaries of the estate. The order for said deposit was made in 1933, eight years before the time the deposit would be exhausted. Obviously, owing to the nature of the obligation, there was no way of determining the amount which would be necessary to pay plaintiff. The judge, who estimated the time plaintiff would live, attempted, in the exercise of his discretion, to fix an amount which would be fair to the beneficiaries by not impounding too much, and fair to the plaintiff by not exacting too little. He could have required a deposit, far greater than he did require, and thereby have made certain that the fund would not be depleted during plaintiff's life. By not requiring a far greater deposit, more assets were available for distribution and this defendant, the principal beneficiary, who received upon distribution more than a million dollars, has had the use of the additional amount that could have been held by the court as adequate security for the payments to plaintiff. Only time could answer whether the deposit was sufficient in amount. An appeal by plaintiff from the judgment fixing the amount of the deposit on the ground that the amount was inadequate would have been futile, inasmuch as the fixing of an amount rested within the discretion of the trial court, the amount was substantial, and there was no abuse of discretion. Depositing the amount, required by the court, was not in fact payment of the obligation to plaintiff. It would have been payment only in the event plaintiff died before the fund was exhausted. The fund has been exhausted, plaintiff is still living, and has not been paid. Defendant has benefited by reason of the mistake of the court in not withholding an adequate amount of the estate to assure payment to plaintiff. By reason of the deposit she received an earlier and larger distribution and has had the use thereof over the intervening several years. The assets which could have been held in trust by the court for plaintiff were distributed principally to defendant, who was a party to the $350 contract which created the main obligation to plaintiff. The contract which she signed (as well as the other one) stated that it "shall be a binding obligation on our estate, and upon our heirs, executors and administrators." She was not misled. She took a fund upon distribution, which could have been held in trust by the court for plaintiff, with knowledge of the written contracts and the judgment, and with knowledge that the deposit might not be sufficient to pay plaintiff for life in accordance with the provisions of the contracts and judgment. The defendant is in quite a different position from the usual distributee who receives a fund after a deposit is made to cover a contingent claim, the amount of which is capable of definite ascertainment. Plaintiff has suffered detriment and defendant has gained advantages under circumstances wherein plaintiff did not have an adequate remedy. In equity it should be regarded that defendant holds in trust sufficient of the distributed assets to pay plaintiff's unsatisfied judgment.

It is my understanding that the matter of Estate of Cornaz, 1937, 8 Cal.2d 347, 65 P. 2d 784, is an authority that funds of an estate may be impounded for the purpose of making monthly payments on an obligation which is not capable of definite ascertainment, but it is not my understanding that it is an authority that the amount impounded constitutes payment of the obligation.

In my opinion the judgment should be affirmed.

In re STAHL'S ESTATE.

McDONALD v. STEVENSON et al.

Civ. 6835.

District Court of Appeal, Third District, California.

Sept. 28, 1942.

1. Appeal and error ⇐1010(1)

A judgment will not be reversed as not supported by sufficient evidence unless it appears from record that, accepting full force of evidence adduced, with every reasonable inference therefrom favorable to prevailing party, the law precludes him from recovering judgment.

2. Appeal and error ⇐931(1)

On appeal from judgment, evidence must be construed most strongly against losing party and every inference and presumption fairly deducible from evidence should be resolved in his favor.

3. Appeal and error ⇐931(1), 989

On appeal, prevailing party's evidence must ordinarily be accepted as true and contradictory evidence disregarded.

4. Husband and wife ⇐274(4)

In heirship proceedings by testator's pretermitted daughter, evidence *held* sufficient to justify trial court's holding that moneys deposited by testator and his wife, who survived him, in joint tenancy bank accounts, were not "community property", that they were divided between spouses by mutual agreement, after which their respective shares were their "separate property," and that testator's share of such moneys on deposit in accounts in his own name was his separate property at time of his death, so as to entitle daughter to half thereof. Probate Code, §§ 90, 91; Gen.Laws 1937, Act 652, § 15a.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Separate Property".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

In the matter of the estate of Frederick C. Stahl, deceased, in which Marguerite McDonald filed a petition to determine heirship. From so much of the decree determining heirship as awarded half of testator's money to petitioner, Emma Stevenson and others appeal.

Affirmed.

Henry & Bedeau, of Sacramento, for appellants.

Albert E. Sheets, Anthony J. Kennedy, and Carl Kuchman, all of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Frederick C. Stahl died testate in Sacramento County on September 21, 1942. He left surviving him his wife Anna Stahl, and a daughter by a former marriage, Marguerite McDonald, respondent here. By his will he bequeathed to his wife one-half share of the community property, and bequeathed to appellants, who are respectively, a sister, brother and nieces of decedent, all his estate "after my said wife Anna M. Stahl receives her one-half of the cash community property." The will made no mention of, or provision for, his said daughter, Marguerite McDonald, who thereafter filed a petition to determine heirship, claiming to be a pretermitted child of decedent, and that she was entitled to inherit under sections 90 and 91 of the Probate Code. The trial court, after hearing, found that the property left by decedent was his separate property; that petitioner, Marguerite McDonald was his child; that she was not provided for in his will, and was unintentionally omitted therefrom; that she was unprovided for by any settlement, and had not an equal proportion of the decedent's property bestowed upon her by way of advancement; and the trial court directed that one-half of the estate of said decedent be distributed to said respondent Marguerite McDonald, and that the remaining one-half be distributed to appellants in the proportions specified in the will.

Appellants upon this appeal contend that the finding of the trial court that the property left by decedent was his separate property is not supported by any substantial evidence, and that therefore the order and decree awarding respondent one-half of the estate, and taking that one-half away from appellants, is erroneous.

[1-3] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of

the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

Bearing in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel in arguing conflicting evidence before an appellate court, a brief summary of the facts as shown by the record in this case, is as follows:

Testator and Anna Stahl were married in 1909, and in the years which followed, had accumulated considerable property, including $42,549.91 in cash. On May 4, 1939, this cash was in joint bank accounts with the spouses as joint tenants. Upon the establishing of each of these joint accounts a written agreement was entered into between the spouses, and with the respective banks, fixing the status of the money deposited to be in joint ownership with the right of survivorship. On May 4, 1939, Mrs. Stahl withdrew $22,942.19 from these various joint accounts without consulting testator, and redeposited this amount in separate bank accounts in her name alone. She testified that she did this because testator had been drinking and drawing checks. On May 5, 1939, the day after Mrs. Stahl made her withdrawals from these accounts and from the safe deposit box and redeposited the money in separate accounts in her own name, testator was fully advised by her as to what she had done, and was told by her that she had withdrawn what she estimated was her share of their money from the joint bank deposits, and that the remainder was his, and that testator agreed to this, and thereafter withdrew the remainder of the money in said joint accounts, and redeposited it in accounts of his own, being assisted in this by Mrs. Stahl. These separate accounts so established by testator continued in his name until the time of his death, and the money in them constitutes the cash in his estate.

In addition to this accumulated cash, the testator and Mrs. Stahl owned real property, which was held by them in joint tenancy. Mrs. Stahl was also earning a salary of $130 per month as a hotel manager, and continued to do so until the testator died. As part of the transaction terminating the joint tenancy in the bank deposits, testator kept and used as his separate funds all of the rentals from the joint tenancy real estate according to the agreement between himself and Mrs. Stahl, and also, Mrs. Stahl paid him $50 each month from her earnings, to be his separate property, which he put in his safe deposit box and kept there until his death, when this money became a part of his estate. After May 5, 1939, until the day of his death, testator took no action to recover any of the money withdrawn by Mrs. Stahl, but on the contrary, he accepted $250 of the money withdrawn by Mrs. Stahl as the purchase price of his interest in their community automobile, and gave her a bill of sale therefor. The testator executed his will on August 8, 1939, and by it he bequeathed all of the cash in his bank accounts and safe deposit box to appellants. After the commencement of the probate proceedings, appellants entered into a written agreement with Mrs. Stahl, by which she assigned to them all her right, title and interest in or to the money which came into the estate.

There is, of course, some testimony contradicting some of the facts hereinbefore set forth, but, as hereinbefore stated, we are not here concerned with the matter of weighing conflicting testimony. The question we have to decide is whether, taking all of the evidence into consideration, together with every inference and presumption favorable to respondent which may be adduced therefrom, and disregarding all evidence in conflict therewith, we must conclude that the evidence is insufficient to sustain the order of the court.

The trial court found that all the moneys in the separate bank accounts of testator and in the safe deposit box were his separate property. The court further found that at all times after May 5, 1939, until testator's death there was an agreement and implied contract between Mrs. Stahl and testator for the termination of the joint tenancy and division of said accumulated cash, into the separate property of each of them respectively; and the court further found that Mrs. Stahl and the appellants as her assignees were estopped to deny the termination of the joint tenancy in said bank accounts, and to deny that the money withdrawn therefrom by the testator was, and is, his separate property.

Section 15a of the Bank Act, Deering's Gen.Laws, 1937, Act 652, provides in part as follows: "When a deposit shall be made in any bank by any person or persons whether minor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, * * *."

In Siberell v. Siberell, 214 Cal. 767, at page 773, 7 P.2d 1003, at page 1005, the court said: "First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character, and, following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors, and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy. A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive. Second, on its face section 164 has no application to a case where 'a different intention is expressed in the instrument,' and it seems to us to be clear, as already pointed out above, that a joint tenancy, the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of the intention to hold the property otherwise than as community property, and that the equal interest of the spouses must therefore be classed as their separate but joint estate in the property."

[4] Appellants assert that the moneys deposited in various joint accounts was community property. They then state: "In other words, property of a husband and wife can be in joint tenancy but still be community property in character. The presumption is that the placing of property in joint tenancy terminates and severs, by consent, the community interest, provided there is no evidence of an intent to the contrary. Mrs. Stahl, the surviving wife, gave no evidence as to any agreement, or as to any fact or circumstance from which an intent could be inferred that the property in joint tenancy was to retain its community character. However, respondent Marguerite McDonald, introduced as her evidence the last will and testament of decedent. This will was dated August 8, 1939, three months and four days after Mrs. Stahl had withdrawn the moneys from the joint accounts. The declarations of the testator as to the character of the property left by him is competent evidence to show that character."

In view of the law and the written agreement signed by the spouses when the joint tenancy accounts were established, we must hold that this argument of appellants was not supported by the evidence. Even if the will of decedent could be construed as stating that said joint accounts were community property, such declarations of the testator would certainly not compel a finding to that effect in the face of the contrary evidence.

Appellants' argument is somewhat ambiguous, but, as nearly as we can analyze it, it is intended to assert that when the testator withdrew his remaining one-half of the money in the joint tenancy accounts, and placed it in an account of his own, where it remained until his death, said money retained its character as community property. Appellants brand as unbelievable and inherently improbable, the testimony of Mrs. Stahl as to the action taken by herself and the testator in withdrawing the moneys from said accounts and the agreement to divide them, and the establishing of separate accounts by each of the spouses for their respective shares. We do not regard the testimony of Mrs. Stahl as inherently improbable, but we construe it not only as probable, but entirely reasonable; and certainly the finding of the court that the moneys remaining in the account established by the testator after the closing of the joint tenancy accounts, was the separate property of testator is amply supported by the record.

We deem it unnecessary to prolong this opinion by discussing some of the other arguments advanced by appellants, as some of the arguments advanced in appellants' briefs are inconsistent with others, and it is

a little difficult to understand exactly what the contentions of appellants are. It is sufficient for the purposes of this decision that it is clear from the record that the court was fully justified in holding that the moneys deposited in the joint tenancy accounts was not community property; that it was divided between the spouses by mutual agreement, and that thereafter the respective shares of the spouses were their separate property; and that upon the death of testator, his share of said moneys, on deposit in accounts in his own name, was his separate property.

In view of the foregoing, that portion of the decree determining heirship decreeing the money of the testator to be his separate property, and awarding one-half thereof to petitioner and respondent, should be, and the same is, hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



54 Cal.App.2d 562

In re STAHL'S ESTATE.

McDONALD v. STEVENSON et al.

Civ. 6769.

District Court of Appeal, Third District, California.

Sept. 28, 1942.

Descent and distribution ⇐47(1)

A testator's only child, not provided for in will giving testator's widow no separate property, of which his estate consisted, did not inherit entire estate, but only half thereof, though widow was in effect disinherited by will. Probate Code, §§ 90, 221, 222.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

In the matter of the estate of Frederick C. Stahl, deceased, wherein Marguerite McDonald, testator's pretermitted daughter, filed a petition to determine heirship opposed by Emma Stevenson and others. From a judgment awarding petitioner only half of testator's estate, she appeals.

Affirmed.

Albert Sheets, Anthony J. Kennedy, and Carl Kuchman, all of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment awarding to a pretermitted daughter of Frederick C. Stahl, deceased, one-half of the estate of said decedent, and denying her claim to be awarded the whole thereof.

Stahl died testate, leaving as his only heirs-at-law a widow, Anna Stahl, and a daughter by a former marriage, Marguerite McDonald. In his will he declared that all of his property was the community property of his surviving wife and himself, and he left one-half of it to his said wife, and the other half to respondents. No mention of his daughter was made in his will. The daughter filed a petition to have her heirship determined. The trial court found that her omission from the will had been unintentional, and that she had not been provided for by way of settlement, advancement, or otherwise. However, the property of the testator, at the time of his death, was found to be his separate property, and not community property, and it was held that as the surviving wife was not given any separate property, she took nothing under the will, and that Marguerite McDonald was entitled to one-half of the estate, and the legatees named in the will, to the other half. From that part of the decree awarding one-half of the estate to the named legatees, Marguerite McDonald has appealed.

Section 90 of the Probate Code provides that when a testator unintentionally omits to provide for a child in his will, and such child is unprovided for by any settlement, and has not had an equal proportion of the testator's property bestowed by way of advancement, such child "succeeds to the same share in the estate of the testator as if he had died intestate." Under sections 221 and 222 of the Probate Code, if a decedent dies without disposing of his separate property by will, and leaves a surviving spouse and only one child, the estate goes, one-half to the surviving spouse and one-half to the child; but if decedent leaves no surviving spouse, the whole estate goes to his issue.

Appellant contends that since in this case the surviving widow is by the will in effect disinherited, that she is not a "surviving spouse" within the language of the foregoing statute for the purpose of determining the share of the estate that goes to appellant herein; and that appellant succeeds to the entire estate, as if decedent had left no surviving spouse. She argues that while a pretermitted child succeeds to the same portion of the testator's estate as if no will had been made, and that as to such portion the testator is regarded as dying intestate, that nevertheless the will is not revoked or invalidated; that it is to be relied upon insofar as it disinherits the widow, but not insofar as it gives any portion of the estate to the named legatees. It is argued by analogy that section 258 of the Probate Code prohibits a person convicted of the murder of a decedent from sharing in the estate of such decedent, and that if the heirs of an intestate decedent were one child, and a widow who had been convicted of his murder, the widow could not share in the estate, and the child would take the whole thereof, under section 222, supra; that in legal effect there would be no surviving spouse. Also, that if a surviving spouse were disqualified to take, because of the provisions of section 259.2 of the Probate Code, the child would take the whole estate, and that therefore, since the widow in the case before us is disqualified by the will, she is not to be considered in determining the share to which appellant would have been entitled had Stahl died intestate. With this contention we cannot agree. Had decedent died intestate, the widow and appellant would each have taken one-half of his estate. Appellant's rights are thus fixed and determined by the fact that decedent left a surviving spouse and one child only. The foregoing sections of the Probate Code providing for succession in case of intestacy are applicable here solely for the purpose of measuring the share of the pretermitted child. Stahl did not die intestate. He left a will, and the fact that the wife is disinherited by that will cannot have the effect of changing the yard-stick by which the rights of appellant as a pretermitted child are determined. Even assuming that appellant is correct in her contentions as to the effect of sections 259.2 and 258, supra, there is no analogy between the situations created thereby and the present situation. The fact that by reason of the will the widow takes nothing, cannot affect the amount the widow and the child would have taken had there been no will. As to the portion that a pretermitted child takes, the testator is regarded as dying intestate, and its succession is directed by law, and not by the will. As to the remainder, its succession is directed by the will. It is hardly logical to say that a will can create a condition which would obtain only if there were no will. Appellant cites no authority for her contentions, and we believe none can be found.

The judgment is accordingly affirmed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concurred.



54 Cal.App.2d 594

DAWSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6793.

District Court of Appeal, Third District, California.

Sept. 29, 1942.

1. Workmen's compensation ⇐1914

Since the Industrial Accident Commission is authorized to act as a court in a quasi judicial capacity and there is no appeal from its decisions, its proceedings may not be tried de novo by a reviewing court. St.1937, pp. 304, 305, §§ 5952(d), 5953; Code Civ.Proc. §§ 1068, 1074; Const. art. 20, § 21.

2. Certiorari ⇐5(1)

The remedy of "certiorari" is confined to cases in which the inferior tribunal lacks jurisdiction or has exceeded its jurisdiction and there is no appeal from its decision. Code Civ.Proc. §§ 1068, 1074.

See Words and Phrases, Permanent Edition, for all other definitions of "Certiorari".

3. Workmen's compensation ⇐1738, 1744

Under statute requiring the facts found and conclusions of law to be separately stated, the findings of the Industrial Accident Commission should conform to the general rules applicable in trials by the superior

court and should consist only of a determination of ultimate facts as distinguished from probative facts. St.1937, p. 294, § 5313.

4. Workmen's compensation ⇐1743, 1748

When findings adopted by the Industrial Accident Commission are not irreconcilably conflicting and may be made certain by reference to the record, they are sufficient. St.1937, p. 294, § 5313.

5. Workmen's compensation ⇐1752

Where several different acts or omissions by the employer were relied upon to support compensation claimants' charge of employer's wilful misconduct, Industrial Accident Commission's negative finding on such issue was a complete determination of the ultimate facts sufficient to support denial of additional compensation. St.1937, pp. 281, 294, §§ 4553, 5313.

6. Workmen's compensation ⇐1376

Compensation claimants have burden to prove that employer was guilty of serious and wilful misconduct resulting in the injury complained of to entitle claimants to increased compensation. St.1937, p. 281, § 4553.

7. Workmen's compensation ⇐1674

In compensation proceeding, evidence was insufficient to establish employer's "serious and wilful misconduct" entitling claimants to increased compensation, alleged to consist of failure to maintain safe staging upon which deceased employee had been required to work resulting in his death when the staging was dislodged, and supported finding for employer on such issue. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Wilful Misconduct".

8. Workmen's compensation ⇐1939

The question of serious and wilful misconduct entitling claimant to increased compensation is ordinarily for the Industrial Accident Commission and its determination may not be interfered with when there is substantial evidence to support the finding, but the reviewing court must indulge all reasonable inferences to support the award. St.1937, p. 281, § 4553.

9. Workmen's compensation ⇐1939, 1947

On certiorari to review an award of the Industrial Accident Commission, annulment of the award is authorized only when the Commission acted beyond its powers or when the award was procured by fraud or is unreasonable or when the findings of fact do not support the award and the findings are not subject to review except as they may have been made without supporting evidence.

10. Workmen's compensation ⇐939

The employer's misconduct justifying increased compensation to claimant must be "serious and wilful" and "wilful misconduct" involves the same dereliction of duty as by an automobile driver authorizing a guest to recover for personal injuries, and depends upon the facts of a particular case, and involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge or appreciation that danger is likely to result therefrom, and is more than "gross negligence", but involves quasi criminal conduct. Vehicle Code, § 403, St.1935, p. 154; St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence" and "Wilful Misconduct".

11. Workmen's compensation ⇐1376

In proceeding for additional compensation for employer's alleged serious and wilful misconduct in failing to maintain safe staging upon which deceased employee had been compelled to work, resulting in his death, claimants had burden to prove that the employer's agents had either actual or constructive knowledge that the staging was so defective that they should have reasonably anticipated resulting injury to workmen employed thereon to justify additional compensation. St.1937, p. 281, § 4553.

12. Workmen's compensation ⇐1939

Appellate court was not authorized to interfere with Industrial Accident Commission's order denying additional compensation to claimant for employer's alleged serious and wilful misconduct where the order was supported by substantial evidence. St.1937, p. 281, § 4553.

Proceeding under the Workmen's Compensation Act by Mildred Dawson and others, claimants, for death of named claimant's husband, Paul Glen Dawson, opposed by Pacific Constructors, Incorporated. To review an order of the Industrial Accident Commission denying additional compensation for the employee's death on ground of

alleged serious and wilful misconduct of the employer, claimants bring certiorari.

Order affirmed.

R. P. Stimmel and Spann, Carr, Cibula & Frazier, all of Redding, for petitioners.

Everett A. Corten and Keith & Creede, all of San Francisco, for respondents.

THOMPSON, Justice.

By means of a writ of certiorari the widow and minor children of Paul Glen Dawson, deceased, seek to review an order of the Industrial Accident Commission, denying additional compensation for his death on the ground of alleged serious and wilful misconduct of the employer in failing to maintain safe staging upon which he was required to work in a shaft. That claim was presented in accordance with the provisions of section 4553 of the Labor Code, St.1937, p. 281. The commission adopted findings pursuant to which the petitioners were awarded damages in the sum of $6,150. It was, however, further determined that the employer was not guilty of serious and wilful misconduct as alleged, or at all, and additional compensation was denied on that account. A petition for rehearing was also denied.

The petition is prosecuted by Mildred Dawson, the widow of Paul Glen Dawson, deceased, and by Paul Dawson, Jr., and Francis Dawson, minor children, by their guardian ad litem, Mildred Dawson. The application on behalf of these petitioners charged the respondent Pacific Constructors, Inc., with serious and wilful misconduct resulting in the death of Paul Glen Dawson.

At the time of receiving the injuries which caused his death, the decedent was employed by the Pacific Constructors, Inc., which is engaged in the construction of the Shasta Dam, located near Redding, Shasta County, California. The building of the dam requires the sinking of a series of shafts, which are subsequently filled with concrete, thus insuring a solid foundation for the dam. The decedent was working in one of these shafts, Number 1315, at the time of the fatal accident, which occurred on the 4th day of March, 1941. This shaft was originally 150 feet in depth.

The evidence indicates that at the time of the accident a small portion of concrete had been poured which covered the bottom of the shaft, decreasing its depth to some extent. In company with three fellow workers, Mr. Dawson, who was employed with the night shift, descended into the shaft and reached a point designated as the 100-foot level. At this point they stepped upon a platform which was supported by staging and framework retained in place by means of wedges driven between the staging and the wall of the shaft. The framework was progressively removed from the bottom of the shaft as the pouring of concrete proceeded. This process included the removal by the workmen of debris, muck, loose timbers, and shaling rock. It was performed by aid of workmen operating from the platform nearest the base of the shaft. The staging and platforms below the 100-foot level, in this shaft Number 1315, had previously been removed. The removal of this framework was performed under the direction of the United States Bureau of Reclamation under whose supervision the construction of Shasta Dam was being conducted.

The men who were working in the shaft immediately prior to the time of the accident used this platform located at the 100-foot level, upon which there was also deposited from time to time two heavy buckets filled with muck. Prior to the time of the accident there was nothing to indicate that the platform or its staging was insecure. The platform did not vibrate or give any indication that it was in a dangerous condition. There is no evidence that the staging was then known to be defective.

No inspection of the staging was made during the interval between the change of the shift of workmen. After this change occurred the decedent and his three companions were employed on this landing only a moment or two when the entire platform was dislodged. Mr. Dawson and one of his fellow workmen fell a distance of forty or fifty feet to the bottom of the shaft, and were fatally injured. They died two days later as a result of the accident. Mr. Moore, who was on that platform when it collapsed, escaped serious injury. His fall was intercepted by a stationary cable and saw which caught his foot, suspended his body and saved him from fatal injury. He was subsequently rescued from that position unharmed. Mr. Patton, the fourth member of the crew, was standing on a ladder when the platform was dislodged, and he also escaped injury.

No witness seemed to know exactly what caused the collapsing of the platform. The record contains much speculation in that

regard. The petitioners assume, and their theory may be correct, that several heavy timbers which rested on the rock wall at the foot of the shaft extending vertically on one side of the structure, to the top thereof and which were supported by an alleged cracked or defective spreader or crossbeam near the top, for some unknown reason was dislodged just after the change of the shift of workmen occurred and caused the upright beams to fall inward, upsetting the platform upon which the workmen stood. These vertical beams were installed to cover a lateral tunnel which had been previously opened into the main shaft, for the purpose of protecting workmen from the danger of falling rock and debris from that source.

The hearing lasted for several days. The claim for compensation was hotly contested. The record consists of 490 pages. The commission adopted findings to the effect that the workman, Paul Glen Dawson, was injured in the course of his employment by falling from a platform in a shaft while he was engaged by the Pacific Constructors, Incorporated, as a result of which he subsequently died. The widow and minor children were awarded compensation on that account in the sum of $6,150. But the commission further found that the accident was not caused by the serious and wilful misconduct of his employer. Additional compensation on that account was denied.

The petitioners for this writ of review contend that the Pacific Constructors, Incorporated, and its shaft superintendent, Mr. Regan, were guilty of serious and wilful misconduct, in installing and maintaining in the shaft dangerously-defective and inadequate staging and structure upon which the employees were compelled to work, and in neglecting to properly brace, block or wedge the framework in the shaft so as to render it safe and secure. It is claimed there is no substantial evidence to support the finding of the commission that the employer or its agents were not guilty of serious and wilful misconduct. It is also asserted the finding which was adopted on the subject of serious and wilful misconduct is not specific or adequate, and that it fails to determine the ultimate facts in that regard.

At the argument of this case it was suggested that, pursuant to the recent opinion of the Supreme Court in the case of Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457, the reviewing court may re-examine and weigh the evidence as in a trial de novo to determine the facts upon which the increase of award was denied.

The Laisne case has no application to the present proceeding. That case is specifically distinguished by the court from proceedings under the Workmen's Compensation Act. Article XX, section 21, of the California Constitution authorizes the Legislature to confer "full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character."

Pursuant to that constitutional provision, section 5952 of the Labor Code was enacted and declares that:

"The review by the court shall not be extended further than to determine whether:

* * * * *

"(d) If findings of fact are made, such findings of fact support the order, decision, or award under review."

The following section of the Labor Code provides in part that:

"The findings and conclusions of the commission on questions of fact *are conclusive and final and are not subject to review.*" (Italics ours.)

In determining that the limitation of jurisdiction of so-called *quasi-judicial* tribunals referred to in the Laisne case does not apply to proceedings under the Workmen's Compensation Act, the court said at page 838 of that opinion in 19 Cal.2d, at page 462 of 123 P.2d:

"The court concludes, however, that section 21 of article XX sufficiently modifies section 1 of article VI to permit the Industrial Accident Commission to act as a court."

[1, 2] Since the Industrial Accident Commission is authorized to and does act as a court in a *quasi-judicial* capacity, and there is no appeal from its decisions, its proceedings may not be tried de novo by a reviewing court. 2 Campbell on Workmen's Comp. 1341, § 1616. The remedy of certiorari is confined to cases in which the inferior tribunal lacks jurisdiction or has exceeded its jurisdiction and there is no appeal from its decision. §§ 1068, 1074,

Code Civ.Proc.; Garvin v. Chambers, 195 Cal. 212, 232 P. 696; 4 Cal.Jur. 1019, § 1; 2 Campbell on Workmen's Comp. 1339, § 1615.

There is no merit in the contention that the commission failed to adopt findings upon the subject of serious and wilful misconduct sufficient to support its denial of additional compensation under section 4553 of the Labor Code. The commission adopted a finding that:

"Said injury and death was not proximately, or at all, caused by the serious and wilful misconduct of the employer herein."

Based on that finding the commission ordered that the employer be "dismissed and discharged from liability herein upon the issue of serious and wilful misconduct."

[3, 4] Section 5313 of the Labor Code merely requires that "The facts found and conclusions of law shall be separately stated." We assume that the findings of the commission should conform to the general rules applicable thereto in trials which are conducted by superior courts, and that they should consist only of a determination of ultimate facts as distinguished from probative facts. Smith v. Industrial Acc. Comm., 26 Cal.App. 560, 147 P. 600; 27 Cal.Jur. 489, § 158. When the findings which are adopted are not irreconcilably conflicting and they may be made certain by reference to the record, they are deemed to be sufficient. Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 708, 28 P.2d 919. The case of Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 100 P.2d 511, 514, upon which the petitioners rely for support of their contention that the finding in question is inadequate, may be readily distinguished from the facts of this case. In our opinion that decision is not controlling in this case. In the Taylor case extra compensation was allowed for wilful misconduct. The commission merely found that "said injury was caused by the serious and wilful misconduct of the employer." The award was set aside and the commission was directed to adopt more specific findings as to what particular acts or conduct it considered as wilful misconduct. Several distinct acts were alleged and relied upon by the petitioners as proof of wilful misconduct. Under the circumstances of that case the mere affirmative finding that "the employer was guilty of wilful misconduct" left an uncertainty as to what particular alleged acts or conduct were deemed to constitute wilful misconduct. The findings on that subject which were adopted were therefore clearly insufficient. The reviewing court properly remanded that cause for the adoption of more specific findings. If there had been only a single designated act or omission pleaded or relied upon by the petitioner as constituting wilful misconduct, it would have been sufficient for the commission to have found that the injury was caused "by the serious and wilful misconduct of the employer." The record would have then shown definitely the application of the finding adopted to the evidence adduced. Under such circumstances that general finding would be adequate. Ethel D. Co. v. Industrial Acc. Comm., supra.

[5] In the present proceeding just the converse of the Taylor case exists. In this case several different acts or omissions on the part of the employer were relied upon to support the charge of wilful misconduct. In effect, the commission found that none of those asserted acts or omissions constituted wilful misconduct. There is no uncertainty regarding the application of that finding. The commission determined each and every one of those issues. Under the circumstances of this case the negative finding of the commission on the issue of wilful misconduct was a complete determination of the ultimate facts. In the case of Caywood v. Farrell, 175 Ill. 480, 51 N.E. 775, 776, it was held that "as, in an action for negligence, a finding that the plaintiff did not use ordinary care to avoid the injury, or that the defendant was not guilty of willful or wanton injury" constituted a finding of mere ultimate facts.

[6, 7] The burden is on the petitioners to prove that an employer is guilty of serious and wilful misconduct which results in the injury complained of, to entitle the claimant to the increase of compensation provided for in section 4553 of the Labor Code. After a careful examination of the record in this proceeding we are unable to say as a matter of law that the Pacific Constructors, Incorporated, was guilty of serious and wilful misconduct. There appears to be substantial evidence to support the challenged finding in that regard. There is a conflict of evidence regarding the alleged defective spreader or crossbeam near the top of the structure against which the vertical timbers rested. It does appear these upright timbers were securely braced against two proper crossbeams at lower elevations of the structure. Most of the witnesses conceded that the structure was built

and maintained in the usual standard manner employed in such shafts throughout the western portion of the United States. It was inspected by a Federal superintendent of the works.

It is also claimed that the absence of certain hanger-rods and the failure to properly block and wedge the frame of the structure in its position in the shaft led to the collapse of the platform. But the evidence is also conflicting in that regard.

[8] We may concede that these defects, if they actually existed, indicate negligence or even gross negligence, on the part of the employer, but it does not follow that it would therefore be guilty of serious and wilful misconduct on that account. The question of serious and wilful misconduct is ordinarily one of fact to be determined by the commission. Its determination in that respect may not be interfered with by a reviewing court when there is substantial evidence to support the finding. Hatheway v. Industrial Acc. Comm., 13 Cal.2d 377, 382, 90 P.2d 68; Ethel D. Co. v. Industrial Acc. Comm., supra; 27 Cal.Jur. 441, §§ 118 and 119. In the Hatheway case, supra, [13 Cal.2d 377, 90 P.2d 70], it is said in that regard:

"In considering the evidence, it must be kept in mind that the question of wilful misconduct is essentially a question of fact, and that on this petition it is our duty to indulge in all reasonable inferences to support the award. As was stated in Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 704, 28 P.2d 919, 921: 'At all events, the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted."

[9] In the Ethel D. Co. case, supra [219 Cal. 699, 28 P.2d 922], the court said:

"It is to be borne in mind that, in a proceeding of this character, where this court is asked to review an award of the Industrial Accident Commission, annulment of the award is authorized only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings themselves are not subject to review except in so far as they may have been made without any evidence whatever in their support. Even then a review of the findings is based upon the theory that the commission had no jurisdiction to make a finding entirely unsupported by evidence rather than upon the theory usually presented upon appeals that findings of a trial court are lacking in sufficient evidentiary support which imposes upon the reviewing tribunal the duty of weighing evidence to arrive at a determination of that proposition. [Citing several authorities.]"

[10] It will be observed that the misconduct on the part of the employer which will justify an increase of compensation provided for by section 4553 of the Labor Code must be both "serious and wilful." The term "wilful misconduct," as it is used in that section, involves the same sort of dereliction of duty on the part of the driver of an automobile which authorizes an individual to recover damages for personal injuries sustained while riding as a guest in the machine of another person, under section 403 of the Vehicle Code, St.1935, p. 154. In the case of Norton v. Puter, 138 Cal. App. 253, at page 258, 32 P.2d 172, at page 174, that term is defined as follows:

"Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. [Citing numerous authorities.]"

The preceding definition is approved by the Supreme Court in the case of Porter v. Hofman, 12 Cal.2d 445, at page 447, 85 P.2d 447.

In the case of Helme v. Great Western Milling Co., 43 Cal.App. 416, at page 421, 185 P. 510, at page 512, the court says:

" 'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its probable consequences.' * * * To constitute 'willful

misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

[11] Applying the previous definitions of wilful misconduct to this case, it follows that the burden was on the petitioners to prove that the authorized agents of the employer had either actual or constructive knowledge of the fact that the platform or structure upon which it rested in the shaft was so defective and dangerous that they should have reasonably anticipated that injury to the workmen employed thereon was likely to result. It is not contended that the employer or its agents deliberately intended to injure the workmen. There is no evidence of the occurrence of any previous accident of that character. No complaint of alleged defective or dangerous staging had been called to the attention of the employer.

[12] Under the circumstances of this case we are not authorized to interfere with the order of the commission denying the petitioners additional compensation for alleged serious and wilful misconduct.

The order is affirmed.

ADAMS, P. J., and SCHOTTKY, J., pro tem., concurred.



54 Cal.App.2d 674

GERBER v. FABER et al.

Civ. 13457.

District Court of Appeal, Second District, Division 3, California.

Oct. 2, 1942.

1. Negligence ⇐121(1)

In action against a bottling company by buyer of a bottle of root beer from retailer for injury to buyer's eye which was cut by a particle of glass when bottle burst, buyer had burden to prove negligence consisting of the failure of the bottling company to exercise the degree of care that was commensurate with the hazard attaching to the handling of the root beer.

2. Negligence ⇐27

If bottling company used the machinery, methods and processes which were accepted as standard in the trade, and which were as reliable and satisfactory as any others, it did not fail in the exercise of proper care and would not be liable to a buyer of a bottle of root beer from a retailer for injury to buyer's eye which was cut by a particle of glass when bottle of root beer burst.

3. Negligence ⇐27

A bottling company was not an "insurer" against the bursting of a bottle of root beer.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

4. Negligence ⇐121(3)

The mere fact that a bottle of root beer may have sustained some injury while going through bottling operations would not show negligence on the part of the bottling company in the absence of some substantial evidence that the results of the injury to the bottle were such as might have been discovered by reasonable and careful inspection, and that no careful inspection had been made.

5. Negligence ⇐134(4)

In action against a bottling company by buyer of a bottle of root beer from retailer, for injury to buyer's eye which was cut by a particle of glass when bottle burst, evidence was insufficient to establish that bottling company was negligent.

6. Negligence ⇐121(3)

The doctrine of "res ipsa loquitur" is inapplicable to the bursting of a bottle of beverage after it has passed from the bottler into the hands of others.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

7. Negligence ⇐121(2)

The rule of "res ipsa loquitur" applies only where the instrumentality at the time of the accident was under the exclusive control of the defendant.

8. Negligence ⇐121(2)

Where there is a division of responsibility in the use or management of an

instrument which causes injury, and such injury might in equal likelihood have resulted from the separate acts of either one of two or more persons, the "res ipsa loquitur" doctrine cannot be invoked against any one of them.

9. Negligence ⇐121(2)

The "res ipsa loquitur" doctrine applies only when the facts proved by the plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence.

10. Negligence ⇐121(1)

Where it becomes incumbent on plaintiff to establish negligence other than by application of the doctrine of res ipsa loquitur, because the proof does not show exclusive control of defendant, plaintiff must go all the way with his evidence and prove some act or omission on part of defendants on whom he would fasten responsibility.

11. Sales ⇐441(3)

In action against a bottling company by buyer of a bottle of root beer from retailer, for injury to buyer's eye which was cut by a particle of glass when bottle burst, evidence was insufficient to show any breach of warranty as to the contents of the bottle. Civ.Code, § 1735.

12. Bailment ⇐31(3)

In action against a bottling company by buyer of a bottle of root beer from retailer, for injury to buyer's eye which was cut by a particle of glass when bottle burst, evidence was insufficient to sustain a recovery by the buyer under the theory that bottling company which did not part with title to the bottle, as owner and letter of the bottle, breached warranty with respect to the bottle. Civ.Code, § 1955.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Hyman Gerber against Sam Faber, doing business under the fictitious name of Sportsman's Club, and the Double Cola Bottling and Ice Company, sued as Double Cola and Bottling Company, a corporation, to recover for injuries to one of plaintiff's eyes, which was cut by a particle of glass from a bottle of root beer. From a judgment in favor of the plaintiff, the Double Cola Ice and Bottling Company appeals.

Judgment reversed.

Chase, Barnes & Chase, Daniel Bryant, and Irvin Stalmaster, all of Los Angeles, for appellant.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles, amici curiae for appellants.

Francis J. Gabel and Newton E. Anderson, both of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff sustained severe injury to one of his eyes, which was cut by a particle of glass from a bottle of root beer which burst as he removed it from a beverage container in the Sportsman's Club, an establishment operated by defendant Faber. He recovered damages against Faber, who had defaulted, and Double Cola Ice and Bottling Company in an action tried by the court. The bottling company, hereinafter referred to as defendant, appeals. Responsive to the allegations of the complaint, the court made the following findings:

"That it is true that the defendant Double Cola Ice and Bottling Company so carelessly and negligently manufactured, made, bottled, kept, maintained, distributed, and sold said beverage known as Real Tang Root Beer and so carelessly and negligently filled, sealed, inspected, kept, maintained, and distributed the same in said glass bottles as to cause said beverage to become and it did become explosive in said bottles and unfit for the purpose for which the defendants Double Cola Ice and Bottling Company and Sam Faber intended them to be used and that it is true that the said beverage in said bottles became dangerous to human health, welfare and well being. It is true that the defendant Double Cola Ice and Bottling Company knew or in the exercise of ordinary care should have known that said beverage in said glass bottles was inherently and imminently dangerous to human health, welfare and well being and unsafe for human use and consumption."

"That it is true that at all times herein mentioned the defendant Double Cola Ice and Bottling Company warranted to said Frank Weinberger and through said Frank Weinberger to said Sam Faber and to the general public who might purchase the

beverage contained in said glass bottles that the contents of said bottles was fit, pure, and safe for human consumption as a beverage and that it contained nothing, and had no inherent qualities, and had not been manufactured, made, bottled, filled, sealed, inspected, distributed and sold in a manner which would make its intended consumption from the bottles in which it was contained or the handling, opening, and drinking thereof dangerous to such persons, including the plaintiff herein, as would purchase and consume the same or that would cause it to explode, burst and blow apart." It was found that this warranty was breached by defendant.

"That it is true that the defendant Double Cola Ice and Bottling Company so carelessly and negligently manufactured said beverage and so carelessly and negligently placed said beverage in said bottle and so carelessly and negligently closed said bottle against the escape of its contents and so carelessly and negligently sold said bottle of beverage and so carelessly and negligently inspected said bottle so as to cause said bottle of beverage to become and it did become an instrumentality imminently dangerous to human health."

The attack here is upon the sufficiency of the evidence to prove negligence or that there was any warranty or breach of warranty upon the part of defendant. The conclusion that we have reached is that the evidence was wholly insufficient to support either of the questioned findings and that upon the undisputed evidence in the case no facts were shown which would support a judgment against defendant for damages.

Preliminarily we should say that it was not and is not contended that the root beer was unwholesome, unfit to drink, or that it contained any deleterious or foreign substance. No reliance was or is placed upon alleged violation of the Health and Safety Code, Div. 21, Ch. 3, Art. 2, St.1939, p. 984 et seq., or other statutory law with respect to the beverage itself. The argument is that the bottle was not strong enough to withstand the gas pressure.

Defendant bottled the root beer in question, sold it to one Weinberger, an independent distributor who bought beverages in case lots and distributed them to his customers in his own truck; defendant retained title to the bottles, which were to be returned; Weinberger delivered the bottle in question, with other bottles, to Faber, who placed them in a large container in his establishment, where they were kept on ice until removed for sale by the proprietor, his employees or his customers, who were allowed to help themselves from the container. Plaintiff was so helping himself to a bottle of root beer after asking Faber's permission, when it burst in his hand before it had been removed entirely from the container.

The root beer bottles had a capacity of 10 ounces. They were purchased by defendant from one of two established and reputable bottle making concerns. They were such bottles as are ordinarily used in the trade. The following facts were established by testimony which stands without dispute in the record: both of the bottle making companies used approved and standard methods of manufacture, testing and inspection. The bottles before they left the hands of the manufacturer were tested for temper of the glass and for tensile strength and also for thermoshock, which consisted of immersing them alternately in hot and cold water. One of the companies tested each bottle under air and hydraulic pressure of not less than 250 pounds per square inch before it was released from the factory. There was evidence that the bottles of the other manufacturer would withstand a pressure of from 350 pounds to 560 pounds per square inch. When new bottles were received from the manufacturer they went into defendant's soaking machine, where they were cleansed and sterilized. Before going to the soaker the bottles were inspected visually and those that were cracked or chipped were discarded. In the soaker they were again picked up and examined and those found to be defective were thrown away. They then passed to a filling machine on a conveyor chain in front of a light, where they were again inspected and defective bottles were removed. In defendant's process the bottles were filled by machine and gas was injected and the bottles were capped by other machines. The bottles were then under 50 pounds pressure to the square inch and went to an agitator, where the pressure was increased by agitation about 5 pounds; thence they went to an accumulation table, where they were again inspected in front of a light for defects in the bottles or foreign matter in the fluid, thence to the stock room and to distributors, who received the merchandise at the back door of the stock room. The pressure exerted in the filling operation registered on a gauge,

A government inspected volume tester tested the volume and checked the pressure in the bottles. These tests were made two or three times on each run of bottles. The ingredients of root beer were at the time in question oil of sassafras, natural oil of Wintergreen U.S.P., oil of Anise lead free, and oil of cloves U.S.P., caramel coloring, gum of Acacia, sugar and water. There is nothing in the ingredients which of itself would cause an increase in pressure. Bottles were returned to the bottler and used many times. Used bottles which had been returned to defendant went through the same operation as new bottles and the percentage of breakage was somewhat less in the used bottles. If a bottle has even a hairline crack it will not retain pressure. The evidence was that the machinery of defendant was in good order, that its gauges were operating properly during the month of plaintiff's accident and that the gauges coincided with tests made on various bottles during each run. The use of gauges was standard practice and all machine equipment was such as is commonly used in the trade and came from the largest manufacturers of such machinery in the United States. The methods and procedure of bottling used by defendant were standard in every respect and defendant used all of the safety devices and tests known to the trade.

In the Faber establishment the bottles were immersed in ice water surrounded by ice, and the undisputed evidence was that the pressure in a bottle in such a cooler would be reduced to 20 pounds per square inch and would not be appreciably increased by taking it in the hand and removing it from the cooler.

As evidence of defendant's negligence plaintiff calls attention to certain admitted facts, namely, that as many as 60 to 100 bottles a day were broken in the bottling process; that a boy picked up four bottles at a time in the soaker; that there was evidence that from 36 to 48 bottles were broken daily in the cleaning process; that about a case of bottles a day were broken in passing from the soaker onto moving platforms and that as many as four cases of bottles a day broke when put under 50 pounds pressure; that 4,500 bottles passed before the eyes of two inspectors within the course of an hour; that only five men were employed in the bottling operation, and that bottles broke or exploded in the store room. The argument is that defendant could reasonably be found negligent in using a bottling process in which so many bottles were broken.

[1, 2] The weakness of plaintiff's argument lies in the fact that it was incumbent upon him to prove negligence consisting of the failure to exercise the degree of care that was commensurate with the hazard attaching to the handling of such carbonated beverages, and that if defendant did use the machinery, methods and processes which were accepted as standard in the trade and which were as reliable and satisfactory as any others, it did not fail in the exercise of proper care.

In a case involving a question of negligence in the manufacture of a chair, the court in Sheward v. Virtue, 1942, 20 Cal.2d 410, 126 P.2d 345, 347, said: "The appropriate standard of care applicable to the facts of the present case is expressed in O'Rourke v. Day & Night Water Heater Co., Ltd., supra [31 Cal.App.2d 364, 88 P.2d 191], to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection and tests had been omitted, the defendant has been negligent. In Smith v. Peerless Glass Co., Inc., 259 N.Y. 292, 181 N.E. 576, it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article." This rule is the one under which defendant's conduct is to be examined for negligence.

Immediately after the accident plaintiff collected the fragments of the bottle and later his attorney sent them to a chemist experienced in metal and glass testing work, who placed the pieces together (some 12 in number, one small piece being missing) and who testified that from observation the bottle had the appearance of having exploded. The chemist suggested to the attorney that the bottle be photographed. The latter left without giving any instructions, the pieces were kept for some time and eventually were thrown away. When asked for his opinion as to the breaking of the bottle the witness answered, "The bottle burst, I don't know whether it was an accumulation of gas or a flaw in the bottle or what it was." He further testified that it appeared that the contents had been forced "from the within rather than from the without" and that he had no

opinion as to why the bottle burst but that it might have been due to a flaw in the bottle, and he further said, "Well, there are a lot of factors if the conditions are right, that is, a flaw in the bottle or often a minute flaw even from the outside or inside and if the conditions were right, that is, such as temperature or some sudden jar or impact or anything that may cause that bottle to give way * * * if you put that bottle out in the sun and there was a flaw in it, the bottle might burst from the increase of volume of gas and if it was a bottle that had a flaw in it of some type, if it was weak at some point, it might give out at the point of least resistance."

Another witness for plaintiff, who was defendant's plant manager during the month of the accident, testified that there was occasional breakage in the store room of bottled beverages, and he stated, "* * * wherever you find glass there will be breakage"; that he had reports of breakage in stores and ice boxes and coolers outside of the plant; that he had seen bottles explode and when asked whether they might explode some time after being shaken or struck, replied, "That is a matter of opinion and my opinion is if a bottle is mishandled at some particular time, you may call it a defect in the bottle, then on the taking of the bottle with the warm hand or mishandling it later on, the bottle may explode and the original cause may be traced back to some time when the bottle has taken some particular abuse and causing the defect. * * *

"Q. Now you yourself, Mr. Beber, have you ever seen a bottle setting quietly without being touched, suddenly explode? A. Yes.

"Q. And when was that? A. They will explode under certain climatic conditions. You take a bottle and just let it set in the sun and if it sets long enough, it will explode if there is any defect at all in the bottle, that is if it is a carbonated drink.

"Q. If you let the contents of that bottle be exposed to the direct rays of the sun— A. I couldn't tell you how long, I have seen them pop, particularly Pepsi-Cola. These are stronger bottles than Pepsi-Cola but I have seen the truck driving along and have seen them pop up, I have seen more Pepsi-Cola burst than any other kind of bottles.

"Q. At the time you saw this Pepsi-Cola bottle explode, bottles explode, they had been subjected to the direct rays of the sun? A. Yes and the moving of the truck.

"Q. And when there is heat and when there is motion, that will increase the pressure in the bottle? A. Yes.

"Q. And if there is a defect that has caused bottles to break? A. Yes."

The word "explode" is frequently used in the testimony and the accident in question is spoken of by respondent as an explosion. This is true in the limited sense that the breaking of the bottle, from whatever cause, released the contents because of the pressure under which they were contained, but it is of course not true in the sense that the substances themselves were explosive or that an explosive force would be generated within the bottle. The bottle could have burst only through one or more of several causes: (1) the pressure under which the bottle was filled was greater than it could stand; (2) pressure thereafter increased to the bursting point; (3) if the pressure was a safe one in the beginning and was not increased, the bottle burst because of the manner in which it was subsequently handled, which could happen whether the bottle was with or without a flaw, that is to say, it might have been broken if it had been flawless, but would have been more easily broken if it had contained a flaw.

[3, 4] Plaintiff's witness, the chemist, as we have said, did not testify that there was any flaw in the glass, and an assumption that there was such a flaw would be wholly unsupported by any direct evidence. As we have said, the undisputed evidence was that the bottle when taken from the cooler would be under only about 20 pounds pressure as against 50 pounds at the time it was bottled, and the hypothesis that it burst solely because of excessive pressure would be wholly false in the absence of evidence that other bottles filled at the same time had burst. That the bottle had sustained some sort of crack before plaintiff took it out of the cooler was not unlikely in view of plaintiff's testimony that he did not strike it against anything in removing it. That the glass was not cracked all the way through is demonstrated by the fact that the pressure in the bottle had not escaped. Plaintiff's testimony that he did not strike the bottle on anything must be taken as true and it would then appear that if the bottle was not itself defective it had been struck and cracked at some other time,

but not severely enough to cause a complete fracture, although sufficiently to break when plaintiff took it from among the other bottles in the ice in the cooler. A finding that it had been cracked while in the possession of defendant would be based upon mere supposition and not upon any evidence of defendant's negligence. Furthermore, defendant was not an insurer of the safety of the bottle and if it had sustained some injury while going through the bottling operation, that fact alone, if established, would not show negligence in the absence of some substantial evidence that the results of the injury to the bottle were such as might have been discovered by reasonable and careful inspection and that no careful inspection had been made, and there is of course no such evidence.

[5] Plaintiff's entire evidence amounts to this: that glass bottles filled with carbonated beverages do break from a variety of known causes and others which are unknown, both before, during and after the bottling process. Add to this the undisputed evidence that the bottles were carefully made, tested and inspected, and that defendant's operations were conducted without negligence and the sum total is proof that there is an unavoidable hazard in the use of glass bottles as containers for carbonated beverages. This does not make out a case of negligence.

[6] The further contention is made that negligence was to be inferred under the res ipsa loquitur doctrine and reliance is had upon authorities from other jurisdictions, some of which apply the doctrine to the bursting of bottles containing carbonated beverages. The appellate courts of our own state have not passed upon the question, but as the doctrine has been developed in California it is clearly inapplicable to the bursting of a bottle after it has passed from the bottler into the hands of others. In support of his argument plaintiff relies upon Grant v. Graham Chero-Cola Bottling Co., 1918, 176 N.C. 256, 97 S.E. 27, 4 A.L.R. 1090; Payne v. Rome Coca-Cola Bottling Co., 1912, 10 Ga.App. 762, 73 S.E. 1087; Coca-Cola Bottling Works v. Shelton, 1926, 214 Ky. 118, 282 S.W. 778; Macon Coca-Cola Bottling Co. v. Crane, 1937, 55 Ga. 573, 190 S.E. 879; Riecke v. Anheuser-Busch Brewing Ass'n, 1921, 206 Mo.App. 246, 227 S.W. 631; Stolle v. Anheuser-Busch, 1925, 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001, and Healey v. Trodd, 1939, 122 N.J.L. 603, 7 A.2d 640.

There are two well considered cases which to our minds demonstrate the fallacious reasoning of the cases relied upon by plaintiff. These are Slack v. Premier-Pabst Corporation, 1939, 1 Terry, Del., 97, 5 A.2d 516, and Stewart v. Crystal Coca-Cola Bottling Co., 1937, 50 Ariz. 60, 68 P.2d 952. In these cases the authorities are reviewed at length, many of those discussed being found in notes in 4 A.L.R. 1094; 8 A.L.R. 500; and 39 A.L.R. 1006. In the Slack case the reasoning in most of the cases relied upon by plaintiff herein was criticized and rejected and the court said at page 518 of 5 A.2d: "The rule which is supported by reason, considerations of justice, and by the decided weight of authority, denies application of the doctrine of Res Ipsa Loquitur, as against a bottler, to the explosion of a bottle of carbonated or fermented beverage in the hands of a dealer." And further at page 519 of 5 A.2d: "It is no more probable that the defendant's negligence was the cause of the explosion and resulting injury, than was the negligence of others who had the management, supervision and control of the bottle after it had been delivered safely by the defendant. In such case, the plaintiff must fail."

The same conclusion was reached in Stewart v. Crystal Coca-Cola Bottling Co., supra, where the authorities sustaining that conclusion are reviewed and reasons are given which we regard as satisfactory for refusing to apply the doctrine of res ipsa loquitur to the explosion of a bottle of coca-cola after it had been handled by a dealer and a customer and had been drawn from and replaced in a box containing broken ice. In Slack v. Premier-Pabst Corporation, supra, it is pointed out that the courts which had endeavored to apply the res ipsa loquitur doctrine had done so in cases involving charges of specific acts of negligence under circumstances which rendered the doctrine inapplicable.

There is a further reason why we cannot accept the reasoning of the cases upon which plaintiff relies. While purporting to apply the res ipsa loquitur doctrine, they either do not go on the rule at all or confuse it with the general rules for proof of negligence. We except from this statement Coca-Cola Bottling Works v. Shelton, supra, 282 S.W. 778, a Kentucky case, where 27 bottles of coca-cola exploded in a single afternoon, because the exceptional facts of that case distinguish it from all others as well as from the case we are

considering. In all but one of respondent's cases the instrumentalities which caused the accidents were not at the time of the accident in the possession or under the control of the bottler or manufacturer. Viewing such a situation as one where the res ipsa loquitur doctrine would not ordinarily apply, the courts accepted either allegation or proof exonerating all others than the bottler or manufacturer from a charge of negligence and held them liable under what they considered to be the res ipsa loquitur doctrine. That this would be an unwarranted extension of that doctrine is readily apparent. In a case where plaintiff undertakes by his proof to eliminate all of the causes except the negligence of one defendant, he cannot then invoke the doctrine as against that defendant; that is to say, in a case where control and management of the instrumentality is divided between two or among several persons, plaintiff by proving want of negligence on the part of all but a single defendant cannot then call into play the res ipsa loquitur rule which would have had no application in the first instance. It either applies on proof of the circumstances of the accident without plaintiff's fault, or it does not apply at all. Sanders v. Nehi Bottling Co., D.C. Tex.1939, 30 F.Supp. 332; Keller v. Cushman, 1930, 104 Cal.App. 186, 285 P. 399; see, also, cases cited supra.

[7-10] The definition of res ipsa loquitur as a rule of law, quoted in Hill v. Pacific Gas & Electric Co., 1913, 22 Cal. App. 788, 790, 136 P. 492, from the opinion in San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 99, 32 S.Ct. 399, 56 L.Ed. 680, emphasizes that the rule applies only where the instrumentality at the time of the accident was under the exclusive control of the defendant, and that is the interpretation of the doctrine which has been applied by our courts without exception. Where there is a division of responsibility in the use or management of the instrument which causes the injury, and such injury might in equal likelihood have resulted from the separate act or acts of either one of two or more persons, the res ipsa loquitur doctrine cannot be invoked against any one of them. Speidel v. Lacer, 1934, 2 Cal.App.2d 528, 38 P.2d 477; White v. Spreckels, 1909, 10 Cal.App. 287, 101 P. 920, 923. In the last mentioned case it was pointed out that the res ipsa loquitur doctrine follows the familiar principle stated in Searles v. Manhattan R. Co., 101 N.Y. 661, 5 N.E. 66 as follows: "Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause. If under the testimony it was just as probable that it was caused by the one as the other, he cannot recover." The res ipsa loquitur doctrine applies only when the facts proved by the plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent, although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence. Lejeune v. General Petroleum Corp., 1932, 128 Cal.App. 404, 18 P.2d 429; see, also, cases collected in 19 Cal.Jur. 708 and 10-Yr. Supplement. When, therefore, it becomes incumbent upon plaintiff to establish negligence other than by application of the doctrine of res ipsa loquitur, because the proof does not show exclusive control in the defendant, he must go all the way with his evidence and prove some act or omission on the part of the defendant or defendants upon whom he would fasten responsibility. A contrary rule would upset many settled rules of evidence in negligence cases. We do not find in the authorities a real conflict as to the true rule of res ipsa loquitur. The apparent conflict has resulted from the failure of some courts to take into account its limitations and to use care in its application.

It is clear that plaintiff's accident may have resulted from some cause other than any negligence on the part of defendant. It appeared from the testimony of the distributor Weinberger that the bottle which exploded in plaintiff's hand may have been on his truck for a week. There was no evidence that the bottle had been carefully handled during that time or during the process of its delivery to defendant Faber nor by the latter or his employees when it was placed in the cooler. In addition to all of this, there is the admitted fact that Faber's customers were allowed to help themselves from the cooler, and it does not appear how frequently that was done nor the manner in which it was done. The law does not impose liability upon one party in favor of another upon

suspicion or mere supposition. Plaintiff had the opportunity and the only opportunity to prove, if it were a fact, that the glass contained a flaw and his evidence, as we have seen, failed completely in that respect. The res ipsa loquitur doctrine cannot be applied so as to raise an inference that the bottle was cracked while in defendant's possession, to the exclusion of the inference that it may have been cracked thereafter. As we have stated, it retained its pressure up to the time when it was handled by plaintiff and it is at least as reasonable to infer that it was cracked after it left defendant's warehouse as to infer that it was cracked before. If it was carefully bottled and handled by defendant and was cracked thereafter, defendant would not be guilty of negligence and the res ipsa loquitur doctrine would cease to be applicable from the time the bottle passed from defendant's exclusive control.

[11] A second ground for the decision of the trial court was a finding that the contents of the bottle were warranted to be fit, pure and safe for human consumption and contained no inherent qualities that would cause it to explode, that "the contents of said bottled beverage did cause said bottle to burst and break into pieces" and that the warranty was thereby breached. The warranty sought to be invoked against defendant, and the sole one upon which plaintiff relies with reference to the contents, is that of a manufacturer, under section 1735 of the Civil Code, namely, that the goods were fit for the purpose for which they were sold. We find it unnecessary to go into the question of warranty further than to say that the evidence was insufficient to show any breach of warranty of the contents. Upon that point nothing need be added to what we have already said concerning the root beer itself. So far as disclosed by the evidence, it was not different from the general run of that beverage. It was alleged in the complaint that defendants also warranted the bottle. This allegation was denied and the finding, as we have seen, limited the warranty to the contents of the bottle.

[12] It will be recalled that defendant Double Cola Company did not part with title to the bottles. But it is now contended that defendant let the bottle and in so doing assumed the obligation to put it into a condition fit for the purpose for which it was let, which obligation is imposed by section 1955 of the Civil Code. The complaint did not allege the letting of the bottle by appellant or the other defendants nor do the findings establish that there was a contract of letting, and necessarily it was not found that there was a breach of any such contract. But if we assume that the case was tried upon the theory that the allegations of the complaint were broad enough to charge a warranty by appellant as owner and letter of the bottle, and a breach of the warranty, the evidence was insufficient to sustain a recovery under that theory as well as under the theory that the contents of the bottle were explosive. All of the direct evidence and the reasonable inferences to be drawn therefrom are against the contention that the contents were explosive or otherwise unfit for use either because of their inherent qualities or excessive pressure in the bottle. There was no evidence that the bottle left the possession of defendant in an unsafe condition unless the bursting of the bottle be accepted as sufficient. That evidence, we have held, is not sufficient to establish negligence on the part of the bottler and it is also insufficient to establish a breach of warranty. In fact, we think it was more reasonable to infer that the bottle burst because of the manner in which it was handled after leaving defendant's possession, than because of its handling by defendant during which it did not burst. What we have said along this line upon the issue of negligence is equally applicable to the alleged breach of warranty. The principal case relied upon by respondent on this point is Naumann v. Wehle Brewing Co., 1940, 127 Conn. 44, 15 A.2d 181, in which a judgment for plaintiff for breach of warranty was affirmed against a bottler of ale. The trial court had found that there was a defect in the bottle and this finding was sustained by reasoning which eliminated negligence in the manufacture of the ale, any blow which the bottle received after it left the hands of the bottler, leaving what the court considered to be the sole remaining inference, namely, that the bottle must have been defective. The court then expressly eliminated the doctrine of res ipsa loquitur because the bottle was not under the exclusive management and control of the defendant, and sustained the finding upon the assumption that the breaking of the bottle of ale was proof that the bottle was not of merchantable quality when it left the hands

of the manufacturer. The effect of the decision is to make the bottler of carbonated beverages an insurer against the bursting of glass containers. We think this is not good law.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.



54 Cal.App.2d 604

In re STRONG'S ESTATE.

CLEAVER et al. v. DAVIES et al.

Civ. 6840.

District Court of Appeal, Third District, California.

Sept. 29, 1942.

Hearing Denied Nov. 27, 1942.

1. Descent and distribution ⇐71(3)

Where petition to determine heirship set forth that petitioners were the half-brother, half-sister, sole children of a predeceased half-sister, and sole child of a predeceased half-brother of deceased, and stated that deceased left no spouses, child, descendant, or parent, petition stated facts sufficient to entitle petitioners to share in deceased's estate.

2. Pleading ⇐433(4)

Where all interested parties were properly before the court in hearing on petitions to determine heirship, and the court, after hearing the evidence, determined that one group of petitioners were the heirs, no mere technical imperfection in petition of the successful group of heirs could undermine the decree.

3. Descent and distribution ⇐71(7)

In proceeding to determine heirship, wherein trial court found that certain of the claimants were heirs of the half-blood of the deceased, trial court was not required to go further and find specifically as to validity of the decree granting divorce to the mother of the parties' ancestor.

4. Evidence ⇐290

In proceedings to determine heirship, trial court properly admitted declarations of the deceased as to the places of his residence, marriage, and divorce. Code Civ. Proc. § 1852; § 1870, subds. 4, 11.

5. Descent and distribution ⇐71(6)

In proceedings to determine heirship, evidence was sufficient to support decree determining that alleged half-brother, half-sister, sole children of the predeceased half-sister, and sole child of a predeceased half-brother of deceased, were heirs of deceased.

6. Divorce ⇐326

Oregon divorce was not void because at the time Oregon laws required that in every divorce action the summons shall be served on the district attorney at least ten days before the term at which the defendant is required to appear and answer, and that in the divorce action only the complaint was served on the district attorney, where the record showed that the district attorney appeared at the trial of the divorce action and participated therein on behalf of the state.

7. Appearance ⇐20

Where a party on whom summons is required to be served, voluntarily appears, and makes a defense, service of summons is "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Appearance ⇐20

Process is "waived" by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or by other recognition of the authority of the court to proceed in the action.

9. Appearance ⇐19(1)

Though a defendant has the right to demand that process be issued against him in the manner provided by law, if process is not so issued and he appears generally without making objection, such appearance, being the purpose of the process, confers jurisdiction of the person, and the court is empowered to act in the premises.

10. Divorce ⇐326

Oregon divorce was not void because at the time Oregon laws required that in

every divorce action the summons shall be served on the district attorney at least ten days before the term at which the defendant is required to appear and answer, and that in the divorce action only the complaint was served on the district attorney, where the state of Oregon after the granting of the divorce amended the statute in question by providing that all divorce decrees, theretofore granted, in which service was not made on the district attorney, were validated and declared to be legal, if otherwise regular.

11. Constitutional law ⇐55

Remedial legislation intended to cure mere irregularities or informalities in proceedings of the courts is not an usurpation of judicial functions.

12. Constitutional law ⇐193

What the Legislature might have authorized in the first instance it can ratify afterwards, so long as no vested rights have intervened.

13. Divorce ⇐326

Oregon divorce decree was not void because no findings of fact were made.

14. New trial ⇐99

The granting of a new trial on ground of newly discovered evidence is discretionary with trial court.

15. New trial ⇐108(2)

In proceedings to determine heirship, trial court did not abuse its discretion in refusing to grant a new trial because of "newly discovered evidence" consisting of an affidavit filed in connection with the application of the ancestor of those claiming to be heirs, for a marriage license, stating that the affiant knew that the applicant was "above the age of twenty-one years", though the ancestor was more than twenty-one years old, since a statement that the applicant was above the age of twenty-one years was not a statement that he was only twenty-one years of age.

See Words and Phrases, Permanent Edition, for all other definitions of "Above the Age of Twenty-one Years" and "Newly Discovered Evidence".

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Proceeding in the matter of the estate of Elmer Vernon Strong, deceased, wherein both Clifton Cleaver and others and Ernest Vernon Davies and others filed petitions to determine heirship. From a judgment determining that Ernest Vernon Davies and others were heirs and entitled to distribution, Clifton Cleaver and others appeal.

Judgment affirmed.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for appellants.

E. G. Funke, Richard S. Munter, of Spokane, Wash., and Carl H. Allen, of San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Elmer Vernon Strong died intestate in Butte County, California, leaving a considerable estate, and leaving no spouse, child, descendent or parent surviving him. Appellants, the so-called Cleaver claimants, are cousins of said deceased, and respondents, the so-called Davies claimants, claim to be a half-brother, half-sister, sole children of a pre-deceased half-sister, and sole child of a pre-deceased half-brother of deceased. Both appellants and respondents filed petitions to determine heirship, and, after hearing, the court found and decreed that respondents, the Davies claimants, have the relationship to Elmer Vernon Strong claimed by them, and, as such, were heirs to his estate. A motion for a new trial was denied, and this appeal is taken from the judgment and order determining that the Davies claimants are entitled to distribution.

It appears from the evidence that on January 1, 1866, John Vernon Davies and Emma J. Cleaver were married in Marion County, Oregon (the county seat of said county being Salem), and that the sole issue of said marriage was Elmer Vernon Davies, who was admittedly the intestate, Elmer Vernon Strong; that a decree of divorce was entered in the Circuit Court of said Marion County in November, 1868, such decree granting the care and custody of said child, Elmer Vernon Davies, who was then, according to the deposition of his mother in the divorce action, twenty-two months old, to Emily I. Davies; that Emily I. Davies and William S. Strong were married in Marion County, Oregon, on October 20, 1870; that John V. Davies and Isabel Foster were married in Whitman County, Washington, on July 2, 1883.

The Davies' claimants produced eight witnesses, and we will summarize their testimony briefly.

Anna Louise Hickey, a sister of Isabel Davies, testified that her sister married John Vernon Davies in July, 1883; that she saw a good deal of him in the Endicott country in Washington; that he was engaged in the sheep, cattle, and horse-raising business, and also had a saloon; that he told her he formerly had a herd of sheep on an island in the river outside of Portland; that he and his family moved to Montana about 1891, and that the last time she saw him was in 1894; that he told her he had been married before, and had been divorced from his first wife; that he had only one child by such former marriage, a son named Elmer, who "was almost a young man" when he married her sister.

Henry Grant Baker, landlord of the apartment house in which intestate lived, testified that he had known Elmer Vernon Strong for seven years prior to his death; that on one occasion while sitting on the front porch of the apartment house, the intestate had said to the witness that he had "some half-brothers and sisters"; that respondent claimant, Ernest Vernon Davies, resembled Elmer Vernon Strong.

Charlotte Davies Hoover, one of the Davies claimants, testified that her father's name was John Vernon Davies; that to the marriage of her father and mother were born six children, two of whom died, without leaving any issue; that one daughter, Verne, and one son, Jack, died after they reached maturity, both leaving issue, which issue, together with herself and her brother Ernest Vernon Davies, are the respondents herein.

Ernest Vernon Davies testified that he was born in Montana on August 26, 1893; that his father, whose name was John Vernon Davies, died in Canada in 1908; that when he was "about five years" he went with his father to the State of Washington, and there saw a man whom his father told him was his brother; that his father told him that he had been married before at Salem, Oregon, and divorced, and that this brother was by the woman that he had married at Salem, and was named Elmer Vernon Davies.

Thomas Walter White testified that he had met John Vernon Davies in Montana; that he had ridden every round-up with him for four or five years, and that they were "pretty warm" friends; that Davies told him that he had a son by the name of Elmer Vernon Davies, by a former wife whom he married at Salem, Oregon.

Edward O. Martin testified that he first met John V. Davies at Endicott, Washington, in 1884; that Davies was married at the time; that Davies was engaged in the sheep and cattle business, and also in the saloon business; that Davies told him he came from Salem, Oregon.

Donald Macrae testified that he first met John Vernon Davies about 1890, in Whitman County, Washington; that Davies had sheep, cattle and horses; that in 1891, Davies told him he had bought a ranch in Montana; was going to ship his sheep and outfit there; that he thereafter, in 1899, saw Davies in Montana; that in 1891, Davies told him that he had lived in the Willamette Valley, Oregon; that he had been married there at one time, and had a boy; that Davies' middle name was generally known as "Vernon"; that Davies was living with his wife, Isabel Davies, in Montana, in about 1901.

Isabel Davies testified by deposition, that she married John Vernon Davies in 1883, at Colfax, Washington; that Davies told her he had been previously married to a woman in Salem, Oregon, and that he had a son who was about seventeen or eighteen years old at time of the marriage of Davies and the witness; that he also told her about hitting the mother of said son with a bootjack, and that his said wife had divorced him. The witness testified as to the names of her children by Davies, and also that she had divorced him, because of his drinking, about 1902.

The record in the divorce action in the case of Emily I. Davies v. John V. Davies, in the Circuit Court of Marion County, Ohio, the decree being dated November, 1866, and separation agreement between John V. Davies and Isabel Davies, dated December 18, 1901, were introduced in evidence. Appellants produced only one witness, Marion G. Cleaver, who testified as to the relationship of appellants to deceased, and who also testified that the father of Elmer Vernon Strong was named John V. Davies, and that Emily Irene Strong divorced John V. Davies, the father of Elmer Vernon Strong.

[1, 2] Appellants urge numerous grounds for the reversal of the decree. The first is that the petition of the Davies' claimants does not state facts sufficient to entitle them to share in the estate. This contention lacks substantial merit. The petition sets forth the relationship of re-

spondents, as hereinbefore set forth, and that decedent left no spouses, child, descendent or parent. No greater particularity is required because, after all, the proceeding is only one to have the court determine who are entitled to inherit the estate of deceased. Appellants themselves filed a petition to determine heirship, and both petitions were heard at the same time. All interested parties were properly before the court, and the court, after hearing the evidence, determined who the heirs of deceased were. No mere technical imperfection in the petition to determine heirship can undermine such a decree.

[3] Appellants' second contention is that the trial court committed error in failing to make a finding as to the validity of the Oregon divorce decree. It is true that the record in the divorce case was introduced in evidence, and that appellants claimed that said decree was invalid. However, the matter of the validity of the divorce decree was not one of the ultimate facts to be determined, but was a mere probative fact. The trial court found that respondents were the heirs of the half-blood of decedent, and was certainly not required to go further and find specifically as to the validity of the divorce decree, for there was no pleading, making that an issue, that required a finding.

[4] Appellants' third contention is that the court committed error in overruling their objections to declarations of John V. Davies as to his place of residence and place of marriage and divorce. Appellants argue that the declarations of a deceased member of a family may be given in evidence as to the fact of birth, death, or marriage, but not as to the place thereof. Appellants cite some rather ancient cases in support of this contention, but it seems clear to us that both reason and authority support the ruling of the trial court.

Section 1852 of the Code of Civil Procedure provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

Subdivisions 4 and 11 of section 1870, Code of Civil Procedure, provides, as to facts which may be proved on trial:

"4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; * * *

"11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary."

We believe that the true rule is well expressed in the following language from the case of Wise v. Wynn, 59 Miss. 588, 42 Am.Rep. 381:

"This ruling of the learned judge was based upon the dicta of many authorities to the effect, that while in questions of pedigree the hearsay declarations of a deceased member of a family are receivable in evidence, as to all matters of birth, death, age, marriage, and the like, declarations as to place are not. The later and better considered cases, however, repudiate this distinction between declarations as to place and those touching other family matters, where the inquiry is strictly one of pedigree, and the declarations as to place are not relied on as giving any right by reason of the place, but proof as to place is made merely by way of identification of the person or family. Thus, in a question of settlement under the poor laws, where the right of settlement is dependent upon the place of present or former residence, hearsay declarations as to place are inadmissible; but where the question is purely one of pedigree, and the effort is to identify the particular person or family about whom the declarant was speaking, declarations as to place stand upon the same footing as any others relative to matters of family history. Wharton Evid., § 208, and cases cited. Manifestly this is the true rule here. There can be no reason founded in good sense for admitting the declarations of a deceased person that he has a brother named Thomas, and excluding his statement of where that brother lives. The name wholly fails to identify without identification of the place, and the one is worthless without the other. If the court below was correct in admitting any of the declarations of Charles Wise touching his family, it should have admitted them all, since they all tended to establish his own identity, and were proffered not for the purpose of basing any particular right on the place of his alleged nativity, but solely for the purpose of showing who he was, and to what family he belonged. * * *

"If they be not admitted, there must be in many cases a failure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and if we reject his own statements as to who he was, and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travellers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were."

Professor Wigmore states in section 1501 of the Third Edition of his work on Evidence:

"The place of birth or death—something more than the fact of birth or death—has by some courts been thought to be an inadmissible subject. But there is no apparent reason to conclude that a statement on this topic is, from either of the above points of view, less trustworthy."

[5] Appellants next contend that the evidence is insufficient to support the decree determining that respondents Davies' claimants are the heirs of deceased. We have already given the substance of the evidence, and we are convinced that the decision of the trial court finds ample support in the record. Indeed, in view of the fact that the evidence of respondents was virtually uncontradicted, the trial court could hardly have reached any other conclusion, unless it disbelieved the evidence of respondents. Appellants' argument is nothing more than an argument upon the weight of the evidence, and it is difficult for us to understand how appellants can contend seriously that the evidence in the instant case is insufficient.

Appellants' fifth contention is that even assuming that the deceased and the Davies' claimants had the same father, the Oregon divorce was void, and the subsequent marriage of John V. Davies void, and the Davies' claimants illegitimate, and not entitled to inherit through their father from his kindred.

[6-9] Appellants point out that the laws of Oregon, in effect at the time of the divorce, and until 1911, required that in every divorce action the summons shall be served on the district attorney at least ten days before the term at which defendant is required to appear and answer, and that in this case only the complaint was served on the district attorney. Appellants argue that the decree of divorce was therefore void. There are two answers to this argument. First, the record shows that the district attorney appeared at the trial of the divorce action and participated therein on behalf of the state. It is well settled that where a party upon whom summons is required to be served, voluntarily appears and makes a defense, the service of summons is waived. As was said in the case of Harrington v. Superior Court, 194 Cal. 185, 228 P. 15, 16: "* * * Process is waived by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or by otherwise recognizing the authority of the court to proceed in the action. 7 R.C.L. 1038, et seq. * * * A defendant has a right to demand that process be issued against him in the manner provided by law, but if process is not so issued and he appears generally without making objection, such appearance, being the purpose of the process, confers jurisdiction of the person and the court is empowered to act in the premises."

[10] The second answer to this argument is that in 1911, the state of Oregon amended the act in question, and in such amendment provided that all decrees of divorce theretofore granted, in which service had not been made upon the district attorney "are hereby validated and declared to be legal, if otherwise regular."

[11] In 16 C.J.S., Constitutional Law, § 128, at page 319, it is stated: "On the other hand, remedial legislation intended to cure mere irregularities or informalities in the proceedings of courts is not an usurpation of judicial functions. * * *"

[12] In Mackenzie v. Douglas County, 91 Or. 375, 178 P. 350, 352, the Supreme Court of Oregon said: "It is a rule supported by a multitude of authorities that what the Legislature might have authorized in the first instance it can ratify afterwards, so long as no vested rights have intervened. * * *"

In Gordon v. City of San Diego, 101 Cal. 522, 36 P. 18, 20, 40 Am.St.Rep. 73, the court said: "* * * Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: 'If the thing wanted or failed to be done, and which constitutes

the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' * * *"

In City of Redlands v. Brook, 151 Cal. 474, 91 P. 150, 152, the court said: "In the absence of constitutional restrictions, the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights. * * *"

See, also, City of Venice v. Lawrence, 24 Cal.App. 350, 141 P. 406; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 227 P. 649; Muncie Nat'l Bank v. Miller, 91 Ind. 441.

Appellants argue further that the decree of divorce is also void because no findings of fact were made. Appellants cite several earlier Oregon cases which hold that a judgment without findings of fact or conclusions of law is void. But in 1932, in the case of Glickman v. Solomon, 140 Or. 358, 12 P.2d 1017, the Supreme Court of Oregon reviewed such former holdings, and said:

"* * * A careful analysis of the above cases, however, shows that each involved a direct attack on the judgment in question, and the legal effect of a void judgment, as distinguished from one which is merely voidable, was not considered. * * *

"Without doubt, the court had jurisdiction of the subject-matter and of the parties. Hence it had the power to render a judgment. If the judgment rendered was erroneous, the party whose rights were thereby affected had the remedy of appeal to correct any errors of law or irregularities in practice, but, until the same was reversed, it must be given full force and effect. * * *

"In the light of the authorities, we conclude that the judgment in question is not void, but is only voidable, and must be given full force and effect in a collateral attack. Previous holdings of this court to the contrary are to that extent overruled."

In 21 C.J.S., Courts, § 194, p. 326, it is said: "As a general rule, the effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective, as well as prospective, and makes the law at the time of the overruled decision as it is declared to be in the last decision; * * *"

In Fleming v. Fleming, 264 U.S. 29, 44 S.Ct. 246, 247, 68 L.Ed. 547, the Supreme Court of the United States said:

"In Tidal Oil Co. v. Flanagan [decided January 7, 1924] 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. [382], * * * we had occasion to consider the same issue. After a somewhat full examination, we held that by a score of decisions of this court a judicial impairment of a contract obligation was not within section 10, art. 1, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error from a state court.

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of section 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract and has become a new and different act of the Legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. * * *"

[13] We are, therefore, unable to agree with the contention of appellants that the divorce decree was void because no findings of fact were made or filed.

Our conclusion that the divorce decree was not invalid makes it unnecessary to prolong this opinion by discussing the question of whether or not the respondent Davies' claimants would be legitimate offspring of John Vernon Davies, even though the divorce decree was invalid. For that reason we will not discuss a number of other points discussed in the briefs.

[14, 15] Appellants' final contention is that the trial court erred in denying their motion for a new trial. The principal

ground urged by appellants in support of their motion for a new trial was newly discovered evidence, which was an affidavit on file in the office of the county clerk of Marion County, Oregon, filed in connection with the application of John V. Davies and Emma J. Cleaver for a marriage license in which affidavit affiant stated that he knew Davies to be "above the age of twenty-one years," and Emma J. Cleaver to be "above the age of eighteen years." Appellants claimed that they had made diligent search of the records, but had been unable to find said affidavit before the trial. Appellants have asserted several times in their briefs that this affidavit showed that the Davies named therein was only twenty-one years old at the time of the marriage, which made it highly improbable that he was the same Davies who was the father of Davies' heirs. Of course it is apparent at once that a statement that a person is "above the age of twenty-one years" is a far different statement from one that he is twenty-one years of age. The granting of a new trial upon the ground of newly discovered evidence is a matter largely within the sound discretion of the trial court. We cannot hold that there was any abuse of discretion in denying appellants' motion for a new trial.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



54 Cal.App.2d 704

SPRINGER et al. v. SODESTROM.

Civ. 12048.

District Court of Appeal, First District, Division 1, California.

Oct. 3, 1942.

1. Appeal and error ⇐933(4)

Where order granting plaintiffs a new trial was a general order, and no written order specifying insufficiency of the evidence was filed with the clerk within ten days after motion was granted, ground that evidence was insufficient could not be considered on appeal by defendant unless the evidence was insufficient in law and without material conflict on any material point.

2. New trial ⇐10

The offering of an instruction on an issue may constitute a "waiver" of the right to urge that the giving of similar instructions was error, but the rule does not restrict the trial court's power to grant a new trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

3. New trial ⇐10

If error appears in the record, the trial court's power to grant a new trial is not limited by the conduct of the parties in inviting such error, nor may the other party on appeal from an order granting a new trial successfully contend that the new trial should not have been granted because error was invited

4. New trial ⇐10

Where a jury has been erroneously instructed and the trial court has determined that the error was prejudicial, the trial court is not precluded from granting a new trial merely because there may be said to be a waiver or an estoppel by one of the parties.

5. Appeal and error ⇐882(20)
New trial ⇐10

If trial court erred in submitting to jury the issue of contributory negligence, order granting plaintiffs a new trial was required to be affirmed on appeal, though plaintiffs themselves submitted instructions on issue of contributory negligence, and case was tried by both sides on the theory that contributory negligence was in issue.

6. Negligence ⇐89(3)

In action by parents for death of twenty-two months old child who at time of accident was in care of an eighteen-year-old girl who acted as nurse, negligence, if any, of the girl was chargeable to the parents.

7. Evidence ⇐14

It is common knowledge that small children have a propensity to run in any direction.

8. Automobiles ⇐162(4)

Where motorist sitting in his automobile in driveway observed through rear

view mirror that small child was on the opposite curb, motorist's conduct in thereafter backing into the street without making any further effort to ascertain the conduct and whereabouts of the child was negligent.

9. Infants ⇐2

A twenty-two months old child is not "sui juris".

See Words and Phrases, Permanent Edition, for all other definitions of "Sui Juris".

10. Negligence ⇐89(3)

A greater amount of care is required of the custodian of a twenty-two months old child in protecting such child than is required in the case of a more mature child.

11. Negligence ⇐136(30)

In action by parents against motorist to recover for the death of their twenty-two months old child who was run over by automobile when motorist backed automobile into street from driveway, whether parents, acting through nurse, were guilty of contributory negligence precluding recovery, was for the jury.

12. Automobiles ⇐245(91)

In action by parents against motorist to recover for the death of their twenty-two months old child who was run over by automobile when motorist backed automobile into street from driveway, whether motorist's negligence was the "proximate cause" of the accident after alleged contributory negligence of parents, acting through nurse, ceased to operate as a factor of causation, was for the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

13. Negligence ⇐136(31)

Where a plaintiff's contributory negligence continues up to the time of an accident, the question whether an intervening act of negligence breaks the chain of causation so as to make the plaintiff's contributory negligence a remote cause rather than a proximate cause of injury is a question for jury.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Henry Springer and another against Andrew Sodestrom to recover for the wrongful death of the plaintiff's child. From an order granting plaintiffs' motion for a new trial, the defendant appeals.

Order reversed.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Custer & Schubert and Theodore Tamba, all of San Francisco, for respondents.

WAGLER, Justice pro tem.

This is an appeal by defendant from an order granting plaintiffs' motion for a new trial. The action was brought by the plaintiffs to recover damages for the wrongful death of their twenty-two-months'-old child. Judgment for defendant was entered upon a jury's verdict. Thereafter, plaintiffs moved for a new trial on three grounds: (1) Insufficiency of the evidence; (2) that the verdict and judgment were against law, and (3) errors in law. Within the time prescribed by law a minute order was entered by the clerk as follows: "In the above entitled action, the motion for new trial having been heretofore submitted to the Court for its consideration and decision, and good cause appearing, it is ordered that the motion be granted." No written order was ever filed.

[1] Inasmuch as the order granting the new trial was a general one, and since no written order specifying insufficiency of the evidence was filed with the clerk within ten days after the motion was granted, that ground cannot be considered on appeal unless the evidence is insufficient in law and without material conflict on any material point. Thomas v. Driscoll, 42 Cal. App.2d 23, 108 P.2d 43.

Plaintiffs do not contend that the verdict and judgment were against law. They rely entirely upon the third ground, to-wit, "Errors in Law," and in support of this contention they maintain that the trial court improperly submitted the issue of the plaintiffs' contributory negligence to the jury.

[2-4] The plaintiffs themselves submitted instructions on the issue of contributory negligence, and the case was tried by both sides on the theory that the question of contributory negligence was an issue in the case, and as such, was a question of fact for the jury. Defendant contends that, since the plaintiffs proposed instructions

on the issue of contributory negligence, they are therefore precluded from predicating error on the giving of such instructions. Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198; Ray v. Kennedy, 24 Cal.App.2d 583, 76 P.2d 147; Charves v. San Francisco-Oakland Terminal Railways, 44 Cal.App. 221, 186 P. 154; Gray v. Ellis, 164 Cal. 481, 129 P. 791. There can be no doubt that under some circumstances the offering of instructions on an issue constitutes a waiver, but that rule does not restrict the power of the trial court to grant a new trial. If error appears in the record, the power of the trial court to grant a new trial is not limited by the conduct of the parties in inviting such error. On an appeal from a judgment, defendant's position would be tenable, but not so when an appeal is from an order granting a new trial. Nieves v. Vigolino, 135 Cal.App. 763, 27 P.2d 916; Pope v. Wenisch, 109 Cal.App. 608, 293 P. 622; Weaver v. Shell Oil Co. of California, 129 Cal.App. 232, 18 P.2d 736. As was stated in Nieves v. Vigolino, supra, 135 Cal.App. page 765, 27 P.2d page 916, "* * * where the jury has been erroneously instructed and the trial court has determined that the error was prejudicial, we do not believe that it is precluded from granting a new trial merely because there may be said to be a waiver or an estoppel on the part of one of the parties. Weaver v. Shell Oil Co., [of California], supra. To hold otherwise would mean that the trial court, by reason of the action of the parties, would be powerless to correct what might be an obvious miscarriage of justice."

[5] It follows that if, in fact, it was error to submit the issue of contributory negligence to the jury, the order must be affirmed. A determination of this question requires an examination of the record.

The plaintiffs are husband and wife; they lived on the north side of Juanita Way in San Francisco; defendant lived opposite plaintiffs on the southerly side of Juanita Way, which is thirty feet wide from curb to curb. On Sunday morning, September 29, 1940, defendant was preparing to drive his son to a street car station and had just backed his automobile out of his garage; he came to a dead stop when the rear wheels of the auto were about on the curb and waited for his son to close the garage doors and get into the car. Plaintiffs' infant son, twenty-two months old, was sitting on the curb on the opposite side of the street in front of plaintiffs' residence.

Defendant testified that while his son was closing the garage doors and getting into the car, he looked in his rear view mirror and saw the child sitting quietly; that he did not again try to ascertain the child's whereabouts; that as he backed into the street he heard a thud under his left wheel, and on investigation found the Springer child under his car. The child's head was ten or twelve feet from the southerly curb line.

[6] The child was, at the time of the accident, in the care of an eighteen-year-old girl who acted as its nurse. Admittedly, the negligence of this nurse, if any, was chargeable to plaintiffs. On the morning of the accident, the nurse had taken the child into the garage in the basement, as was her custom, and engaged herself in washing the child's clothes in the laundry trays which were in the garage.

The nurse testified that while she was doing the washing, the garage doors were open; that after she had been in the garage about five minutes she heard a cry; that she ran out to the street and saw the baby under defendant's car; that she had been instructed by the parents never to let the baby out of her sight; that she never permitted the child to go into the backyard or out onto the sidewalk alone. Both the nurse and Mr. Springer testified that the child had many times been taken into the garage by the nurse while the laundry was being done and while the garage doors were open, and that the child had never gone out of the garage on any previous occasion.

The defendant produced as a witness eight-year-old Barbara Young, who was on the sidewalk in front of her home on the same side of the street as the Springer home, and a distance therefrom of five houses plus the width of Evelyn Street. She testified that she saw defendant's car parked in his driveway; that about five minutes before the accident she saw a young woman bring the child out on the sidewalk, then go back inside; that the child sat on the curb; that when the defendant backed into the street the child ran across the street and into the car.

[7, 8] The conduct of small children is unpredictable, and their propensity to run in any direction is a matter of common knowledge. Having once observed the child on the opposite curb while his vehicle was still motionless in the driveway, defendant's conduct in backing into the street without making any further effort to ascertain the conduct and whereabouts of the small child was not that of a reasonably careful and prudent person under the circumstances. Cal.Jur.Supp., vol. 11, p. 454, § 283; Scandalis v. Jenny, 132 Cal. App. 307, 22 P.2d 545; Waterbury v. Elysian Spring Water Co., 139 Cal.App. 355, 33 P.2d 1048. However, the defendant is not the only person whose conduct is in issue in this case. Here the parents are suing in their own right to recover for the wrongful death of their child.

Parents are chargeable with ordinary care in the protection of their minor children. 19 Cal.Jur., Negligence, p. 662, § 87; Healy v. Market St. Ry. Co., 41 Cal. App.2d 733, 107 P.2d 488; Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A.L.R. 401.

[9, 10] There is a direct conflict as to how the child happened to be on the curb in the first instance. Barbara Young testified that a woman brought the child out on the sidewalk and then went inside. The nurse said the child escaped from the garage while she was doing the laundry. The child in this case was only twenty-two months old; it was not sui juris. A greater amount of care is required of the custodian in the protection of such a child than is required in the case of one more mature. The nurse knew that the garage doors were open, and in spite of the fact that the child had been in the garage before under identical circumstances and had not gone into the street, this fact did not warrant her in relaxing her vigil.

[11] Plaintiffs' charge of negligence is based upon defendant's failure to be constantly vigilant and to heed the well-known propensity of small children to run into the street. Would not a like failure on the part of the custodian of the child charge the plaintiffs with contributory negligence? Obviously so. We must conclude that the question whether or not the plaintiffs, acting through the nurse, at the time and place in question, used ordinary care in the exercise of their parental duty was, under the pleadings and the proof, an issue in the case, and that the testimony of both the nurse and Barbara Young was such that reasonable minds might differ on this issue. The trial court, therefore, properly submitted the issue to the jury. Healy v. Market Street Ry. Co., supra; Carrisosa v. Southern Service Co., 128 Cal.App. 160, 16 P.2d 1032; De Nardi v. Palanca, 120 Cal.App. 371, 8 P.2d 220; Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 275 P. 980; Metcalf v. Romano, 83 Cal.App. 508, 257 P. 114; Wong Kit v. Crescent Creamery Co., 87 Cal.App. 563, 262 P. 481; Patania v. Yellow-Checker Cab Co., 102 Cal.App. 600, 283 P. 295. See, also, Dattola v. Burt Bros., 288 Pa. 134, 135 A. 736, 51 A.L.R. 209.

It is plaintiffs' final contention that even though the nurse may have been negligent in permitting the child to be on the street in the first instance, that once the defendant became aware of the child's presence the nurse's negligence, as a matter of law, ceased to operate as a factor of causation, and that the defendant's negligence was, therefore, a proximate cause of the accident.

[12] This is a question upon which reasonable minds, under the evidence in the record, might differ. As such, the issue of proximate cause was properly submitted to the jury with appropriate instructions. Gallichotte v. California Mut., etc., Ass'n, 4 Cal.App.2d 503, 41 P.2d 349; Traylen v. Citraro, 112 Cal.App. 172, 297 P. 649; Restatement of the Law of Torts, §§ 434, 453.

[13] Furthermore, if, as plaintiffs assume for the sake of their argument on this point, the nurse was negligent in the first instance in permitting the child to be on the street unattended, they must likewise concede that such negligence continued up to the time of the accident. Under such circumstances, the question whether or not an intervening act of negligence breaks the chain of causation so as to make the original negligence a remote cause rather than a proximate cause of an injury, is always a question of fact to be decided by the jury. Pastene v. Adams, 49 Cal. 87; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am.St.Rep. 134; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825; Royal Indemnity Co. v. Midland Counties Public Ser. Corp., 42 Cal.App. 628, 183 P. 960; Polloni v. Ryland, 28 Cal.App. 51,

151 P. 296; Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 124 P.2d 51.

A recent expression on this point by the Supreme Court is to be found in the Fennessey case, supra, where the court said (page 53 of 124 P.2d): "The main contentions of appellants are that the evidence proves as a matter of law that at the time of the accident they were engaged in 'emergency' work within the meaning of a municipal ordinance, but that, assuming negligence on their part, the evidence fails to show that such negligence was a proximate cause of the accident. In regard to the latter contention, it is their theory that the act of the jitney bus driver broke the chain of causation between any negligence in parking the truck and plaintiff's injuries. * * * Whether the parking of appellants' repair truck between the safety zone and the curb had anything to do with the swerve or turn of the jitney bus on to the first or second street car tracks, as the result of which the accident occurred, or whether the jitney driver could have averted such accident, notwithstanding that he violated the ordinance prohibiting driving to the left of a safety zone, were purely questions of fact to be determined by the jury. If the jury believed the evidence in support of respondents' theory that the parking of appellant company's car was a proximate cause of the accident, we are unable to interfere. [Citing cases.] In Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 98, 29 P.2d 781, 782, the court said: 'The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury.' [Citing cases.] "

The instructions given to the jury on the issues of negligence and proximate cause were correct in all respects.

Since no errors of law appear in the record, upon which the order granting the new trial could have been predicated, the order should be and is reversed.

PETERS, P. J., and WARD, J., concurred.

JOHNSON v. SACRAMENTO NORTHERN RY. et al.

Civ. 11921.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1942.

Rehearing Denied Oct. 28, 1942.

Hearing Denied Nov. 27, 1942.

1. Negligence ⇐83

The last clear chance rule which permits recovery by a plaintiff who has himself been guilty of negligence is an exception to the general rule of negligence, and its application is limited to those cases in which all of the essential elements of the rule are present.

2. Negligence ⇐83

The "last clear chance rule" applies only when the plaintiff has been negligent, and as a result is in a position of danger of which he is either not aware or from which he cannot escape by ordinary care, and defendant is aware of plaintiff's danger and inability to escape, and has a clear chance to avoid injuring plaintiff by the exercise of ordinary care, but fails to do so.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance Rule".

3. Negligence ⇐83

The "last clear chance rule" is generally applied to cases in which there is a distinct sequence of events which gives party sought to be charged a last clear chance to avoid consequences of injured party's original negligence after discovery of injured party's peril but ordinarily not to cases involving collisions between moving vehicles, where injured party is driving a rapidly moving vehicle in which act creating peril occurs practically simultaneously with happening of accident and does not give party sought to be charged a last clear chance to avoid the accident after discovering injured party's peril.

4. Automobiles ⇐227(3)
Railroads ⇐338

The "situation of danger" or "position of danger" within the meaning of the last clear chance rule as applicable to a plaintiff operating a moving vehicle is reached only when plaintiff, in moving toward path of an on-coming train or vehicle has reached a position from which he cannot escape by ordinary care, and it is not

enough that plaintiff was merely approaching a position of danger.

See Words and Phrases, Permanent Edition, for all other definitions of "Position of Danger" and "Situation of Danger".

5. Negligence ⇐83

Where a plaintiff is merely approaching a position of danger, he has the same opportunity to avoid the accident by ordinary care as has defendant, and ordinary rules of negligence and contributory negligence apply rather than exceptional rule of last clear chance.

6. Railroads ⇐348(6)

Testimony of motorcyclist relating to collision with defendant's train which was at variance with other undisputed evidence concerning skid and gouge marks made by motorcycle when brakes were applied, and which required belief that train started from a complete stop and, proceeding at a slow speed, covered practically an equal distance in the same time from the point of claimed stop to point of impact as was covered by motorcyclist after application of his brakes was "inherently improbable" and could not be relied upon to support verdict for motorcyclist.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable".

7. Railroads ⇐348(6)

Where motorcyclist on clear dry day was driving at excessive speed on broad main highway which was straight and practically level and saw warning signs, railroad track and defendant's slowly moving train when a long way off, and skidded from 175 to 180 feet after applying brakes, was brushed off motorcycle and run over by locomotive as motorcycle passed under locomotive which stopped within eight feet after impact, evidence failed to support verdict for motorcyclist based upon "last clear chance" doctrine.

8. Railroads ⇐338

Where a rapidly moving vehicle skids into the side of a train, the period of time remaining after the operator of the vehicle has reached a position of danger is too short to afford a motorman or engineer a last clear chance to avoid the accident, the negligence of both parties is "substantially concurrent", and a recovery may be had, if at all, only under the ordinary rules relating to negligence and contributory negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantially Concurrent Negligence".

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Kenneth Johnson, a minor, against Sacramento Northern Railway and others for injuries sustained in a collision between plaintiff's motorcycle and defendant's electric freight train. From a judgment for plaintiff and an order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals.

Reversed with directions.

C. W. Dooling, Arthur B. Dunne, and Dunne & Dunne, all of San Francisco, for appellants.

Elmer P. Delany and Joseph G. DeForest, both of San Francisco, for respondent.

SPENCE, Justice.

In this action to recover damages for personal injuries sustained in a collision between plaintiff's motorcycle and an electric freight train operated by the defendant company, judgment upon the verdict of the jury was entered in favor of plaintiff and against the defendant railroad company and the defendant Torbet, the motorman. Defendants made a motion for judgment notwithstanding the verdict and also a motion for a new trial which motions were denied. Defendants appealed from the judgment and also from the order denying their motion for judgment notwithstanding the verdict.

The accident occurred at about 2 o'clock on the afternoon of September 24, 1938, on Highway No. 40, at a point near Vacaville where the single track of the defendant railroad company crosses said highway approximately at a right angle. Plaintiff, a young man 19 years of age was traveling from San Francisco to Salt Lake City upon his motorcycle and was proceeding along said highway in an easterly direction at a rapid speed. The motorcycle was a 1930 model and the front brake thereon was disconnected. The train of the defendant

company consisted of an electric locomotive and a box car and it was proceeding in a southerly direction at a slow speed across said highway in making the trip from Vacaville to Fairfield. Plaintiff threw on his rear brake and locked the rear wheel of his motorcycle at a point about 175 to 180 feet from the track. After skidding the motorcycle for about 100 feet, plaintiff threw it on its right side and thereafter the motorcycle and plaintiff slid from the remaining distance of approximately 75 feet to the track, striking the side of the locomotive. The motorcycle continued on through under the locomotive to the east side of tracks but plaintiff was brushed off beneath the train where one of the wheels of the rear truck of the locomotive ran over his arm. The train was promptly stopped and while one of plaintiff's legs was crushed, it was not run over.

Upon the trial, defendants made a motion for a nonsuit and a motion for a directed verdict. The trial court stated that there was a serious legal question as to whether the case should be permitted to go to the jury but the motions were denied. The trial court instructed the jury that plaintiff was chargeable with negligence as a matter of law but nevertheless submitted the case to the jury upon the theory that the last clear chance doctrine might be applied. The main question raised on this appeal is whether there was sufficient evidence to sustain the verdict and judgment or, stated in another way, whether there was any substantial evidence to warrant the giving of the instructions on the doctrine of last clear chance. Defendants contend that there was not and our review of the record and of the authorities cited by respective counsel leads us to the conclusion that defendants' contention must be sustained.

[1, 2] Before examining the evidence in greater detail, it is appropriate to refer to the essential elements which must be present to warrant a recovery, under the last clear chance doctrine, by one who has himself been guilty of negligence. Said doctrine may be said to be an exception to the general rule and its application is limited to those cases in which all of said elements are present. In the frequently cited case of Palmer v. Tschudy, 191 Cal. 696, at page 700, 218 P. 36, at page 37, the court said, "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he *then* has a *clear* chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence." (Italics ours.) Substantially similar enumerations of said essential elements are found in many other cases See Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Chappell v San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; Holmes v. South Pac. C. Ry. Co., 97 Cal. 161, 31 P. 834; Curtis v. Pacific Electric Ry. Co., 15 Cal.App.2d 580, 59 P.2d 890; Korchak v. Pacific Electric Ry. Co., 9 Cal. App.2d 89, 48 P.2d 752.

[3] The doctrine is most frequently applied in situations where a driver or pedestrian has placed himself, through his own negligence, in, or in very close proximity to, the path of an oncoming train or vehicle and is thereafter discovered in such position of danger by the operator of the oncoming train or vehicle in ample time for the latter to avoid the accident by the exercise of ordinary care. In such cases there is a distinct sequence of events which gives the party sought to be charged time for effective action to avoid the consequences of the injured party's original negligence or in other words a *last clear* chance to avoid the accident *after* the discovery of the injured party's peril. It is only in exceptional circumstances that the doctrine may be applied to cases involving collisions between two moving vehicles or at least in cases where the injured party is driving a rapidly moving vehicle for in such cases the act creating the peril ordinarily occurs practically simultaneously with the happening of the accident and the party sought to be charged can not be said to have had a *last clear* chance to avoid the accident *after* the discovery of the injured party's peril. That the injured party may not ordinarily invoke such doctrine in cases involving collisions between moving vehicles and trains at rail-

road crossings is established by numerous decisions in this jurisdiction. Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359; Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, 164 P. 798; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Lambert v. Southern Pacific R. Co., 146 Cal. 231, 79 P. 873; Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 59 P.2d 617; Ellerman v. Pacific Electric Ry. Co., 7 Cal.App.2d 385, 47 P.2d 521; Barnett v. Atchison, etc., Ry. Co., 99 Cal.App. 310, 278 P. 443; Giannini v. Southern Pacific Co., 98 Cal. App. 126, 276 P. 618. In certain exceptional cases, cited by plaintiff, involving collisions between moving vehicles and trains, the last clear chance doctrine has been applied and we shall hereinafter refer to said cases.

We had occasion to deal at length with the question of the applicability of the last clear chance doctrine in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932, a case involving two moving automobiles at an intersection. In that case, we said at page 232, of 136 Cal.App., at page 936 of 28 P.2d, "While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery." See, also, Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, 265 P. 517; Giannini v. Southern Pacific Co., 98 Cal.App. 126, 276 P. 618; Barnett v. Atchison, etc., Ry. Co., 99 Cal.App. 310, 278 P. 443; Baecht v. Marsh Bros., etc., Inc., 118 Cal.App. 63, 4 P.2d 585; Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 59 P.2d 617; Erwin v. Morris, 10 Cal.App. 2d 168, 51 P.2d 149; Lasch v. Edgar, 46 Cal.App.2d 726, 116 P.2d 949; Behne v. Pacific Electric Ry. Co., 30 Cal.App.2d 437, 86 P.2d 843.

In Hutcheson v. Misenheimer, 169 Va. 511, 194 S.E. 665, at page 667, the court said, "The doctrine presupposes time for effective action. It is not applicable where the emergency is so sudden that there is no time in which to avoid the accident. Unless there is an appreciable difference in time between the earlier negligence of the plaintiff and the later negligence of the defendant and a last clear chance to avoid the accident afforded the defendant, which he fails to avail himself of, the doctrine does not apply." See, also, Barnes v. Ashworth, 154 Va. 218, 153 S.E. 711; Juergens v. Front, 111 W.Va. 670, 163 S.E. 618.

And in St. Louis S. W. R. Co. v. Simpson, 286 U.S. 346, 52 S.Ct. 520, 76 L.Ed. 1152, the United States Supreme Court refused to apply the last clear chance doctrine where the evidence showed that the negligence of the deceased and of the conductor were "substantially concurrent." The court there said at page 351 of 286 U.S., at page 522 of 52 S.Ct., at page 1155 of 76 L.Ed., "The transaction from start to finish must have been a matter of seconds only. * * * Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent."

[4, 5] It is also significant to note that the "situation of danger" or "position of danger," referred to in the authorities dealing with the last clear chance doctrine, is reached only when a plaintiff, moving toward the path of an oncoming train or vehicle, has reached a position "from which he cannot escape by the exercise of ordinary care." In other words, it is not enough, under the last clear chance doctrine, that plaintiff is merely approaching a position of danger, for until he has reached a position of danger, he has the same opportunity to avoid the accident by the exercise of ordinary care, as has the defendant. In such cases the ordinary rules of negligence and contributory negligence apply, rather than the exceptional doctrine of last clear chance. It is only in cases in which, after plaintiff reaches a position of danger, defendant has a last clear chance to avoid the accident by the exercise of ordinary care, and plaintiff has no similar chance, that the doctrine is applicable.

In Young v. Southern Pacific Co., 182 Cal. 369, at page 380, 190 P. 36, at page 40, a case involving a collision between a motorcycle and a slowly moving train, the court said, "The only evidence observable by the train employes was that the deceased was proceeding heedlessly forward. The last clear chance doctrine was not applicable until he arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care. Until he reached that point the train employes had a right to rely upon his continuing obligation to observe the approach of the train. * * * Under the last clear chance doctrine the peril which calls upon the train employes to act must be an actual one from which the imperiled party cannot escape by the exercise of ordinary care. Until the deceased reached the point from which he could not escape injury by the exercise of ordinary care, either by stopping or accelerating his pace, the doctrine of last clear chance does not apply." And in Young v. Southern Pacific Co., 189 Cal. 746, at page 757, 210 P. 259, at page 263, the second appeal of the same case, the court said, "* * * while the testimony last referred to may have shown that the deceased, when first sighted, was approaching a position of danger, still it does not show that at that time he was in a position of inescapable danger. And until he was in a position of inescapable danger the trainmen were not obligated to apply the emergency brakes * * *."

In Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, at page 6, 164 P. 798, at page 800, a case involving a collision between an automobile and a street car, the court said, "The doctrine of the last clear chance could not become applicable until Arnold's negligence had brought him so close to the track that he could not by ordinary care either stop or turn aside so as to avoid a collision, or until his conduct showed that he intended to hazard a crossing ahead of the car, and when these conditions became apparent the utmost care by either party would have been unavailing to prevent the accident." See, also, Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 P. 119; Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am.St.Rep. 68; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Choquette v. Key System Transit Co., 118 Cal.App. 643, 5 P.2d 921.

We now turn to a further consideration of the evidence in this case. The accident occurred on a clear, dry day on the broad main highway above mentioned. The highway at that point consists of the main concrete highway, twenty feet in width, with asphalt shoulders, each ten feet in width, at the sides thereof. The right of way for said highway is 100 feet in width, and dirt shoulders, which are practically level, are at either side of the asphalt shoulders. The highway is straight and practically level for a long distance in either direction. Near Vacaville, the single track line of the defendant company crosses said highway. There are numerous warning signs and signals in the vicinity of the crossing. A detailed description of these signs and signals need not be given, as plaintiff admittedly saw the signs, the track and the train when a long distance from the crossing. Suffice it to say that as plaintiff approached the crossing from the west, he first crossed the intersection of the highway and Davis Street, where a large warning sign hung over the highway. This sign was 402 feet west of the crossing and plaintiff saw said sign and also saw the train as he was approaching said sign. The motorman likewise saw plaintiff as he was approaching said sign, and nothing thereafter obstructed the view of either.

It is not claimed that the train was operated at a rapid speed at any place in the vicinity of the crossing. It admittedly traveled slowly, the highest estimate of its speed at any place in the vicinity of the crossing being ten miles per hour. Other estimates were all lower. On the other hand, plaintiff's own estimate of his lowest speed before applying his brake was thirty-five to forty miles per hour. All other estimates of plaintiff's speed were higher and indicated that plaintiff was traveling at fifty-five to sixty miles per hour when he applied his brake. Plaintiff conceded that he was merely estimating his speed, as his motorcycle was not equipped with a speedometer. He had passed an automobile, which was traveling in the same direction, about one or two miles before reaching the crossing. The driver of said automobile was Mr. Hecker, an employee of the Motor Vehicle Department. Mr. Hecker testified that he himself was traveling at forty-eight or forty-nine miles per hour, as shown by his speedometer; that plaintiff was traveling in excess of fifty miles per hour upon passing; and that plaintiff

thereafter pulled away so that plaintiff was about 1,000 feet ahead of him at the time the accident occurred. One of the other disinterested witnesses, who was at the Davis Street intersection, estimated plaintiff's speed at sixty miles per hour.

The evidence regarding the skid marks and gouge marks stands uncontradicted. Plaintiff testified that when he applied the brake, the rear wheel locked and skidded. He also testified that he laid his motorcycle on its side "because that makes a motorcycle stop quick; the wheels are not turning and the whole side of the motorcycle is against the ground digging in and it drags down faster. * * *" When asked as to the most effective way to stop a motorcycle, plaintiff testified, "The most effective way is to throw it broadside and lay it on its side and let it dig in," which method would stop it "quicker than any brakes could." Testimony as to the length and nature of the marks was introduced through several witnesses. The skid marks of the motorcycle started on plaintiff's right half of the concrete highway at a point 175 to 180 feet from the track. These skid marks were broken slightly, which breaking was no doubt caused by the bounding of the motorcycle after the application of brakes, as testified by numerous witnesses. These skid marks and gouge marks formed a slightly curved line, which crossed onto the asphalt shoulder on plaintiff's right side of the highway as they approached the track. The skid marks ended about seventy-five feet west of the track, and the gouge marks continued on from that point to the track. There is no serious dispute concerning the length of these marks or the fact that plaintiff's motorcycle made them, as plaintiff's counsel says in his brief, "He applied the brake of the motorcycle with such force that burnt rubber marks were left on the concrete for the distance described by defendants' witnesses, and gouge marks on the south asphalt shoulder for seventy-five feet, according to the measurement of those marks by Highway Officer Olsen."

There are other facts as to which there is no real conflict in the evidence. That point of impact with respect to the highway was near the center of the south asphalt shoulder or slightly south thereof. In other words, said point was at least fifteen feet south of the center of the concrete portion of the highway. Plaintiff interprets certain evidence as indicating that the point of impact may have been slightly further south and on the dirt shoulder rather than the asphalt shoulder, but we do not believe the evidence to which plaintiff refers, even if we assume that the point of impact may be inferred therefrom, strengthens plaintiff's position. After the impact, the train stopped after traveling not more than approximately eight feet. As to the point of impact with respect to the train, we likewise find no real conflict in the evidence. Defendants claim that the impact was on the side of the locomotive and to the rear of the front truck of the locomotive. Plaintiff claims in his briefs that there was evidence from which the jury could have inferred "that the point of contact was in front of, or right at, the front truck of Motor 601." We find no evidence from which the jury could have inferred that the contact was at a point in front of the front truck or that plaintiff's arm may have been run over by the front truck rather than the rear truck, as suggested in plaintiff's briefs. The testimony of every witness, including plaintiff, shows conclusively that plaintiff and the motorcycle slid into the side of and passed underneath the locomotive between the trucks, and that plaintiff's arm was run over by a wheel of the rear truck. Plaintiff had originally testified on his deposition with respect to the point of impact on the train and stated that he was pretty sure it was the box-car. On reading his deposition, he substituted the word "engine" for "box-car." Upon the trial, he testified that he went underneath the locomotive from the side; that he had run into the train rather than the train running into him; and that a wheel of the rear truck ran over his arm.

Plaintiff was questioned with respect to his ability to stop his motorcycle under the circumstances existing at the scene of the accident and he testified that going at a speed of thirty-five or forty miles per hour, he could have stopped the motorcycle, using only the rear brake, in around 140 feet or a little less.

Several witnesses, including disinterested witnesses, were at or near the scene at the time and testified as to the relative movements of the train and motorcycle shortly before the accident happened. The testimony of all of said witnesses, with the exception of plaintiff, was in substantial accord.

The testimony of said witnesses shows that the train had proceeded slowly down the track from its starting point in Vaca-

ville, which was only a short distance away; that the train had slowed down almost to a stop as it approached the highway for the purpose of making a check of the operation of the signals and of the traffic on the highway; that one or more automobiles proceeding westerly had stopped in response to the signals and had then proceeded westerly across the tracks ahead of the approaching train; that the motorman saw plaintiff approaching from the west when plaintiff was beyond the overhanging sign at Davis Street and some 500 to 700 feet away from the track; that the motorman then glanced at an automobile which had been proceeding westerly and had stopped east of the tracks in response to the signal; that the motorman then slightly accelerated the speed of the train to cross the highway, which speed was never more than eight to ten miles per hour at the highest estimate; that after starting across the highway, the motorman again saw plaintiff, who was then 250 to 300 feet from the track; that plaintiff proceeded on toward the track and applied his brake when 175 to 180 feet from the track, resulting in the skidding and bouncing of the motorcycle; that the motorman immediately applied the brakes to stop the train, but that plaintiff and his motorcycle slid into the side of the train in the manner above described. While the testimony of the train crew was to the effect that it was difficult to estimate plaintiff's speed as he was approaching toward them, they estimated that just prior to applying his brakes, plaintiff appeared to be going about fifty-five miles per hour. As above indicated, other witnesses estimated the speed at that time at from fifty-five to sixty miles per hour.

Plaintiff's testimony differed from that of all other witnesses in certain particulars. He testified that he saw the train when he was near the overhanging sign and that the train was at a complete stop; that he approached the track at from thirty-five to forty miles per hour; that said complete stop had been made by the train, with the front of the locomotive about seven feet north of the northerly asphalt shoulder; that he was within 100 feet of the track when the train started up from said complete stop and that he thereafter threw on his brakes, locked his wheel, laid the motorcycle on its side and slid under the locomotive, as above described. It is upon this evidence that plaintiff relies, and he claims that said evidence was sufficient to support the verdict and judgment.

[6] The inherent improbability of said testimony of plaintiff is at once apparent. Said testimony, insofar as it related to the speed of the motorcycle and the place where the brakes of the motorcycle was applied, was at variance with other evidence which was undisputed, including that concerning the skid and gouge marks made by the motorcycle when the brake was applied. Warwick v. Maneely, 40 Cal.App.2d 235, 104 P.2d 831. Said undisputed evidence showed that while plaintiff could have stopped his motorcycle under the circumstances within 140 feet by the application of the brake alone, if he had been traveling between thirty-five and forty miles per hour, he was traveling at such speed that he could not stop said motorcycle within 175 to 180 feet by the application of the brake and the further use of the more effective method of laying the motorcycle on its side and letting it "dig in." But even disregarding for the moment said undisputed testimony regarding the marks made by the motorcycle upon the highway, and considering only the testimony of plaintiff himself regarding the speed of the motorcycle and the place where the brakes were applied in relation to his testimony regarding the movement of the train, the inherent improbability of said testimony is still apparent. It would mean that the train, starting from a complete stop and proceeding at a slow speed, covered practically an equal distance in practically the same time in traveling from the point of the claimed complete stop to the point of impact as was covered by plaintiff after the application of his brake. It requires no further elaboration to show the inherent improbability of these portions of plaintiff's testimony.

[7] But as we read plaintiff's briefs, he would apparently have us accept only portions of his testimony and only portions of the testimony offered by defendants, and then, by a process of elaborate calculation, applied to the selected portions of the testimony, determine that there was some evidence from which the jury could have reasonably concluded that the defendant motorman had a last clear chance to avoid the accident. We have endeavored to follow the calculations made upon the testimony so selected, but are unable, under

any view of the evidence, to find any substantial evidence which would support a verdict and judgment based upon the last clear chance doctrine.

It must be remembered that the last clear chance doctrine involves just what its name implies. As this court said in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, at page 227, 28 P.2d 932, at page 934, "In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had a *chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party." See, also, Behne v. Pacific Electric Ry. Co., 30 Cal.App.2d 437, 86 P.2d 843; Bogardus v. Snyder, 17 Cal.App.2d 411, 62 P.2d 153; Read v. Pacific Electric R. Co., 185 Cal. 520, 197 P. 791.

[8] It must be further remembered that considerable distance is covered by a rapidly moving vehicle in a very short space of time. Such distance may be calculated precisely, but it is sufficient for our purposes to say that an approximate calculation of travel in feet per second may be made by multiplying miles per hour by 1.5. Thus a vehicle going forty miles per hour travels approximately sixty feet per second and a vehicle going sixty miles per hour travels approximately ninty feet per second. As above indicated, a rapidly moving vehicle approaching a railroad crossing does not reach a "position of danger" within the meaning of last clear chance doctrine, until it reaches a point where it can no longer be stopped or turned aside to avoid the collision. Up to that point, it is merely approaching a position of danger and the motorman need not assume in advance that the driver of the vehicle will pass from a position of safety without taking proper precautions. If the driver continues on without taking proper precautions, such as reducing his speed, it is clear that he will pass from a position of safety and into a position of danger in a fraction of a second. The last clear chance cannot come into operation until after the vehicle has reached such position of danger and ordinarily, in the case of rapidly moving vehicles, the remaining time is too short to afford to the motorman a *last clear chance* to avoid the accident. It is for this reason that said doctrine has ordinarily been held inapplicable to cases involving accidents between moving vehicles and trains at railroad crossings, and that it has been quite consistently held inapplicable in cases where the vehicles were moving as rapidly as was plaintiff's motorcycle. We have found no authority in which the doctrine has been applied where a rapidly moving vehicle has skidded into the side of a train. In such case, a recovery may be had, if at all, only under the ordinary rules relating to negligence and contributory negligence.

The comments last made sufficiently distinguish the authorities upon which plaintiff relies. Chappell v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73, involved an automobile stalled on the track. Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58, involved a pedestrian standing between double tracks with her path blocked by a standing car. Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85, involved what the court termed "peculiar circumstances." The deceased was engaged with a group of others in a bicycle race and spectators were lined along the sides of the road. Despite the warnings of spectators, the street car moved slowly across the path of the group of bicyclists. The court said on page 520 of 140 Cal., on page 17 of 74 P., 63 L.R.A. 238, 98 Am.St. Rep. 85: "There is no parallel between a case presenting such circumstances and the ordinary case where a person is discovered walking or riding towards a railroad track." Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, 267 P. 758, is another case involving peculiar circumstances. The automobile there was proceeding in the opposite direction from the street car under such circumstances that it was trapped and could not be extricated from its position of danger. Rasic v. Schultheiss, 121 Cal.App. 560, 9 P.2d 550, involved a pedestrian struck by an automobile. Paulos v. Market Street Ry. Co., 136 Cal.App. 163, 28 P.2d 94, involved a horse drawn vehicle which turned to cross a street car track and arrived at the track well ahead of the car.

The court there said at page 169 of 136 Cal.App., at page 96 of 28 P.2d, that "Appellants do not deny that the evidence warranted instructions upon the doctrine of the last clear chance." None of said authorities presents facts which are similar to those presented by the record before us.

Here the negligence of plaintiff and the negligence, if any, of the motorman were, in the words of the United States Supreme Court "substantially concurrent" and calculations such as those made by plaintiff are "unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent." St. Louis S. W. Ry. Co. v. Simpson, 286 U.S. 346, 52 S.Ct. 520, 522, 76 L.Ed. 1152. And as was said in Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, at page 121, 265 P. 517, at page 519, "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance." There is no escape from the conclusion that the record before us presents a case where the "negligence of the injured party was contemporaneous, concurrent, continuing, and contributory" with the negligence, if any, of the motorman and such a case is excluded from the operation of the last clear chance doctrine. Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259, 262.

We therefore conclude that the case is governed by the general rules of negligence and contributory negligence, rather than by the last clear chance doctrine, as shown by authorities above cited dealing with ordinary collisions between moving vehicles and trains at railroad crossings. It follows that the evidence was insufficient to sustain the verdict and judgment and that defendants' motion for judgment notwithstanding the verdict should have been granted. In view of these conclusions, it becomes unnecessary to consider the other points raised in defendants' briefs.

The judgment and the order denying defendants' motion for judgment notwithstanding the verdict are reversed and the trial court is directed to enter its order granting said motion.

NOURSE, P. J., and STURTEVANT, J., concurred.



54 Cal.App.2d 651

SANDERS v. CITY OF LONG BEACH.

Civ. 13454.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1942.

1. Municipal corporations ⇐857

In action against city for injuries sustained from a fall when plaintiff-invitee was descending steps in municipal auditorium room in which motion pictures were being shown, city's negligence was for jury under evidence that the room was unlighted and unattended, and that room had no signs warning of the stairs and that stairs had no handrail. Gen.Laws 1937, Act 5619.

2. Municipal corporations ⇐857

In action against city for injuries sustained from a fall when plaintiff invitee was descending steps in a municipal auditorium room, evidence that plaintiff had been invited to enter an unattended room, which had been impenetrably darkened to show a motion picture, did not establish that plaintiff was contributorily negligent as a matter of law so as to preclude recovery.

3. Municipal corporations ⇐848, 855

Where plaintiff, a member of the general public while attending a "know your city week" conducted by city in its auditorium had entered a darkened auditorium room where pictures were being shown at city's invitation, plaintiff was an "invitee" to whom city owed duty of ordinary care for her safety, and plaintiff was entitled to assume that she would not be exposed to

danger coming to her only through violation of city's duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Appeal and error ⇐927(3, 7)

When considering a motion for nonsuit or for directed verdict, the appellate courts must view the evidence in the light most favorable to plaintiff.

5. Municipal corporations ⇐742(5)

In action against city for injuries sustained from a fall when plaintiff invitee was descending steps in a municipal auditorium room in which motion pictures were being shown, evidence established that city, in operating the auditorium to conduct a "know your city week" to advertise the city and to instruct residents and visitors concerning municipal departments, was acting in a "proprietary" rather than a "governmental capacity" rendering city liable for damages from its officers' negligence independently of the Public Liability Act. Gen.Laws 1937, Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Capacity" and "Proprietary Capacity".

6. Municipal corporations ⇐848

Where municipal auditorium in which city was conducting a "know your city week" was operated by city in a proprietary capacity and evidence was prima facie sufficient on private proprietary standards to establish city's negligence resulting in injuries to plaintiff invitee when she fell down steps in an auditorium room in which motion pictures were being shown, notice to a responsible officer of city such as would be required under Public Liability Act became immaterial. Gen.Laws 1937, Act 5619.

7. Municipal corporations ⇐724
Schools and school districts ⇐89

A municipality is protected from liability at common law while exercising the delegated functions of sovereignty which include police regulation, crime prevention, preservation of health, fire prevention, care of the poor, and education of the young.

8. Municipal corporations ⇐725

While schoolhouses, city halls, jails, and fire houses are governmental instrumentalities and the city is not liable at common law for injuries to persons sustained therein, the rule does not apply to other buildings constructed by a municipality, though for the benefit of its people.

9. Municipal corporations ⇐725, 733(3, 4), 734

A city is engaging in a "proprietary activity" for negligence in which it is liable without notice to a responsible officer of the city, in operating a hospital, an electric light plant, a water system, a garage for repair of automobiles used in carrying out governmental functions, or an airport, and it is not necessary that city derive revenue from carrying out of such activities. Gen.Laws 1937, Act No. 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Proprietary Activity".

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Elizabeth Sanders against the City of Long Beach, a municipal corporation, for injuries sustained from a fall while plaintiff was descending steps in a municipal auditorium owned and operated by defendant. From a judgment for plaintiff, after denial of defendant's motions for nonsuit and for directed verdict, defendant appeals.

Affirmed.

George P. Kinkle, of Los Angeles, and Clifford E. Hayes, of Long Beach, for appellant.

Fred M. Riedman, of Long Beach, for respondent.

SCHAUER, Presiding Justice.

Defendant City of Long Beach appeals from the judgment upon a verdict, entered against it and in favor of plaintiff.

The evidence shows that on May 27, 1940, defendant city was the owner and operator of a municipal auditorium, and had invited the general public to attend a "Know Your City Week" then being conducted by defendant in such auditorium. At about 8:00 p.m. of said day plaintiff was in the convention hall of the auditorium, where a performance presented by defendant had just been completed. It was then announced that there would be nothing further in the convention hall for about half

an hour, but that *"there was some pictures being shown"* in another room, known as Convention Room No. 2, and anyone wishing to see them could attend. Convention Room No. 2 was reached by means of a lighted hallway leading to a doorway into the room. Inside the doorway the room maintained the same floor level for about eight feet and then dropped off by means of four stair steps down to a lower level upon which were placed the seats for spectators. Plaintiff proceeded to this room, where the showing of the motion pictures had *already started,* as was perhaps to be expected from the wording of the announcement as related by plaintiff in the language above quoted. She found the room unlighted except for the illumination reflected by the screen in the front part of the room and by the motion picture projector in the middle, saw no usher or other attendant, walked slowly into the room through a crowd standing around the door, and upon arriving at the four steps stumbled and fell to the floor. In so falling she struck her head upon one of the seats and received the injuries on account of which this action was brought. Plaintiff had not previously been in this room and did not know of the steps. On cross-examination she testified the room was so dark "you could not see your hand before your face." There were no stair lights, and it was stipulated that there was no warning sign telling of the stairs and no hand rail to support or guide patrons, and also that "there was an ordinance for the rental of the auditorium at various schedules, various events."

[1] At the conclusion of plaintiff's case defendant moved, first, for a nonsuit, and, when that motion was denied, for a directed verdict; this motion, also, was denied. The case then went to the jury, without the introduction of evidence by defendant. Defendant here contends that these motions should have been granted upon each or either of two grounds: (1) That plaintiff's evidence showed her to be guilty of contributory negligence as a matter of law, in that she proceeded into a "place of impenetrable darkness," and (2) that there was no showing of notice of any defective or dangerous condition to any responsible officer of defendant city a sufficient length of time to enable it to have remedied the same, as required by the Public Liability Act of 1923, Stats.1923, p. 675, Deering's Gen.Laws, 1937, Act 5619, p. 2630. A third ground—that there was no evidence of negligence on the part of defendant—was urged at the trial, in support of the motions for nonsuit and for a directed verdict, but defendant apparently concedes on this appeal that that question was properly for the jury if the defendant had notice as provided for in the Public Liability Act or if its activity was proprietary in character. In the latter case the liability of the city for the negligent conduct of its servants or the unsafe condition of its property would be the same as that of a private employer or owner. (Peccolo v. City of Los Angeles, (1937) 8 Cal.2d 532, 536, 66 P.2d 651; General Petroleum Corp. v. Los Angeles, (1937) 22 Cal.App.2d 332, 338, 70 P.2d 998, 72 P.2d 551).

[2] In support of its first ground—that plaintiff was guilty of contributory negligence as a matter of law—defendant relies chiefly upon the case of Bruce v. Risley, (1936), 15 Cal.App.2d 659, 59 P.2d 847, wherein at the conclusion of plaintiff's case the court ruled that plaintiff was guilty of contributory negligence as a matter of law and directed a verdict in favor of defendant. It there appeared that plaintiff as a prospective tenant was inspecting a storeroom owned by defendant. At the rear of the room was a door opening on a platform leading to a flight of stairs to the basement. Believing there was another room on the other side plaintiff opened the door, lighted a match which enabled him to see that the floor beyond the doorway for a distance of about six inches resembled the floor of the storeroom, and when the match went out lighted another which enabled him to see not farther than ten inches beyond him, advanced through the doorway, and through an opening at the side of the stairway fell eight feet to the basement floor below. The appellate court, in upholding the trial court's ruling, stated (at page 663 of 15 Cal.App.2d, at page 849 of 59 P.2d): "It is the established rule in this state that the ruling of a trial court as to whether or not a given state of facts presented to it establishes negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. [Citations.]," and then concluded that plaintiff had fully appreciated the warning of the darkness and in proceeding without sufficient illumination had been guilty of negligence contributing to the accident. The ruling on the facts in that case cannot be applied, however, where, as here, plaintiff walks along a course she had been specifically invited by defend-

ant to follow and enters a room which was, and which she had reason to anticipate would be, darkened as an incident to the very purpose for which she had been invited to enter it—the showing of a motion picture. Even assuming that the darkness could be defined as "impenetrable," that fact may well have tended to reassure plaintiff of the safe condition of a room being used as a theater and which she was invited to enter rather than to warn her of unseen danger if she carried out in full her acceptance of defendant's invitation and walked into the room in search of a seat.

[3, 4] Defendant owed to plaintiff, an invitee, the duty of exercising ordinary care for her safety (see Dingman v. A. F. Mattock Company, (1940) 15 Cal.2d 622, 624, 104 P.2d 26; McStay v. Citizens' Nat. T. & S. Bank, (1935) 5 Cal.App.2d 595, 599, 43 P.2d 560; Koppelman v. Ambassador Hotel Co., (1939) 35 Cal.App.2d 537, 540, 96 P.2d 196; Emery v. Pac. T. & T. Co., (1941) 43 Cal.App.2d 402, 406, 407, 110 P.2d 1079; Matherne v. Los Feliz Theater, Cal.App. (1942) 128 P.2d 59; Pease v. San Diego U. Sch. Dist., Cal.App. (1942) 128 P.2d 621), and plaintiff was entitled to assume that she would not be exposed to a danger that would come to her only through a violation of defendant's duty to her (Hechler v. McDonnell, (1941) 42 Cal.App.2d 515, 517, 109 P.2d 426; Beck v. Sirota, (1941) 42 Cal.App.2d 551, 557, 109 P.2d 419; Hanson v. Cordoza, (1930) 106 Cal.App. 500, 505, 290 P. 62; Gornstein v. Priver, (1923) 64 Cal.App. 249, 259, 221 P. 396; and see Sommerfield v. Miratti, (1942) 49 Cal.App.2d 450, 454, 121 P.2d 746). The absence of stronger illumination and of an attendant may have suggested to plaintiff that no dangers were present which would reasonably require disclosure, and have led her to believe that she was safe in proceeding into the room. Viewing the evidence in the light most favorable to plaintiff, as required when considering a motion for a nonsuit (Archer v. City of Los Angeles, (1941) 19 Cal.2d 19, 23, 119 P.2d 1; Robinson v. George, (1940) 16 Cal.2d 238, 241, 105 P.2d 914; see McStay v. Citizens' Nat. T. & S. Bank, supra, (1935) 5 Cal.App.2d 595, 600, 43 P. 2d 560) or for a directed verdict (Estate of Flood, (1933) 217 Cal. 763, 768, 21 P.2d 579; Estate of Lances, (1932) 216 Cal. 397, 400, 401, 14 P.2d 768; Collins v. Nelson, (1936) 16 Cal.App.2d 535, 537, 61 P.2d 479), we conclude that no abuse of discretion appears in the trial court's ruling that the question of plaintiff's contributory negligence was for the jury (see Bruce v. Risley, supra, (1936) 15 Cal.App.2d 659, 663, 59 P.2d 847).

Defendant refers us also to the cases of Powers v. Raymond, (1925) 197 Cal. 126, 239 P. 1069; Hilsenbeck v. Guhring, (1892) 131 N.Y. 674, 30 N.E. 580, and Rohrbacher v. Gillig, (1911) 203 N.Y. 413, 96 N.E. 733 (all three of which are cited in 15 Cal.App.2d on page 664 of the opinion, 59 P.2d 847, in Bruce v. Risley, supra); and to the case of Medcraft v. Merchants' Exchange, (1931) 211 Cal. 404, 295 P. 822. In each of those cases the plaintiff was held to be guilty of contributory negligence but in none of them do the facts correspond with those in the case now before us. In Powers v. Raymond, supra, plaintiff, a hotel employee, was injured as the result of a fall while walking late at night along a dark and unlighted bypath on the hotel grounds instead of using the main well-lighted roadway provided by the hotel; she was held to be a mere licensee as to the path she took, and a verdict was directed in favor of defendants. In Hilsenbeck v. Guhring, supra, plaintiff opened the wrong door off of an apartment house hall, found only darkness confronting him, and upon proceeding without securing a light fell down a flight of stairs instead of entering the room he had sought. In Rohrbacher v. Gillig, supra, plaintiff ignored a broad well-lighted and plainly apparent stairway provided as the means of reaching the upper floors of a building, walked down a dark hall in search of another stairway, saw a door half open, stepped through it, and fell down an elevator shaft. In Medcraft v. Merchants' Exchange, supra, plaintiff, seeking a washroom, ignored a lighted room which was the one he sought, opened another door, stepped through it into darkness, and dropped down an air shaft; in granting a nonsuit the court held plaintiff to have been a mere licensee when he undertook to enter the darkened space. In those cases, which we may designate as wrong-area or wrong-room cases, we find nothing impelling us to change our view that plaintiff cannot be said to be guilty of contributory negligence as a matter of law where, in acceptance of an express invitation she pursues the designated path and proceeds into the very room which she was

invited to enter and which she could expect to find in substantially the darkened condition in which she actually found it. Consistent with this conclusion are the cases of Brinkworth v. Sam Seelig Co., (1921) 51 Cal.App. 668, 197 P. 427; Roach v. Wells Fargo Bk. & Union Trust Co., (1929) 102 Cal.App. 380, 282 P. 967; Hodge v. Weinstock, Lubin & Co., (1930) 109 Cal.App. 393, 293 P. 80; Walsh v. Maurice Mercantile Co., (1937) 20 Cal.App. 2d 45, 66 P.2d 181, and Thompson v. B. F. Goodrich Co., (1941) 48 Cal.App.2d 723, 120 P.2d 693. In each of those cases it was held that the question of contributory negligence was for the jury where the plaintiff invitee tripped and fell over an unexpected but plainly visible obstruction on the floor of fully lighted premises to which the invitation extended, but which obstruction the plaintiff had failed to see. If with the ability to do so, plaintiff simply fails to look down and see an obstruction and is not contributively negligent as a matter of law, then it appears to us that the situation is even more strongly in favor of plaintiff in the instant case, where no means was provided by which she could have seen the unexpected danger, if she entered while a picture was being projected, and where, in the ordinary course of events, it must or should have been contemplated that invitees would so enter.

[5, 6] In answer to the second of defendant's grounds of its motions for nonsuit and for a directed verdict, plaintiff relies upon the cases of Boothby v. Town of Yreka City, (1931) 117 Cal.App. 643, 4 P.2d 589, and Chafor v. City of Long Beach, (1917) 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106, as establishing that defendant in operating the auditorium here involved was acting in a proprietary rather than in a governmental capacity and was therefore liable for damages resulting from the negligence of its officers, agents, and employees, independently of the Public Liability Act (see Davoust v. City of Alameda, (1906) 149 Cal. 69, 70, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann. Cas. 847; Kellar v. City of Los Angeles, (1919) 179 Cal. 605, 607, 178 P. 505). We conclude that the Chafor case, wherein the law pertaining to this question was thoroughly and clearly discussed and explained, does settle conclusively that defendant's auditorium here was being maintained and operated by it in a proprietary capacity. Therefore, since the evidence is prima facie sufficient to establish negligence on private proprietary standards, the question of notice to a responsible officer of defendant city, such as would be required to meet the conditions of the Public Liability Act, becomes immaterial. Defendant argues that the fact that in both the Boothby and the Chafor cases the premises on which the respective injuries occurred were leased out by the defendant cities at the times of the accidents distinguishes those cases from the one at bar, inasmuch as defendant city here was not renting out the auditorium on the occasion of the Know Your City Week. The opinion in the Chafor case itself refutes this argument. It is there stated (at page 483 of 174 Cal., at page 672 of 163 P., L.R.A.1917E, 685, Ann. Cas.1918D, 106):

"* * * it is important to note that the true test does not rest upon the determination as to whether or not the municipality is reaping a monetary gain. * * * In other words, the act does not become governmental merely by virtue of the fact that the city from the performance of it reaps no direct pecuniary return. * * *"

"[174 Cal. page 491, 163 P. page 675] The conclusion already expressed concerning the general purpose of the construction of this auditorium, and the specific purpose of its use upon the day in question does not at all depend upon the evidence which was introduced to the effect that the city did not charge any rental upon the day in question, and that it did rent portions of the auditorium for purposes of private gain. The fact that no rental was charged upon this particular day is in no wise determinative of the question * * *."

[7, 8] The evidence here does not disclose the exact purpose for which defendant city was conducting the Know Your City Week, although there was testimony to the effect that "each department had charge of its own exhibits," and that the pictures on the occasion here involved "were to have been lifeguard pictures taken by one of the local lifeguards and were to have been followed by a park picture put on by the superintendent of municipal parks." Apparently, therefore, the object was to advertise the city generally and give instruction to residents and visitors of defendant city concerning the various departments of the municipality. The Chafor case further establishes that such use of the build-

ing is not governmental. The true basis of distinction between governmental and proprietary activities is set forth at page 487 of the opinion (in 174 Cal. 478 at page 674 of 163 P., L.R.A.1917E, 685, Ann.Cas. 1918D, 106, in the following words:

"* * * the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle. [Citation]

"But it is of course true that modern cities and towns enter upon many forms of activity, operate utilities for the benefit of the inhabitants, and provide many means for the easing or improving of the condition of the people that were never dreamed of at common law. Nevertheless the uniform holding as to all such activities on principles manifestly just to the people themselves is that no matter how beneficial they may be in a general sense to the inhabitants of the municipality, unless they are governmental in their essence, the municipality's conduct in managing them is controlled by the same rules of liability that apply to an individual. Thus, while schoolhouses, city halls, jails, fire houses, are with much uniformity held to be instrumentalities for governmental purposes, no such rule applies to other buildings constructed by a municipality, though for the benefit, convenience, or advantage of its people. * * *

"[174 Cal. page 489, 163 P. page 674] * * * True, it [the auditorium] was maintained for the benefit of the municipality in the sense that it afforded the populace a meeting place for many forms of amusement and instruction. But in all these respects it differed no whit from any other auditorium or assembly hall built and maintained by private capital for the same purposes. The city had full charge of it, could let it out, or refuse to let it out at its pleasure. * * * That in any individual instance the city allowed it to be used without a rental charge, no more affected the governing principle than it would be affected if a private proprietor did the same thing."

The principle involved is that quoted in both the Chafor case and the case of Davoust v. City of Alameda, supra, from Dillon on Municipal Corporations. The quotation, as stated on page 72 of 149 California Reports, on page 761 of 84 P., 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847 (Davoust v. City of Alameda) is: "In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself; * * * but in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."

[9] That the defendant city was conducting the Know Your City Week to advertise itself and give instruction concerning its various activities and the operation of its several departments did not make the function of the building during that week a governmental one. It is established in this state that a city is engaging in a proprietary activity in operating its own hospital (Bloom v. San Francisco, (1884) 64 Cal. 503, 504, 3 P. 129); its own electric-light plant (Davoust v. City of Alameda, supra, (1906) 149 Cal. 69, 72, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847; Sincerney v. City of Los Angeles, (1921) 53 Cal. App. 440, 447, 200 P. 380); its own water system (South Pasadena v. Pasadena Land, etc., Co., (1908) 152 Cal. 579, 593, 93 P. 490; see Ritterbusch v. City of Pittsburgh, (1928) 205 Cal. 84, 269 P. 930, 61 A.L.R. 448); its own garage for the repair of its own cars, *even though such cars be used in the carrying out of its governmental functions* (Bertiz v. City of Los Angeles, (1925) 74 Cal.App. 792, 796, 241 P. 921); or its own airport (Coleman v. City of Oakland, (1930) 110 Cal.App. 715, 719, 295 P. 59). That the city derives revenue from the carrying on of any of these activities is not the essential factor which makes such activities proprietary in nature (Chafor v. City of Long Beach, supra, (1917) 174 Cal. 478, 483, 491, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106; Kellar v. City of Los Angeles, supra, (1919) 179 Cal. 605, 610, 178 P. 505; Crone v. City of El Cajon, (1933) 133 Cal.App. 624, 629, 24 P.2d 846). Rather, it is that they do not fall

within those functions which are essentially governmental in character.

Defendant has referred us to the cases of Meyer v. San Francisco, (1935) 9 Cal. App.2d 361, 49 P.2d 893, and Crone v. City of El Cajon, supra. Those cases, however, do not cause us to change our opinion that the jury was legally justified in finding and the trial court in holding, that defendant city here was acting in a proprietary capacity in operating the building involved. Both cases, so far as pertains to matters here involved, are based upon the earlier case of Kellar v. City of Los Angeles, supra, which is not contra to, but which relies upon doctrine declared in, the Chafor case. In the Kellar case, plaintiff's injuries were suffered at a summer camp operated by defendant city, and our Supreme Court in holding the operation of the camp to be a governmental function likened the enterprise to public parks and stated (at page 609 of 179 Cal. 605, at page 506 of 178 P.): "Like the public parks, they [such camps] are referable solely to the duty of maintaining the public health, and have nothing of the nature of an ordinary business enterprise." The injuries involved in the Meyer case and in the Crone case occurred while the respective plaintiffs were enjoying the facilities of public parks, apparently found to have been maintained by the defendant municipalities for the benefit of the public health. Maintenance of public health is a governmental function but operation of a public auditorium, including its use to advertise the owner-city, is a proprietary activity.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

21 Cal.2d 26

BUSINESS MANAGEMENT CORPORATION v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STATISTICS AND LAW ENFORCEMENT, et al.

L. A. 18363.

Supreme Court of California.

Oct. 1, 1942.

Licenses ⇐29

A motion picture employment agency which maintained a permanent office in Beverly Hills, but which stated in its application for license that it intended to call on the average of several times a week on behalf of its clients at various motion picture studios in Los Angeles to secure and negotiate employment for its clients, was required to pay higher license fee applicable in Los Angeles because the city of Los Angeles was one of the "places" of the agency's operation within statutory provision that no license shall protect any places other than those designated in the license. St.1937, p. 230 et seq., § 1550 et seq., as amended; St.1939, p. 2111, § 1588; St.1941, p. 2648, § 1593.

See Words and Phrases, Permanent Edition, for all other definitions of "Place".

In Bank.

Mandamus proceeding by the Business Management Corporation, petitioner, against the Department of Industrial Relations, Division of Labor Statistics and Law Enforcement of the State of California, and others, respondents, to compel the named defendant to grant petitioner a license to conduct business as a motion picture employment agency.

Alternative writ previously issued by District Court of Appeal discharged and peremptory writ of mandate denied.

For prior opinion, see 123 P.2d 142.

Hanna & Morton, Gang & Kopp, Byron C. Hanna, and R. E. Kopp, all of Los Angeles, for petitioner.

L. L. Schaumer, of Los Angeles, and Charles Dreyfus and Fred G. Goldsworthy, both of San Francisco, for respondents.

CURTIS, Justice.

Petitioner sought a writ of mandamus in the District Court of Appeal, Second District, Division Two, to compel the respondent Department to grant petitioner a license to conduct business as a motion picture employment agency under a statutory classification applicable to the location of its office in the city of Beverly Hills. The writ issued as prayed. Thereafter a petition by respondents for hearing in this court was granted.

There is no conflict as to the material facts upon which this proceeding was predicated. On January 26, 1942, petitioner filed with respondents an application for a license to operate a motion picture employment agency in the city of Beverly Hills, pursuant to the provisions of the Labor Code of California, division II, part 6, chapter 1, St.1937, p. 230 et seq., as amended. The city of Beverly Hills has a population in excess of 25,000 and not exceeding 100,000.

In the form of application furnished petitioner by respondents was the query "Places where agency will operate," which question petitioner answered as follows:

"Your applicant maintains a suite of offices which are utilized by applicant in the pursuit of said occupation and the rendition of said services at 9484 Wilshire Boulevard, Beverly Hills, California, and the applicant's business will be conducted and transacted at said offices. The applicant on an average of several times a week will call on behalf of its clients at RKO motion picture studios, Paramount motion picture studios, and other motion picture studios in the City of Los Angeles and at motion picture studios located elsewhere in the County of Los Angeles at such localities as Culver City and upon employers of motion picture artists wherever such employers may be found and interviewed, in places of business other than the premises of applicant, in hotels, restaurants or private homes in any locality in the State of California for the purpose of securing and negotiating employment for clients represented by applicant, and occasionally at such motion picture studios or elsewhere on locations where motion pictures are being produced, for the purpose of counseling or advising with said clients in connection with the rendition of artistic services by them at such places under existing contracts of employment."

At the time of filing with respondents the aforesaid application petitioner tendered a check in the sum of $50 as payment of the annual license fee. On January 28, 1942, respondents denied petition-

er's request for a license on the ground that petitioner, under the foregoing statement detailing the proposed scope of its field operations, intended to conduct its business not only in the city of Beverly Hills but also in the city of Los Angeles, which latter place had a population in excess of 100,000, and, therefore, the annual license fee would be $100 pursuant to the provisions of section 1588 of the Labor Code, St.1939, p. 2111, which reads as follows:

"Every employment agency shall pay to the Labor Commissioner annually at the time a license is issued or renewed a license fee of:

"(a) One hundred dollars in cities having a population of over one hundred thousand.

"(b) Fifty dollars in cities having a population of over twenty-five thousand and not exceeding one hundred thousand.

"(c) Ten dollars in all other places.

"All figures as to population shall be based on the latest United States Government census."

The single question to be determined in this case is whether the petitioner's acknowledged plan of doing a portion of its employment agency business in the city of Los Angeles as specified in its application establishes the latter "place" as an area of operation within the contemplation of the prescribed schedule of fees. In measuring the import of the basic statutory classification fixing the license rate, regard must be had for the *present* wording of section 1593 of the Labor Code, which, so far as is here material, provides as follows: "No license shall protect any other than the person to whom it is issued nor any *places* other than *those* designated in the license." [Emphasis added.] As so modified in 1941 by the Legislature, St. 1941, p. 2648, the change of language in this section consisted solely in the substitution of the word "places" for the term "place" and the corresponding grammatical variation of the italicized demonstrative pronoun to read "those" instead of "that"; in other respects, the form of the sentence was left unaltered by the amendment. Thus, the significance of the plural in lieu of the singular reference to the location of the licensee's business operations must be accorded appropriate weight in the disposition of the issue in controversy.

Noteworthy at the outset is the stipulation of the parties as to the custom prevailing before the date of the aforesaid statutory change with respect to the issuance of a license to an employment agency. They agreed that "prior to the amendment of section 1593 of the Labor Code in 1941, if an applicant for an employment agency license presented an application showing that the applicant intended to transact business at a particular location, a single license fee was collected by the Labor Commissioner from such applicant, the amount of which was determined by the location specified. If the applicant specified two or more of such places of business, separate license fees were collected for each such specified location, determined according to the population of the city of each such location." The opposing parties recognize that the previous restriction of the coverage of the license to one place of operation only was abandoned by the 1941 amendment to section 1593 so as to permit the protection of more than one location by the issuance of a single license, but they differ in their construction of the word "places" as it appears in the presently effective enactment. Petitioner argues that the legislature by the use of the term in question intended to refer merely to *fixed places of business* of an employment agency —its office addresses—and that therefore the petitioner's maintenance of a single office located within the city limits of Beverly Hills controls the amount of its license fee irrespective of its designation of the city of Los Angeles as a necessary field of operation for the proper servicing of its clients. On the other hand, respondents contend that by virtue of the aforementioned amendment all cities listed by an applicant as places of operation, regardless of whether or not it maintains offices in such locations, enter into the determination of the license rate, which should be fixed according to the population of the largest community so specified, and that consequently the petitioner's statement of its intent to do some business in the city of Los Angeles subject it to a license fee commensurate with the privilege of operating in a place of that size. Consideration of the substantial character of the change made in the wording of section 1593 by the 1941 amendment, as noted, in relation to other pertinent provisions of the Labor Code evidencing the legislative scheme of treating the operation of employment agencies as a field of business activity "affected with a public interest" (Olsen v.

State of Nebraska ex rel. Western Reference & Bond Association, Inc., 313 U.S. 236, 61 S.Ct. 862, 864, 85 L.Ed. 1305, 133 A.L.R. 1500) demonstrates the propriety of respondents' position in the premises and constrains the rejection of the narrow line of argument advanced by petitioner.

As originally enacted in 1913, section 1 of the Employment Agency Act (Stats. 1913, ch. 282, p. 515, § 1; Deering's Gen. Laws 1931, Act 2349) defined the term "employment agency" as the *business* of conducting an agency for the purpose of procuring or attempting to procure employment or engagements for persons seeking such, *"whether such business is conducted in a building or on the street or elsewhere."* (Emphasis added.) Upon the codification of this branch of the law in the Labor Code, the Legislature re-enacted in substantially the same language this definition of an employment agency, although substituting in lieu of the above-quoted italicized clause the following words: "regardless of where such business is conducted." (Emphasis added.) Labor Code, § 1551, subd. (a), St.1937, p. 230. Thus from the date of its original treatment of this subject it is plain that the Legislature recognized that the *business* of such an agency is not restricted to a fixed location, an office address, but that it as an activity of a "floating" character may be readily pursued in any part of the state where appropriate contacts promotive of its interests may be made.

Also of importance in this connection is the statutory schedule of license fees, graduated in amount according to the city population figures specified in section 1588, as above quoted. Measured by the context of that enactment, it is clear that the word "places" there relates to the geographical units or territory wherein the agency contemplates operation, and not to the buildings or rooms used for its office accommodations. Correlating this section with the above-quoted language of section 1593, as amended, it reasonably follows that the Legislature intended to use the term "places" in the same sense in both cases, so that by virtue of the latter mentioned code provision a licensee accorded the *privilege* of doing an employment agency business in specified localities would be protected in its scope of operation only as to those *places* (cities, towns or other geographical units) designated in the license. Of course, it is readily conceivable that an employment agency might conduct all of its business at its fixed address, in which event its field of operation and its office would be the *same place* and its license fee would be scaled accordingly. However, where the applicant lists in its request for a license *places* of proposed operation additional to the locale of the office, the Legislature by its amendment to section 1593 has provided a means whereby such licensee may enjoy the privilege of doing business in the various enumerated communities upon the procurement of a *single* license, but interwoven in such extension of the protective limits of a license is the necessary implication that the place of largest population so designated in the application shall control the amount of the license fee payable under the terms of section 1588.

Inapplicable to the consideration of the point of statutory construction here at issue is the petitioner's reference to certain sections of the Labor Code expressly alluding to the premises where the agency maintains its offices and illustrative of the Legislature's use of the word "place" in relation to the building or rooms serving as the fixed headquarters of the licensee. Such provisions dealing with matters connected with the posting of the license, § 1581, the investigation of the premises to determine their fitness, § 1583, and the recital of certain kinds of places as unsuitable for the location of an employment agency, § 1585, merely manifest the Legislature's recognition of the need for regulating the conduct of this particular business at its source—the place where applicants for employment would be apt to congregate—in the protection of the public welfare and as a proper exercise of the state's police power. However, these purely regulatory laws are to be distinguished from statutory enactments concerning license rates based on a territorial classification and scaled according to the size of the community to be served. The latter legislation is predicated upon the accepted definition of the word "license" as a grant of permission or authority to do a particular thing, to exercise a certain privilege, or to carry on a particular business or pursue a certain occupation. 16 Cal.Jur. 187 et seq. Consequently such statutes in their use of the word "places" must be interpreted according to their context as referring to cities, towns or other geographical units wherein

the licensee is accorded the privilege of doing business, and not simply to fixed office addresses.

Likewise without force in the present situation is the petitioner's citation of such cases as Arram v. Walters, (1936) 2 All England Law Reports Annotated, 959, and Kirkwood v. Gadd, [1910] App.Cas. 422, for the proposition that a registrant's office location must be deemed his place of business when only *incidental* transactions and *isolated* acts are performed elsewhere. The question under consideration here relates to the issuance of a license authorizing the conduct of *future* business in certain specified territories, and in applying the schedule of fees prescribed in section 1588 as the standard governing the extension of the privilege sought by the licensee, there is no available method of prejudging the amount of activity in which the applicant *will* engage in the cities designated as *prospective* places of operation. From this aspect it is manifest that the Legislature by the 1941 amendment to section 1593 provided a scheme whereby an agency under *one* license would receive protection in *all* locations listed in its application, but the applicant desiring to operate in a city of class (a) size under section 1588, while maintaining its office in a smaller center of population, would be put on a parity with an agency confining its conduct of business to its office address in the larger place, and each would pay the same amount as a license fee for the exercise of a like privilege of business operation. That this is a fair and equitable interpretation of the legislation in question is beyond dispute.

Adverting briefly to the facts in the present case, the petitioner's statement in its application as above quoted discloses its intent to call "on an average of several times a week * * * on behalf of its clients" at various motion picture studios "in the City of Los Angeles * * * in places of business other than the premises of applicant * * * for the purpose of securing and negotiating employment for" its clients. Such plan of activity unquestionably demonstrates a regularity of pursuit and a continued course of transactions; but what portion it will bear to the total amount of annual business done by the petitioner cannot be foreseen, nor does such an estimate enter as a factor of consideration. Accordingly, the petitioner's acknowledged *places of operation* are the cities of Los Angeles and Beverly Hills, and the former being the larger in size under the aforementioned statutory classification determines the fee payable by the petitioner as a prerequisite to its exercise of the *privilege of doing business* under the license sought.

The alternative writ heretofore issued by the aforementioned District Court of Appeal is discharged and a peremptory writ of mandate is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.



21 Cal.2d 58

PEOPLE v. GIRETH.

Cr. 4443.

Supreme Court of California.

Oct. 8, 1942.

Homicide ⇐253(1)

Evidence sustained conviction of first degree murder. Pen.Code, § 1239.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Leslie B. Gireth was convicted of first degree murder, and he appeals.

Affirmed.

Leslie B. Gireth in pro. per., for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an automatic appeal from a judgment of conviction of first-degree murder imposing the death penalty on the defendant. See § 1239, Pen. Code.

Examination of the record discloses that on July 16, 1942, the defendant, a married man, shot and killed a young woman whom he had been meeting clandestinely. The victim was shot as she slept in a motor-court cabin shared with the defendant in Alameda County. Defendant left the scene of the homicide and by telephone notified the authorities of the crime. He was taken

into custody shortly thereafter and freely admitted the shooting. Accordingly, he was indicted for murder. At all times he has refused the assistance of counsel. Upon his arraignment he pleaded guilty. After hearing evidence addressed to the degree of the crime, the court determined it to be of the first degree and imposed the death penalty.

The voluntary statement of the defendant to the authorities shortly after his arrest and his testimony before the grand jury when it was investigating the crime, support the judgment. An alienist testified as to defendant's sanity.

The judgment is affirmed.



21 Cal.2d 17

BALES v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18338.

Supreme Court of California.

Oct. 1, 1942.

1. Descent and distribution ⇐71(7)

The failure of Probate Code, providing procedure for determining heirship, to include provision for entry of default implied an abrogation of former practice and the application of usual civil procedure. Probate Code, §§ 1080–1082, 1233; Code Civ.Proc. §§ 585, 586.

2. Descent and distribution ⇐71(1)

Justice and sound policy require that estate of decedent be distributed to persons rightfully entitled thereto and that every concern and endeavor of a probate court should be directed to the accomplishment of that object. Probate Code, §§ 1080–1082.

3. Descent and distribution ⇐71(7)

In proceeding to determine heirship, order directing entry of default against all persons who had not appeared or filed petition to determine heirship was in excess of court's power, as to claimant who had no knowledge of the proceeding, and was not binding on such claimant. Probate Code, §§ 1080–1082, 1233; Code Civ.Proc. §§ 581, subd. 3, 585, 586.

4. Descent and distribution ⇐71(7)

In proceeding to determine heirship, superior court, upon determining that amended statement of heirship of claimant who filed statement shortly after receiving knowledge of existence of proceeding was legally sufficient, properly ordered that the claimant be permitted to file her claim in disregard of prior general default order. Probate Code, §§ 1080–1082, 1233; Code Civ. Proc. §§ 581, subd. 3, 585, 586.

5. Jury ⇐19(7½)

The right to a trial by jury in probate proceedings exists only where the statute expressly confers such right, so that the failure to incorporate in statute regulating will contests as matter for consideration of jury the question of interest of an objector to probate of will establishes such preliminary issue for determination of court. Probate Code, § 371.

6. Descent and distribution ⇐71(7)

In proceeding to determine heirship, every claimant, whether upon initiating petition or statement of heirship presented after commencement of proceeding, has the right to have all evidence affecting the disposition of claimant's heirship submitted to jury for its consideration, and therefore court usurped function of jury in passing on merits of claim of heirship. Probate Code, § 1081.

7. Descent and distribution ⇐71(3)

Claimant upon presenting statement and accompanying document showing her status as an heir of deceased, established her absolute right to participate in heirship proceeding, and mere fact that claimant sought entry at a late date did not furnish court with discretionary power to exclude claimant from the heirship proceeding. Probate Code, §§ 1080, 1081.

8. Descent and distribution ⇐71(1)

Probate proceedings are purely statutory and special in their nature, so that the superior court, although a "court of general jurisdiction", is circumscribed in heirship proceedings by statute conferring jurisdiction and may not competently proceed in a manner essentially different from that provided by statute. Probate Code, §§ 1080–1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Court of General Jurisdiction".

9. Descent and distribution ⇐71(3)

Court's order striking from heirship proceeding appearance of claimant who filed statement of claim shortly after discovering existence of proceeding, despite claimant's compliance with statutory provision, was unauthorized and void notwithstanding prior entry of general default order. Probate Code, §§ 1080–1082.

10. Descent and distribution ⇐71(3)

Court's order denying motion to file claim of heirship in heirship proceeding and directing dismissal of claimant from the proceedings was an act in excess of the court's jurisdiction, where claimant had complied with statutory requirements. Probate Code, §§ 1080–1082.

11. Descent and distribution ⇐71(7) Mandamus ⇐4(3)

Order striking from heirship proceeding appearance of claimant despite her compliance with statutory provisions and order denying claimant's motion to file claim of heirship and directing her dismissal from the proceeding were not "appealable orders" and their review and reversal in course of appeal from decree determining heirship would not be an "adequate remedy" and therefore claimant was entitled to writ of mandate. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy" and "Appealable Order".

12. Mandamus ⇐27

Where the exercise of judicial discretion is not involved in a matter and duty of court to act in a particular way becomes absolute, writ of mandate will issue for relief of the aggrieved party.

In Bank.

Proceeding for writ of mandate by Lucy Fay Bales against the Superior Court of Los Angeles County.

Writ of mandate granted.

Guy F. Bush, Arthur E. Briggs, and E. Llewellyn Overholt, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Ernest R. Purdum and Douglas De Coster, Deputy Co. Counsel, David R. Faries, and Wm. B. Himrod, all of Los Angeles, for respondent.

Faries & McDowell, Bailie, Turner & Lake, Salisbury, Robinson & Himrod, Frank J. Mackin, Charles A. Loring, Norman A. Bailie, and Richard A. Turner, all of Los Angeles, and George K. Ford, of San Francisco, amici curiae for respondent.

CURTIS, Justice.

This is an application for a writ of mandate to compel the Superior Court of Los Angeles County to permit the petitioner to participate in a proceeding to determine heirship pending in that court in the matter of the estate of Michael F. O'Dea, deceased. On several prior occasions controversial issues respecting the status and rights of claimants to this estate have been considered and adjudicated by this court, and for a full recital of the facts regarding the heirship proceeding generally, reference is made to the previous opinions rendered. In re O'Dea's Estate, 15 Cal.2d 637, 104 P.2d 368; Marlow v. Superior Court, 17 Cal.2d 393, 110 P.2d 11; O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621. The pertinent facts necessary to reach a decision in the present case and as related in the petition and answer thereto are as follows:

On July 25, 1939, the Superior Court of Los Angeles County, in response to an appropriate motion by counsel for a certain group of the numerous claimants to the O'Dea estate, made its order directing the entry of a default against all persons who had not at that date appeared or filed petitions to determine heirship. Since the making of that order, the court has been engaged from time to time in reviewing the numerous depositions and documentary evidence which had been filed in the proceeding in behalf of the various claimants, and in ruling on the objections made to the admissibility of such oral testimony and evidence preliminary to the scheduled impanelment of a jury, as demanded, for the trial of the issues of fact involved in the heirship determination. On October 27, 1941, the petitioner herein served and filed a notice of motion that she would move said court for an order permitting the filing of her appearance and statement of claim of interest in the estate. This motion was accompanied by an affidavit of merits setting forth the reasons for the petitioner's delay in presenting her claim as the daughter of the deceased Michael F. O'Dea. According to her account of various controlling factors entering into her

personal background and family history, supported by a genealogical chart and appropriate affidavits of several persons corroborating her recital of material events, the petitioner first learned of the death of O'Dea and the contest over his estate on October 7, 1941, when her attention was directed to a current newspaper article referring to the heirship proceeding and the alleged existence of a daughter of the deceased. It further appears from her affidavit that the petitioner, immediately upon her discovery of the pendency of this proceeding, consulted an attorney as to her rights in the matter and pursuant to his advice, presented her motion for leave to file her claim, as above mentioned. Affidavits in opposition to the petitioner's motion were filed on behalf of other claimants to the estate, and following the taking of oral testimony at several hearings held in regard to this matter, the court on November 12, 1941, made its order permitting the petitioner to file an amended claim of heirship. As part of its ruling the court, after characterizing the amended claim as simply an "enlargement" of the petitioner's first application and as "legally sufficient," directed that the petitioner in the forthcoming jury trial present her claim first and the evidence in support thereof.

On November 14, 1941, counsel for opposing claimants filed a motion to set aside and vacate the order of November 12, 1941, and to strike from the files the petitioner's appearance in the heirship proceeding, on the ground that it was in defiance of the general default order of July 25, 1939, and further, that it was a sham, a fraud and a contempt of court. Affidavits in support of and in opposition to the motion to strike were filed by the respective parties, and on December 2, 1941, following successive hearings at which evidence both oral and documentary was introduced, the court made its order vacating the previous order of November 12 and striking from the record the petitioner's aforementioned appearance, without prejudice to a renewal upon the showing of merit. On March 6, 1942, the petitioner again moved the court for permission to file her claim, which as incorporated in a "second amended statement" differed as to certain details from her previous statements. In conjunction with this motion she presented her affidavit of merits, some twenty-three supporting affidavits, and a family chart. Numerous opposing affidavits were filed on behalf of other claimants to the estate, considerable oral testimony was taken at successive hearings, and after extensive argument by counsel for the respective parties the court on April 2, 1942, denied "the motion of Lucy Fay Bales to file or refile (her) appearance or statement of claim of heirship," and the proceedings on said motion were ordered dismissed.

On April 16, 1942, the petitioner applied to this court for a writ of mandate "compelling the respondent court to restore to the files, records and calendar, the appearance, amended appearance and last filed appearance and statement of heirship, and to assume and take jurisdiction of the cause manifested and commenced by said appearance and amended appearance and statement of heirship of the petitioner presented and filed pursuant to order of court on November 12, 1941, and said last appearance and statement of claim filed on March 16, 1942, and to provide the petitioner with a trial and hearing in the manner prescribed by law on the merits of the issues raised by said statements of heirship, and to allow and permit the petitioner to participate fully in and be represented in all proceedings" now pending to determine heirship in the estate of Michael F. O'Dea, deceased.

Of fundamental importance in the disposition of this mandamus proceeding is the determination of the effect of the general order of default rendered on July 25, 1939, upon the petitioner's application for leave to file her claim of heirship pursuant to the provisions of sections 1080–1082 of the Probate Code. In O'Day v. Superior Court, supra, the propriety of that default order and the entry of a judgment of dismissal based thereon were sustained in respect to *claimants who had previously appeared in the heirship proceeding* but who were not present or represented by counsel at the trial on July 25, 1939, and who failed to respond upon the roll call on that date. It was there declared that matters of procedure not covered by sections 1080–1082 of the Probate Code are governed by the rules of practice for civil actions contained in the Code of Civil Procedure, and under authority of section 581, subdivision (3), of the Code of Civil Procedure, the probate court could order a dismissal against previously appearing claimants who failed to attend the trial, when other claimants appeared on the day

specified and asked for such dismissal. From these brief remarks as to the scope of the O'Day decision it is manifest that that case does not purport to conclude the rights of the present claimant to participate in the heirship determination, for the petitioner is in the distinguishable position of *not having appeared* in the O'Dea proceeding until some twenty-seven months following the order of default made on July 25, 1939, and, according to her sworn statement, of not having had knowledge of the existence of such litigation until some few weeks before her assertion of her claim of heirship on October 27, 1941.

[1-4] Prior to 1931, the year of the enactment of the Probate Code, the court, under authority of former section 1664 of the Code of Civil Procedure, unquestionably had the right to make an order adjudging *all* persons (named or not named) who had not appeared in an heirship proceeding to be in default. Hitchcock v. Superior Court, 73 Cal. 295, 14 P. 872; In re Kasson's Estate, 141 Cal. 33, 74 P. 436. But sections 1080–1082 of the Probate Code, outlining a simple and expeditious method of determining who are the rightful heirs of an estate and entitled to the distribution thereof, contain no reference to the entry of defaults in such proceedings. The omission of such provision for, or mention of defaults in the present statute would imply abrogation of the former practice (23 Cal.Jur., p. 778; In re Todd's Estate, 17 Cal.2d 270, 109 P.2d 913) and the application of usual civil procedure. § 1233, Prob.Code. Sections 585 and 586 of the Code of Civil Procedure, dealing generally with the entry of defaults against *named* defendants in civil actions, furnish no authority for a probate court's order of default against a person who had not theretofore appeared in a proceeding to determine heirship. Every consideration of justice and sound policy requires that the estates of decedents be distributed to persons rightfully entitled thereto, and that every concern and endeavor of a probate court should be directed to the accomplishment of that object. Edlund v. Superior Court, 209 Cal. 690, 289 P. 841. The consideration of this ultimate aim of heirship proceedings in correlation with the present lack of statutory authority for the court's entry of the default of a claimant of an estate who had not at the date of such ruling filed a statement of heirship impels the conclusion that the respondent court's order of July 25, 1939, as to the petitioner, was an act in excess of its power and hence not binding upon her. In so deciding this question it is appropriate to mention here that while the foregoing observations as to the limited operative effect of this default order are contrary to the views held by this court at the time of its denial, without opinion, of an ex parte application made by a similarly situated claimant seeking relief through the issuance of a writ of mandamus to enforce his right to participate in this same heirship proceeding (Thomas J. Mahoney v. Superior Court of Los Angeles, L.A.No.18220, Minutes of the Supreme Court, January 27, 1942),[1] the fuller presentation of this issue as contained in the briefs on file herein has induced this change of viewpoint. Accordingly in the present case the respondent court, upon determining on November 12, 1941, that the petitioner's amended statement of heirship was "legally sufficient," properly ordered that the petitioner be permitted to file her claim, in disregard of the general default order of July 25, 1939.

[5, 6] The next point to be considered is whether it was within the discretion of the respondent court to refuse the petitioner the right to participate in the determination of the heirship proceeding. This question arises in connection with the court's order of December 2, 1941, vacating its previous order of November 12, 1941, in response to the motion of opposing claimants that the petitioner's appearance in the heirship proceeding be stricken as a "sham, fraud and a contempt of court." In support of its position that after consideration of the extensive and conflicting oral and documentary evidence introduced at the successive hearings held with reference to the aforesaid motion to strike, it was within its power to decide preliminarily whether or not the claim of the petitioner possessed sufficient merit to permit her to intervene in the heirship proceeding, the respondent court relies upon cases involving contests of wills, wherein it is settled that the contestant is not entitled to have the question of his interest tried before a jury, but that the determination of such initial matter is for the court. In re Land's Estate, 166 Cal. 538, 540, 137 P. 246; In re Stark's Estate, 48 Cal.App.2d 209, 217, 119 P.2d 961. The force of this

[1] No opinion filed.

suggested analogy is completely dispelled upon reference to the code provisions governing the conduct of these respective proceedings. Section 371 of the Probate Code limits the issues of fact that may be tried by a jury upon the request of either party to those *substantially affecting the validity of the will,* specifying such matters to involve the competency of the decedent to make a will, his freedom from duress, menace, fraud, or undue influence, the due execution of the will, or "any other question substantially affecting the validity of the will." Since it was definitely decided in In re Dolbeer's Estate, 153 Cal. 652, 657, 96 P. 266, 15 Ann.Cas. 207, that the right to a trial by jury in probate proceedings exists only where the statute expressly confers such right, the failure to incorporate in section 371 as a matter for the consideration of the jury the question of interest of an objector to the probate of a will establishes such preliminary issue as one for the determination of the court. On the other hand, section 1081 of the Probate Code, relating to the conduct of the hearing in an heirship proceeding, provides that "at the time appointed, *a trial of the facts* must be by jury, as in the case of the contest of a will, unless a jury is waived * * *." (Italics added.) Since the very nature of this latter litigation fixes the determination of the alleged existence of relationship borne by the claimant to the deceased to be the controlling factor, section 1081 must be construed as giving to every such claimant, whether upon initiating petition or statement of heirship presented after the commencement of the proceeding, the right to have all evidence affecting the disposition of this single, ultimate issue submitted to the jury for its consideration. Consistent with this requirement of section 1081 and the scheduled impanelment of a jury for the trial of the facts in the O'Dea heirship proceeding, it is manifest that the respondent court, in passing upon the merits of the petitioner's claim incidental to its order dismissing her from the proceeding, usurped the functions of the jury.

[7] The petitioner upon presenting her statement and accompanying documents showing her status as an heir of the deceased, established her absolute right to participate in the proceeding. § 1080, Probate Code. The mere fact that the petitioner sought entry at such a late date, the trial of certain questions of law preliminary to the impanelment of the jury having commenced in July, 1939, does not furnish the respondent court with discretionary power to exclude her from the heirship proceeding in an endeavor to facilitate the disposition of the O'Dea litigation. Decisive of this point is the following language of section 1081 of the Probate Code: "Any claimant entering or re-entering such proceedings shall be bound by evidence introduced and depositions taken prior to his entry into the proceeding or during his absence therefrom, except that he may in the discretion of the court have the right to examine any witness further if it be possible so to do." This statutory language, expressive of the Legislature's intention to authorize a claimant's entry or re-entry into an heirship proceeding at any time prior to the submission of the issues of fact for decision, serves to emphasize the right of the petitioner, subject to the specified limitation, to intervene in the O'Dea litigation. Accordingly, it was beyond the bounds of its discretionary power for the respondent court to determine, as a matter of expediency affecting the conduct and progress of the hearing, to exclude the petitioner from participation in the heirship proceeding.

[8-11] "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. Smith v. Westerfield, 88 Cal. 374, 379, 26 P. 206." In re Strong's Estate, 119 Cal. 663, 666, 51 P. 1078, 1079. The respondent court's order striking from the heirship proceeding the appearance of the petitioner, despite her compliance with the provisions of section 1080, was clearly unauthorized by any provision of law and was therefore void and of no effect whatsoever. In re England's Estate, 214 Cal. 298, 5 P.2d 428; Texas Co. v. Bank of America, 5 Cal.2d 35, 53 P.2d 127. Upon a like basis the respondent court's order of April 2, 1942, again denying the petitioner's motion to file a claim of heirship and directing her dismissal from the proceeding was an act in excess of its jurisdiction. Neither of these unauthorized orders was appealable, § 1240, Prob. Code; In re O'Dea's Estate, 15 Cal.2d 637, 104 P.2d 368, nor would their review and reversal in the course of an

appeal from the decree determining heirship be an *adequate* remedy insofar as permitting the petitioner's exercise of her right to have the merits of her claim submitted to the jury at the same time that the others are heard by that body. Moreover, the hearing of this O'Dea proceeding promises to be a lengthy and tedious affair in view of the numerous claimants involved, and an appeal from the trial court's decision of the controversy would necessarily entail considerable time and great expense, material burdens which the petitioner should not be required to bear in the enforcement of the substantial right accorded her by statute.

[12] In the circumstances above outlined, where the exercise of judicial discretion is not involved in the matter and the duty of the court to act in a particular way becomes absolute, the writ of mandate will issue for the relief of the aggrieved party. As is said in 38 Corpus Juris at page 608: "While as already shown the discretion of the court will not ordinarily be controlled by mandamus, it is not universally true that the writ will not issue to control such discretion or to require a judicial tribunal to act in a particular way. Where the discretion of a court can be legally exercised in only one way, mandamus will lie to compel the court so to exercise it; and in some cases mandamus has been employed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy, as for instance where no appeal lies, or where the remedy by appeal is inadequate. It may also be employed to prevent an abuse of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion." In support of the text it is sufficient to cite the following well-considered cases: Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 482, 114 P. 978; Ex parte Ford 160 Cal. 334, 346, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; Newlands v. Superior Court 171 Cal. 741, 744, 154 P. 829; Sakurai v. Superior Court, 65 Cal.App. 280, 283, 223 P. 575; Alexander v. Superior Court, 91 Cal.App. 312, 266 P. 993.

Let a peremptory writ of mandate issue directing the respondent court to permit the petitioner to file her respective statements as to her claim of heirship and to participate in the proceeding to determine who are the rightful heirs of Michael F. O'Dea, deceased, pending in said court.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

CARTER, Justice (concurring).

I concur in the conclusion reached in the majority opinion and I agree with all of the reasons advanced in support thereof, but I do not want to be understood as giving even lip service to the unsound decision by the majority of this court in the case of O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621. In my opinion, the petitioner in the case at bar stands in the same position as the petitioners in the case last cited and that a proper interpretation of sections 1080 to 1082 of the Probate Code compels the conclusion that the orders of July 25, 1939, granting a nonsuit as to the claimants who had appeared and default as to claimants who had not appeared were void. It is obvious that petitioner in the case at bar stands in no different position than petitioners in O'Day v. Superior Court, supra, as to their second statement of heirship which the trial court refused to permit them to file and this court sustained the ruling of the trial court therein. I took this same position when the petition for writ of mandate was presented to this court on January 27, 1942, in the case of Thomas J. Mahoney v. Superior Court of Los Angeles County, L. A. No. 18220, and voted for the granting of the writ therein prayed for.

21 Cal.2d 45

STATE OF OHIO, ex rel. SQUIRE. Superintendent of Banks of Ohio, v. PORTER.
L. A. No. 18302.

Supreme Court of California.

Oct. 2, 1942.

1. Limitation of actions ⇐2(1)

The statute of limitations of the forum governs time for commencement of action arising in another state.

2. Limitation of actions ⇐58(4)

A stockholder's liability for his proportionate share of corporate indebtedness is a "liability created by law" within statute requiring that action against stockholder to enforce such a liability be brought within three years after liability was created. Code Civ.Proc. § 359.

See Words and Phrases, Permanent Edition, for all other definitions of "Liability Created by Law".

3. Limitation of actions ⇐2(1)

The full faith and credit clause of Federal Constitution requires recourse to applicable constitutional provisions, statutes, and court decisions of Ohio in determining when Ohio bank stockholder's liability for his proportionate share of bank's indebtedness was created for purpose of ascertaining whether action to enforce such liability is barred by California statute of limitations. Code Civ.Proc. § 359; Gen.Code Ohio, §§ 710-75, 710-95; Const. Ohio art. 13, § 3, adopted in 1912; U.S.C.A.Const. art. 4, § 1.

4. Banks and banking ⇐47(1)
Constitutional law ⇐34

The liability imposed by Ohio Constitution on banking corporation's stockholders for such corporation's debts to extent of par value of their stock in addition to amount invested therein was direct and self-executing, did not need legislation to make it effective, and created primary obligation against stockholder by operation of law. Const.Ohio art. 13, § 3, adopted in 1912.

5. Banks and banking ⇐49(6)

Under Ohio statute, Ohio superintendent of banks has exclusive authority to enforce stockholder's individual liability for debts of bank of which he has taken possession for purpose of liquidation, and cannot bring action to enforce such liability until he has taken possession for such purpose. Gen.Code Ohio, § 710-95.

6. Limitation of actions ⇐11(1)

The Ohio superintendent of banks, suing to enforce stockholders' liability for bank's debts, represents bank's creditors, and any statute of limitations barring creditor's action to enforce such liability bars such action by superintendent. Gen.Code Ohio, §§ 710-75, 710-95.

7. Banks and banking ⇐49(6)

When Ohio superintendent of banks took possession of Ohio bank for liquidation, provisions of Ohio statute, giving superintendent exclusive right to enforce stockholder's liability for bank's debts, became operative and automatically abated any previous right of bank's creditors to enforce such liability, including actions pending when statute became effective. Gen. Code Ohio, §§ 710-75, 710-95.

8. Banks and banking ⇐49(6)

The Ohio statute giving such state's superintendent of banks exclusive authority, after taking possession of bank for liquidation, to enforce stockholders' liability for bank's debts, did not substitute new or different liability from that already existing, but merely substituted such officer for bank's creditors in enforcement of such liability. Gen.Code Ohio, §§ 710-75, 710-95.

9. Banks and banking ⇐47(1)

The provisions of Ohio statute as to enforcement of liability of stockholders of bank, taken over by superintendent of banks, for debts of such bank, are "procedural", not "substantive". Gen.Code Ohio, §§ 710-75, 710-95.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedural Provision" and "Substantive Provision".

10. Banks and banking ⇐47(1)

The primary, direct, and self-executing superadded or double liability of bank stockholders for bank's debts, as declared in Ohio Constitution, could not be changed by statutory procedural provision relating to method of enforcing such liability. Gen. Code Ohio, §§ 710-75, 710-95; Const.Ohio, art. 13, § 3, adopted in 1912.

11. Constitutional law ⇐207(3)
Limitation of actions ⇐58(5)

A suit in California by Ohio superintendent of banks to enforce stockholder's superadded liability for Ohio bank's debts

is not on the assessment, so that California court is not required to hold that statute of limitations began to run on date of assessment in order to accord "full faith and credit" to assessment as a "public act" or avoid violation of "privileges and immunities" clause of Federal Constitution. Code Civ. Proc. § 359; Gen.Code Ohio, §§ 710-75, 710-95; U.S.C.A.Const. art. 4, §§ 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit", "Privileges and Immunities", and "Public Act".

12. Courts ⇐95(2)

In action by Ohio superintendent of banks to enforce superadded liability of Ohio bank's stockholder, residing in California, for bank's debts, California Supreme Court is bound by Ohio court's interpretation of Ohio constitutional provisions and statutes in determining whether action is barred by California statute of limitations. Code Civ.Proc. § 359; Gen.Code Ohio, §§ 710-75, 710-95; Const.Ohio art. 13, § 3, adopted in 1912; U.S.C.A.Const. art. 4, § 1.

13. Limitation of actions ⇐58(5)

Under Ohio law, the superadded liability of stockholders of Ohio bank in hands of state superintendent of banks for such bank's debts was created on day when bank failed to meet its obligations in ordinary course of business and limited its payments to specified percentage of demand deposits or matured obligations, so that action brought in California by such superintendent to enforce California stockholder's liability over three years after such date was barred by California statute of limitations. Code Civ.Proc. § 359; Gen.Code Ohio, §§ 710-75, 710-95; Const.Ohio, art. 13, § 3, adopted in 1912.

TRAYNOR, J., and PETERS, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the State of Ohio, on the relation of S. H. Squire, Superintendent of Banks of such state, in charge of the liquidation of the Union Trust Company of Cleveland, against Clarence H. Porter, to enforce defendant's superadded liability as a stockholder of such bank. Judgment for plaintiff, and defendant appeals.

Reversed.

For prior opinion, see, Cal.App., 121 P.2d 538.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, and Charles O. Parker, of Chicago, Ill., for appellant.

Mathes & Sheppard, Gordon F. Hampton, Emrys Davis, and Wm. C. Mathes, all of Los Angeles, Thomas J. Herbert, Atty. Gen. (Ohio), E. S. Lindemann, Sp. Counsel to Atty. Gen., E. J. Halambeck, Asst. Sp. Counsel to Atty. Gen., and Paul M. Gregg, of Los Angeles, for respondent.

SHENK, Justice.

The State of Ohio, on the relation of S. H. Squire, superintendent of banks in charge of liquidation of the Union Trust Company of Cleveland, commenced this action on May 26, 1936, in Los Angeles County, to enforce an alleged stockholders' liability against the defendant. In his answer the defendant raised the point that the cause of action was barred by the provisions of section 359 of the California Code of Civil Procedure. The case was tried on stipulated facts, judgment was for plaintiff, and the defendant appealed.

The Union Trust Company was a banking corporation. It was organized and existed under the corporation and banking laws of the State of Ohio. On February 27, 1933, and for some time prior thereto, the defendant was a stockholder owning 560 shares of capital stock of the company, having a par value of $25 per share. On the morning of that day, the company was unable to meet its obligations in the regular course of business. Pursuant to a resolution of its board of directors, but without statutory authority, it operated all that day on a so-called restricted basis in that it refused to pay out on demand more than 5 per cent of any demand deposit or other matured obligation. On the evening of that day, the Ohio legislature enacted a law, effective immediately, authorizing the superintendent of banks to place any banking institution on a restricted basis and to segregate all deposits thereafter received. Accordingly, the superintendent made such an order applicable to the Union Trust Company. On April 8, 1933, the superintendent appointed a conservator to take possession of the business and property of the bank. The conservator

was in possession and control from that date until June 15, 1933, when the superintendent declared and determined that the company was in an unsound and unsafe condition. He thereupon took possession for the purpose of liquidation. On July 30, 1934, the superintendent, after auditing the affairs of the bank, found that the liabilities exceeded the assets in an amount greater than the stockholders' so-called superadded or double liability. On August 1, 1934, the superintendent caused notices to be mailed to the stockholders, advising them that the assets were insufficient to discharge the liabilities and that he intended to enforce the individual liability of the stockholders. He advised each stockholder of the amount (100 per cent assessment) and demanded payment on or before November 1, 1934.

[1] It is well settled that the statute of limitations of the forum governs the time for the commencement of an action arising in another state. McElmoyle v. Cohen, 13 Pet. 312, 10 L.Ed. 177; Great Western Telegraph Co. v. Purdy, 162 U.S. 329, 16 S. Ct. 810, 40 L.Ed. 986; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139.

[2, 3] As applied to the present controversy, section 359 of the California Code of Civil Procedure provides that an action against a stockholder to enforce a liability created by law "must be brought within three years after * * * the liability was created." The stockholder's liability for his proportionate share of the corporate indebtedness is a "liability created by law" within the meaning of this section. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87; Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077. The time when the liability was created must be differentiated from the time when the cause of action accrued. To determine when the liability was created the full faith and credit clause of the United States Constitution, art. IV, § 1, requires recourse to the applicable constitutional provisions, statutes and decisions of Ohio. Converse v. Hamilton, 224 U.S. 243, 32 S. Ct. 415, 56 L.Ed. 749, Ann.Cas.1913D, 1292.

[4] The stockholders' superadded or double liability was imposed by article XIII, section 3 of the Ohio constitution, which provided that "stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." The liability was direct and self-executing, did not need legislation to make it effective, and created a primary obligation against the stockholder by operation of law. Squire v. Standen, 135 Ohio St. 1, 18 N.E.2d 608, 120 A.L.R. 952; State v. Bremer, 130 Ohio St. 227, 198 N.E. 874; Snider v. United Banking and Trust Company, 124 Ohio St. 375, 178 N.E. 840; Lang v. Osborn Bank, 100 Ohio St. 51, 125 N.E. 105. However, the Ohio legislature saw fit to enact section 710-75 of the General Code of that state. On February 27, 1933, when the Union Trust Company suspended business, said section provided as follows: "Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The stockholders in any bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such bank to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; * * *. At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders."

[5, 6] And on March 31, 1933, section 710-95 of the Ohio General Code was amended to read as follows:

"The superintendent of banks, upon taking possession of the business and property of any bank, shall have, exercise and discharge the following powers, authority and duties, without notice or approval of court, but subject to the provisions of this chapter, to-wit: * * *

"9. If he ascertains that the assets of such bank will be insufficient to pay its debts and liabilities, to enforce the individual liability of each shareholder thereof as provided in section 710-75 of the General Code. Until an order to declare and pay a final dividend shall be entered in the liquidation proceedings the right to enforce

such liability is hereby vested exclusively in the superintendent of banks."

The obvious effect of this amendment was to lodge in the superintendent of banks the exclusive authority to enforce the stockholders' liability in cases where he had taken possession of a bank for the purpose of liquidation. Fulton v. Wetzel, 47 Ohio App. 72, 190 N.E. 776; Feldman v. Standard Trust Bank, 46 Ohio App. 67, 187 N.E. 743. And under its provisions the superintendent could not bring an action to enforce the stockholders' liability until he had taken possession for the purpose of liquidation. Snider v. United Banking and Trust Co., supra. It is the law of Ohio that when the superintendent of banks sues to enforce the stockholders' liability he represents the creditors (Feldman v. Standard Trust Bank, supra), and that any statute of limitations which would bar an action by the creditor would likewise bar an action brought by the superintendent of banks to enforce the superadded liability. State v. Bremer, supra.

[7] February 27, 1933, the day the bank failed to meet its obligations in the ordinary course of business and limited its payments to 5 per cent of any demand deposit or matured obligation, marked the beginning of voluntary liquidation. A cause of action was immediately created and accrued to the creditors. At that time the superintendent of banks had not taken possession for the purpose of liquidation, and his action in that respect was the all-important condition precedent to the enforcement of the stockholders' liability. Snider v. United Banking and Trust Company, supra. He did not take possession until June 15, 1933. During the period from February 27 to June 15, 1933, the creditors could have enforced the stockholders' liability. Snider v. United Banking and Trust Company, supra. Inasmuch as the right of the creditors to enforce that liability had accrued as early as February 27, 1933, the liability upon which the present action was based certainly was created at least as early as the date the cause of action accrued. When on June 15, 1933, the superintendent took possession of the bank for the purpose of liquidation, the provisions of section 710-95 giving the superintendent the exclusive right to enforce the liability became operative and automatically abated any right theretofore possessed by the creditors to enforce such liability, including actions pending when the amendment to section 710-95 became effective. Fulton v. Wetzel, 47 Ohio App. 72, 190 N.E. 776.

[8-10] The statute giving the superintendent of banks the exclusive authority after taking possession to enforce the stockholders' liability did not substitute a new or different liability from that already existing, that is, it did not "uncreate" an already created liability. The statute merely substituted the superintendent of banks in place of the creditors in the enforcement of the stockholders' liability. It is the settled law of Ohio that the provisions of the General Code sections in this respect were procedural and not substantive. Snider v. United Banking and Trust Company, supra; Squire v. Borton & Borton, 132 Ohio St. 180, 5 N.E.2d 479. Furthermore, the primary, direct and self-executing stockholders' liability declared in the Ohio constitution could not be changed by a procedural provision relating to the method of its enforcement.

Additional support is found in the decisions of Ohio for the conclusion that the stockholders' liability was created the day the bank failed, namely, on February 27, 1933. In Squire v. Harris, 135 Ohio St. 449, 21 N.E.2d 463, a transferee of bank stock was held not subject to the superadded liability where the transfer in question took place on the same day but after the bank had ceased to receive money on general deposit. Also, it has been held that the 60-day period preceding failure, prescribed in Ohio General Code, section 710-75, during which a transferor of bank stock remained liable as surety for the transferee's liability, related back from the day the bank failed, and not from the day the superintendent of banks took possession. Bailey v. State, Ohio App., Cuyahoga Co., 32 N.E.2d 453.

[11] The plaintiff contends that the suit is on the "assessment"; that the "assessment" is a "public act" within the scope of article IV, section 1 of the federal Constitution and must be accorded full faith and credit by the courts of California; that since the Ohio law and the National Bank Act, U.S.C.A. title 12, § 21 et seq., are similar, the decisions involving the National Bank Act to the effect that the suit is on the "assessment" are controlling; that such result is in accord with Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077, which holds that the liability is created at the time of the assessment; and that to give a different interpretation of the Ohio law would be to

violate article IV, section 2 of the United States Constitution, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The case of State v. Melaragno, Ohio App., Cuyahoga Co., 1930, 31 Ohio Law Rep. 627, does not support the plaintiff's position that the present action must be deemed to be on the assessment. In that case the court was applying a statute of limitations which prescribed a period commencing from the time the cause of action accrued, as distinguished from the time the liability was created. Furthermore, the reasoning of that decision to the effect that the liability did not accrue until the assets of the bank were liquidated is contrary to the established and admitted holding of the Ohio supreme court that the stockholders' liability is direct, primary and self-executing. It may be noted that it is not necessary in an action by the superintendent of banks in Ohio to enforce the stockholders' liability that he even allege that he has declared an assessment.

Other cases cited by the plaintiff do not support his position. They include: Squire v. Standen, supra; State v. Murfey, Blossom & Co., 131 Ohio St. 289, 2 N.E.2d 866; Vance v. Warner, 129 Ohio St. 357, 195 N. E. 704; State v. Cruikshank, 51 Ohio App. 61, 199 N.E. 611; Baumgardner v. State, 48 Ohio App. 5, 192 N.E. 349. In those cases the courts of Ohio recognized that the liability which was enforced by an assessment was the direct and primary stockholders' liability, even though the necessity therefor and the amount thereof be determined exclusively and finally by the fact and the amount of the assessment.

[12] The plaintiff's citation of numerous authorities construing the National Bank Act and other acts similar to the Ohio statute is unavailing for the reason that we are here bound by the Ohio court's interpretation of the provisions of the constitution and statutes of that state.

In the case of Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077, this court held that the liability under the California Bank Stockholders' Liability Act (Deering's Gen. Laws, Act 652a) was "created" when the assessment was made. This holding could be considered only in the absence of construction by the courts of Ohio of its own fundamental and statutory laws. As we have seen, the Ohio courts have denominated the stockholders' liability direct, primary and self-executing, as distinguished from the indirect and secondary stockholders' liability involved in the California decision. Although the limitation of section 359 of the California Code of Civil Procedure is applied in the same sense in both the Richardson case and the present case, namely, from the time the liability was created, the different conclusions result from the all-important differences in substantive law creating the rights upon which suit was brought. In the Richardson case it was recognized that if the stockholders' liability was direct and primary, as under the earlier California law, the liability would have been created at the time the obligation was incurred, and not at the time the assessment was levied.

To give proper effect to the Ohio law in this case obviously is not a violation of the privileges and immunities clause of the United States Constitution. The time limitation of said section 359 is applied uniformly to compute the applicable period of limitation for the commencement of the action from the time the liability was created.

[13] We therefore conclude that under the law of Ohio the stockholders' liability here sought to be enforced was created on the 27th day of February, 1933, and that as the action was not brought within three years after that date it is barred by section 359 of our Code of Civil Procedure.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. Statutes of limitation are procedural statutes that operate to bar the remedy after a reasonable time for bringing suit upon an accrued cause of action has elapsed. They are not intended to alter or destroy the substantive rights or liabilities involved. See 34 Am.Jur. 15. When enforcement is sought in the courts of one state of a right created under the law of another, the law of the forum governs matters of procedure, including the period of limitation imposed upon the remedy. Restatement, Conflict of Laws, §§ 603, 604. Invoking the general rule with respect to statutes of limitation, the majority opinion relies upon the provisions of Code of Civil Procedure, section 359, to bar suit upon a bank stockholder's liability created under the laws of the State of Ohio.

Section 359, while located in that part of the Code of Civil Procedure dealing with statutes of limitation generally, is no ordinary statute of limitations. The section requires that actions against stockholders to enforce a liability created by law be brought "within three years after * * * the liability was created." The three-year period commences to run from the date the liability is created, irrespective of when the cause of action accrues, and the action might be barred thereunder before any right to sue accrues. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87; see 7 Cal.L.Rev. 346. This statute, far from prescribing a reasonable period within which an accrued cause of action can be enforced by suit, actually delimits the liability itself. Such a statute, operating to qualify certain rights and liabilities created under the laws of this state, should not be regarded as a procedural regulation of the forum with respect to actions involving the enforcement of foreign rights and liabilities. Statutes that do not merely limit the remedy, but qualify the right, are treated as part of the substance of the obligation to be determined according to the law under which the obligation is created. Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067; Osborne v. Grand Trunk R. Co., 87 Vt. 104, 88 A. 512, Ann.Cas.1916C, 74; cf. Central Vermont Ry. Co. v. White, 238 U.S. 507, 511, 35 S.Ct. 865, 59 L.Ed. 1433, Ann.Cas.1916B, 252; see Restatement, Conflict of Laws, § 605, comment a; 34 Am.Jur. 16; 28 Yale L.J. 492, 494.

Section 359 may be applied for reasons of policy to qualify rights and liabilities arising under the laws of this state. When the section was included in the Code of Civil Procedure in 1872 the Constitution of California provided that each shareholder of a corporation was individually and personally liable for his proportion of all its debts and liabilities. Const. of 1849, art. IV, § 36. A similar provision was incorporated in the Constitution of 1879. Art. XII, § 3. This liability not only worked hardship upon the individual shareholder, but obstructed the state's industrial development. See criticism in Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077, and in 17 Cal.L.Rev. 276. It was inevitable that so broad a liability should come to be strictly limited. Thus, it was held to be "created" within the meaning of section 359 when the obligation was incurred so that the period of limitations could run and the creditor be barred from suing the shareholder before his right to sue had even accrued. Hunt v. Ward, supra. This interpretation was reaffirmed in an opinion pointing out that reliance thereon had been an important factor in the investment of millions of dollars in this state. Gardiner v. Royer, 167 Cal. 238, 139 P. 75. The harshness of proportional liability was mitigated by this construction. When the constitutional provision imposing this liability was finally repealed in 1930 section 359 ceased to be necessary as a limiting restriction upon an unwisely broad liability, but its repeal was apparently overlooked.

Whatever the reasons of policy for the way in which section 359 has been applied to liabilities created under local law, the application of that section to a stockholders' liability created under the laws of another state raises major issues that have been disregarded in the present case as in those that have preceded it. Without a clear perception of the distinction between local and foreign liabilities, it has been held that section 359 is applicable to the liability of bank stockholders imposed by other jurisdictions. See Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Miller v. Lane, 160 Cal. 90, 116 P. 58. The interpretation of section 359 that starts the period running from the time the liability is created rather than when the cause of action accrues, together with the holdings, made for other purposes, by courts of sister states that their bank stockholder's liability is a direct and primary one created at the time the obligation is incurred, results in destroying foreign substantive rights before they are ever actually enforceable.

The Ohio courts have held that under Ohio law the stockholder's liability is created at the time the debt is incurred or the deposit is made (State v. Arrowhead Investments, Inc., 10 O.O. 119; Poston v. Hull, 75 Ohio St. 502, 80 N.E. 11; Brown v. Hitchcock, 36 Ohio St. 667; Squire v. Abbott, 8 O.O. 134), but this interpretation does not affect the statute of limitations in that state, for the action there is not barred until six years after the cause of action accrues. National Bank of Lima v. Squire, 3 O.O. 531. The cause of action accrues to the creditor when the bank fails to meet its obligations in the ordinary course of business (Squire v. Abbott, supra; cf. Brown v. Hitchcock, supra; National Bank of Lima v. Squire, supra); it accrues to the superintendent of banks when he determines that the bank is insolvent. National

Bank of Lima v. Squire, supra; State v. Bremer, 130 Ohio St. 227, 198 N.E. 874; State v. Weinberger, 44 Ohio App. 264, 185 N.E. 432; Feldman v. Standard Trust Bank, 46 Ohio App. 67, 187 N.E. 743; Trustees of Ohio Wesleyan University v. State, 50 Ohio App. 51, 197 N.E. 612, 621. In the present case the Ohio superintendent of banks determined that the bank's condition was unsound and took possession for the purpose of liquidation on June 15, 1933. On July 30, 1934, after auditing the books of the bank, the superintendent found that its liabilities exceeded its assets. He mailed notices to this effect to the stockholders on August 1, 1934, advising them that he intended to enforce their individual liability to the extent of a 100 per cent assessment to be paid by November 1, 1934. Under Ohio law his cause of action did not accrue before July 30, 1934, and his right of action in Ohio was not barred until six years from that date. If, however, the deposits sued upon were made or the debts involved were incurred more than three years before he determined that the bank was insolvent, the application of section 359 would cut off the superintendent's right to sue the bank's stockholders in California before it arose and would thus operate to destroy a foreign substantive right before it was ever actually enforceable. This result is reached directly in the case of State of Indiana v. Hoffman, 53 Cal.App.2d 796, 128 P.2d 162, petition for hearing denied by this court, October 1, 1942, holding that the liability of the stockholders is created as soon as the debt is incurred. A similar determination was avoided in the present case only because the opinion finds it unnecessary under the facts to go back farther than the date of the bank's failure, more than three years before suit was filed.

California has no policy necessitating the destruction of the substantive right of the foreign bank depositor to enforce the liability imposed upon the bank's stockholders, and no interest in riding over such rights. In fact, its policy is to impose such liability, for not only does it have a bank act substantially identical with the Ohio statute, but this court has held that the liability under that act is not created until an assessment is made by the superintendent of banks. Richardson v. Craig, supra; see, also, Johnson v. Greene, 9 Cir., 88 F.2d 683, reaching the same conclusion regarding the National Bank Act, from which the California and Ohio statutes were copied. It could not have held otherwise without vitiating the statutory provisions relating to assessments, for an assessment can rarely be imposed within three years of the creation of the bank's indebtedness. The majority opinion, while conceding the right to maintain actions in the courts of this state to the California superintendent of banks, denies such a right on parallel facts to the Ohio superintendent and thus vitiates the Ohio statutory provisions relating to assessments.

The opinion ignores the fact that the suits in question are brought upon a statutory assessment that would be fully recognized and enforced in the Ohio courts (Squire v. Standen, 135 Ohio St. 1, 18 N.E. 2d 608, 120 A.L.R. 952; State v. Murfey, Blossom & Co., 131 Ohio St. 289, 2 N.E.2d 866; Vance v. Warner, 129 Ohio St. 357, 195 N.E. 704; State v. Cruikshank, 51 Ohio App. 61, 199 N.E. 611; Baumgardner v. State, 48 Ohio App. 5, 192 N.E. 349), and thus gives rise to an unconstitutional denial of full faith and credit to the statutes of Ohio and the assessment levied thereunder. Bradford Elec. L. Co. v. Clapper, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026, 82 A.L.R. 696; Broderick v. Rosner, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100, 100 A.L.R. 1133; John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106; Restatement, Conflict of Laws, § 332, p. 408; see Langmaid, Full Faith and Credit Required for Public Acts, (1924) 24 Ill. L.Rev. 383. An assessment of stockholders' liability, whether made by court order or by an administrative officer pursuant to statutory authority, is a public act to be accorded full faith and credit, under the Constitution of the United States, in the courts of another state. Broderick v. Rosner, supra; Converse v. Hamilton, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann.Cas.1913D, 1292. The defendant stockholder may set up personal defenses (Chandler v. Peketz, 297 U.S. 609, 56 S.Ct. 602, 80 L.Ed. 881), but once the obligation of the stockholders is determined in an assessment proceeding, the existence and amount of the debt and the proportional liability of each are res judicata and not subject to collateral attack in an action brought in another state to enforce collection against a non-resident stockholder. Selig v. Hamilton, 234 U.S. 652, 34 S.Ct. 926, 58 L.Ed. 1518, Ann.Cas.1917A, 104; Marin v. Augedahl, 247 U.S. 142, 38 S.Ct. 452, 62 L.Ed. 1038; Glenn v. Liggett, 135 U.S. 533, 10 S.Ct. 867, 34 L.Ed. 262; see Restatement, Conflict of Laws, § 186,

comment c; 13 Fletcher, Cyclopedia of the Law of Private Corporations (perm. ed.), § 6522, p. 953.

It is unconstitutional to impose as a prerequisite of suit a condition impossible to fulfill on the pretext of regulating procedure. Broderick v. Rosner, supra; Rankin v. Barton, 199 U.S. 228, 26 S.Ct. 29, 50 L.Ed. 163; Lamb v. Powder River Live Stock Co., 8 Cir., 132 F. 434, 65 C.C.A. 570, 67 L.R.A. 558. In Broderick v. Rosner, supra, the New York superintendent of banks brought an action in New Jersey to recover on an assessment of the statutory liability of stockholders of an insolvent New York bank. The New Jersey courts, refusing to allow the action, relied upon the Corporation Act of New Jersey providing that no action against any stockholder of a foreign corporation to enforce the statutory liability arising under the laws of another state could be brought in the courts of New Jersey unless it was in the nature of an equitable accounting with all stockholders and creditors as necessary parties. The Supreme Court held that New Jersey could not deny full faith and credit to the New York assessment, since the New Jersey statute, while nominally affecting the remedy only, imposed a condition impossible to fulfill as a prerequisite of an action to enforce an assessment of a sister state and therefore violated the full faith and credit clause of the United States Constitution. In concluding that the assessment was as much entitled to full faith and credit as if it had been made by court order, the opinion declared [294 U.S. 629, 55 S.Ct. 593, 79 L.Ed. 1100, 100 A.L.R. 1133]: "The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being nonresidents, could not have been personally served with process. Converse v. Hamilton, 224 U.S. 243, 252, 260, 32 S.Ct. 415, 56 L.Ed. 749 [Ann.Cas. 1913D, 1292]. The reason why in that case the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the nonresident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assessment because statutes are 'public acts' within the meaning of the clause." The barring of actions in this state before the cause of action ever accrues is certainly as drastic as the condition imposed by the New Jersey law held invalid in the foregoing case.

PETERS, Justice pro tem., concurred.



21 Cal.2d 889

SQUIRE, Superintendent of Banks of Ohio, v. MERRIAM (two cases).

L. A. 18303, 18304.

Supreme Court of California.

Oct. 2, 1942.

Limitation of actions ⇐58(5)

Under Ohio law, the superadded liability of stockholders of Ohio bank in hands of state superintendent of banks for such bank's debts was created on day when bank failed to meet its obligations in ordinary course of business and limited its payments to specified percentage of demand deposits or matured obligations, so that action brought in California by such superintendent to enforce California stockholder's liability over three years after such date was barred by California statute of limitations. Code Civ.Proc. § 359; Gen.Code Ohio, §§ 710-75, 710-95; Const.Ohio art. 13, § 3, adopted in 1912.

TRAYNOR, J., and PETERS, Justice pro tem., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by S. H. Squire, as Superintendent of Banks of the State of Ohio, against Cliffe U. Merriam and Madaline M. Mullins, to enforce defendants' superadded liability as stockholders of the Guardian Trust Company and the Union Trust Company, in which Charles E. Beardsley, as administrator, of the estate of defendant Mullins, was substituted for such defendant after her death. Judgments for plaintiff against

defendant Merriam and for defendant administrator, and defendant Merriam appeals.

Reversed.

For prior opinions, see, Cal.App., 121 P.2d 534, 537.

Hill, Morgan & Bledsoe, Kenneth K. Wright, Meserve, Mumper & Hughes, and Roy L. Herndon, all of Los Angeles, and Charles O. Parker and Markheim, Parker & Miller, all of Chicago, Ill., for appellant.

Mathes & Sheppard, Wm. C. Mathes, and Emrys Davis, all of Los Angeles, Thomas J. Herbert, Atty. Gen., (Ohio), E. S. Lindemann and A. O. Husband, Sp. Counsel to Atty. Gen., E. J. Halambeck, Asst. Sp. Counsel to Atty. Gen., and Gordon F. Hampton and Paul M. Gregg, both of Los Angeles, for respondent.

SHENK, Justice.

Plaintiff, as superintendent of banks in charge of the liquidation of the business and property of the Guardian Trust Company and the Union Trust Company, both of Ohio, commenced these actions on July 28, 1937, in Los Angeles County, to enforce the alleged stockholders' liability of the defendants Cliffe U. Merriam and Madaline M. Mullins as stockholders in those corporations.

The Guardian Trust Company and the Union Trust Company were Ohio banking corporations. On February 27, 1933, the defendant Merriam was and for some time prior thereto had been a stockholder of record in the Guardian Trust Company, owning 157 shares of its capital stock of a par value of $100. On the morning of that day, the company was unable to meet its obligations in the regular course of business. Pursuant to a resolution of the board of directors, but without statutory authority, it operated on a restricted basis on that day in that it refused to pay more than one per cent of any demand deposit or other matured obligation. On the evening of that day, the Ohio legislature enacted a law, effective immediately, authorizing the superintendent of banks to place any banking institution on a restricted basis and to segregate all deposits thereafter received. Accordingly, the superintendent made such an order applicable to the Guardian Trust Company. On April 8, 1933, the superintendent appointed a conservator to take possession of the business and property of the bank. The superintendent took possession for the purpose of liquidation on June 15, 1933. On July 11, 1933, he declared the individual liability of the stockholders of the company to be one hundred per cent of the par value of the shares. On July 15, 1933, he caused notices of the liability to be mailed to the stockholders. The notices demanded payment on or before September 15, 1933.

On February 27, 1933, defendant Merriam was the record owner of 1652 shares of the capital stock of the Union Trust Company of the par value of $25 per share.

On February 28, 1933, the 157 shares of capital stock in the Guardian Trust Company and the 1652 shares of capital stock in the Union Trust Company were transferred of record to the defendant Madaline M. Mullins, who died on November 3, 1939, in the county of Los Angeles. Charles E. Beardsley was appointed administrator of her estate and thereafter was substituted in the place of Madaline M. Mullins as a defendant in the actions.

On June 11, 1936, both defendant Merriam and defendant Mullins for a valuable consideration executed a waiver of the statute of limitations if the causes of actions herein sued upon were not barred prior to June 15, 1936.

Judgments were entered for the plaintiff against the defendant Merriam and for the defendant administrator in both cases. The defendant Merriam appeals. The two cases were consolidated for the purpose of the appeal.

In the case of State of Ohio v. Porter, Cal.Sup., 129 P.2d 691, this day decided, it was held that the cause of action there sued upon was created on February 27, 1933, and that the action was barred by section 359 of the California Code of Civil Procedure. The questions of law involved herein are the same as those presented and passed upon in the case of State of Ohio v. Porter, supra. On the authority of that case the judgments appealed from are reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent for the reasons set forth in the dissenting opinion in State of Ohio v. Porter, Cal.Sup., 129 P.2d 691, this day decided.

PETERS, Justice pro tem., concurred.

54 Cal.App.2d 646

PAGETT v. INDEMNITY INS. CO. OF NORTH AMERICA et al.

SAME v. AMERICAN SURETY CO. OF NEW YORK et al.

Civ. 12085.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1942.

Hearing Denied Nov. 28, 1942.

1. Pleading ⇐356(3)

An amended complaint, which sets up a new and different cause of action, is subject to motion to strike.

2. Pleading ⇐356(3)

Where original complaint alleged cause of action against indemnity insurance company as surety on bond of brokerage company for a single transaction and amended complaint sought to set up six new and different causes of action based upon other alleged acts of fraud occurring at different times, trial court properly granted motion to strike such amended complaint and entered judgment of dismissal.

3. Licenses ⇐26

Action against surety company on surety bond of brokerage company to recover for alleged fraud of brokerage company in connection with security transactions was governed by special two-year statute of limitations contained in Corporate Securities Act, and not the general limitation applicable to actions on the ground of fraud. St.1933, p. 2316, § 6, subd. 3; Code Civ.Proc. § 338, subd. 4.

4. Limitation of actions ⇐179(2)

Where complaint against surety company to recover on brokerage company's surety bond for fraud in connection with security transaction was filed more than two years after occurence of the claimed fraud but failed to sufficiently allege fraudulent concealment so as to suspend running of statute of limitations until discovery of fraud, complaint was barred by special two-year statute of limitations contained in Corporate Securities Act. St. 1933, p. 2316, § 6, subd. 3.

5. Limitation of actions ⇐179(2)

Where it was impossible to determine theory of complaint because of jumble of allegations and confusion resulting from promiscuous incorporation by reference of allegations from one count thereof to another, complaint failed to comply with rules of pleading to be observed by a plaintiff who seeks to toll the running of the statute of limitations upon the theory of a fraudulent concealment. St.1933, p. 2316, § 6, subd. 3.

Appeals from Superior Court, City and County of San Francisco; Robert McWilliams and George W. Schonfeld, Judges.

Actions by F. E. Pagett against Indemnity Insurance Company of North America and others and against American Surety Company of New York and others on two surety bonds issued respectively by the named defendants. From separate judgments of dismissal, plaintiff appeals.

Affirmed.

Harry G. Henderson, of San Francisco, for appellant.

John Guthrie Heywood and Joseph G. DeForest, both of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff appeals from two separate judgments of dismissal. The first of said judgments was entered in favor of defendant Indemnity Insurance Company of North America following the granting of said defendant's motion to strike the third amended complaint as to said defendant. The second of the said judgments was entered in favor of defendant American Surety Company of New York after the sustaining of said defendant's demurrer to the fourth amended complaint without leave to amend.

This action was filed on September 8, 1939. The original complaint contained but one count and judgment was sought against both defendants upon two surety bonds issued respectively by the two defendants above mentioned. The first and second amended complaints do not appear in the transcript. The third amended complaint contained nine counts, three of which were directed at defendant American Surety Company and six of which were directed at defendant Indemnity Insurance Company. After granting the motion of defendant Indemnity Insurance Company to strike the third amended complaint as to said defendant, the trial court entered its judgment of dismissal as to said defendant. Plaintiff filed two separate documents in

said action, each of which was entitled "Fourth Amended Complaint." In one of said documents, Indemnity Insurance Company was named as the only defendant other than fictitious defendants. In the other of said documents, American Surety Company was named as the only defendant other than the fictitious defendants. The document entitled "Fourth Amended Complaint," and in which Indemnity Insurance Company was named as the only defendant, contained six counts similar to those directed against said defendant in the third amended complaint. As the action was dismissed as to Indemnity Insurance Company after the granting of said defendant's motion to strike the third amended complaint, the transcript shows no pleadings interposed by said defendant with respect to said purported fourth amended complaint. The document entitled "Fourth Amended Complaint," and in which American Surety Company was named as the only defendant, contained three counts similar to those directed against said defendant in the third amended complaint. Said defendant filed a demurrer to said fourth amended complaint interposing the plea of the bar of the two-year statute of limitations found in subdivision 3 of section 6 of the Corporate Securities Act. See Stats.1933, chap. 898, pp. 2308, 2315. The trial court sustained the demurrer of said defendant to said fourth amended complaint without leave to amend and the judgment of dismissal in favor of said defendant followed.

Appeal from the Judgment in Favor of Defendant Indemnity Insurance Company.

The motion of defendant Indemnity Insurance Company to strike the third amended complaint as to said defendant was granted upon the ground that said third amended complaint set up alleged causes of action against said defendant which were new and different from the alleged cause of action set up in the original complaint. It is therefore necessary to compare the two pleadings.

According to the allegations of the original complaint E. M. Lewis & Co. was engaged in the business of selling securities to the public. Pursuant to the requirements of the above mentioned subdivision 3 of section 6 of the Corporate Securities Act, defendants furnished surety bonds for said E. M. Lewis & Co. The bond of defendant American Surety Company was alleged to have been in effect from January 1, 1936 to January 5, 1937. The bond of defendant Indemnity Insurance Company was alleged to have been in effect from November 19, 1936 to September 17, 1937. The single count contained in the original complaint was based solely upon the alleged fraud of Harry Rostad, an employee of E. M. Lewis & Co., in obtaining from plaintiff for said E. M. Lewis & Co. a loan in the sum of $5,000 bearing 6% interest. It was alleged that said transaction occurred on September 29, 1936 and that the fraud consisted of a false representation by Rostad that Paul McDonald, who was known to plaintiff as an outstanding banker and business man, had made a similar loan in the sum of $10,000 to said E. M. Lewis & Co.

The third amended complaint, in the six counts thereof relating to defendant Indemnity Insurance Company, alleged that the bond of said defendant was in effect during the same period of time as that alleged in the original complaint, to wit: November 19, 1936, to September 17, 1937. The six counts thereof were based upon alleged acts of fraud other and different from the single alleged act of fraud on September 29, 1936, set forth in the original complaint. Count 1 was based upon an alleged act of fraud occurring on January 26, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $3,000. Count 2 was based upon an alleged act of fraud occurring on March 31, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $7,000. Count 3 was based upon an alleged act of fraud occurring on April 17, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $3,000. Count 4 was based upon an alleged act of fraud occurring on April 29, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $2,000. Count 5 was based upon an alleged act of fraud occurring on May 13, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $1,000. Count 6 was based upon an alleged act of fraud occurring on June 4, 1937, in connection with the alleged sale to plaintiff of a security for the sum of $2,000. In each of said counts the alleged fraud consisted of the alleged false representation by Rostad at the time of each of said six transactions that said "transaction was a sound and prudent investment."

It appears entirely clear that the original complaint was insufficient to state a cause

of action against defendant Indemnity Insurance Company. The single count thereof related to the single alleged fraudulent transaction occurring on September 29, 1936, and it was alleged that the bond of said defendant was in effect only from and after November 19, 1936. It appears equally clear that the third amended complaint sought to set up six new and different causes of action based upon other alleged acts of fraud occurring between January 26, 1937, and June 4, 1937, and in the period during which it was alleged that said defendant's bond was in effect. In each of said six counts of the third amended complaint, the fraud upon which the count was based consisted of a different fraudulent representation occurring on a different date and with respect to a different transaction from that involved in the single count of the original complaint.

[1, 2] It is well settled that a new and different cause of action may not be set up in an amended complaint and that the trial court should grant a motion to strike an amended complaint which sets up an entirely new and different cause of action. See Groom v. Bangs, 153 Cal. 456, 96 P. 503; Altpeter v. Postal Telegraph-Cable Co., 26 Cal.App. 705, 148 P. 241; Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; 21 Cal.Jur. 199. We are therefore of the opinion that the trial court properly granted the motion of defendant Indemnity Insurance Company to strike the third amended complaint as to said defendant and properly entered the judgment of dismissal. Smith v. Ling, 73 Cal. 72, 14 P. 390.

Appeal from the Judgment in Favor of Defendant American Surety Company.

The demurrer of the defendant American Surety Company to the fourth amended complaint was sustained upon the ground that the alleged causes of action set forth therein were barred. Said fourth amended complaint contained three counts against said defendant based upon three alleged fraudulent acts. Count 1 was based upon an alleged fraudulent act occurring on September 16, 1936. Count 2 was based upon an alleged fraudulent act occurring on September 29, 1936. Count 3 was based upon an alleged fraudulent act occurring on October 28, 1936. This action was not filed until September 8, 1939.

Subdivision 3 of section 6 of the Corporate Securities Act (see Stats. 1933, chap. 898, pp. 2308, 2316) provides: "Any person who sustains an injury covered by such bond, may in addition to any other remedy that he may have, bring an action in his own name upon said bond for the recovery of any damages sustained by him; provided, however, that no such action may be brought after the expiration of two years from and after the time when the act or default complained of may have occurred."

[3-5] Defendant American Surety Company contends that said section provided a special two-year statute of limitations covering the time for the commencement of this action upon the bond, and that said statute, rather than the section relating to the general limitation on an action "on the ground of fraud" (Code Civ.Proc., § 338, subd. 4), was applicable. In our opinion this contention must be sustained. Glassell Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; 16 Cal.Jur. 403–404. But it is urged by plaintiff that while he did not bring the action within two years after any of the transactions occurred, he sufficiently alleged a case of fraudulent concealment and that the applicable statute did not therefore commence to run until the date of discovery, which date was alleged to have been November 15, 1937. Our examination of plaintiff's fourth amended complaint, however, leads us to the conclusion that the allegations relating to the claimed fraudulent concealment were insufficient within the rules set forth in Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Lady Washington Con. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810, and Haley v. Santa Fe Land Imp. Co., 5 Cal.App.2d 415, 42 P.2d 1078. We may further add that it appears impossible to determine the theory of plaintiff's fourth amended complaint because of the jumble of allegations found therein and because of the confusion which results from the promiscuous incorporation by reference of allegations from one count thereof to the other. The pleading falls short of complying with the "stringent rules of pleading" which must be observed by a plaintiff who seeks to toll the running of the statute of limitations upon the theory of a fradulent concealment.

The judgments appealed from are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

ALLEN et al. v. CALIFORNIA MUTUAL BUILDING & LOAN ASS'N et al.*

Civ. 12121.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1942.

Hearing Granted Dec. 7, 1942.

1. Appeal and error ⇐1099(7)

Question on appeal whether evidence was sufficient to support findings and judgment could not be deemed settled by prior decisions, unless same issues and same evidence were presented on appeals from judgments in those cases.

2. Building and loan associations ⇐42(17)

The general purpose of section of building and loan association act dealing with claims against a building and loan association under liquidation is to set up an orderly method of presenting claims so that validity, amount, and priority of claims may be determined at any early date. St.1933, p. 2719, § 13.16; St.1935, p. 1500, § 13.16.

3. Building and loan associations ⇐42(17)

Under the building and loan association act, the legislature intended that no person, not even an investor in an association, should be permitted to assert any claim without presentation of the claim, unless the claim so asserted was a claim of an investor, asserted in conformity with such investor's rights as such rights appeared on the books of the association. St. 1933, p. 1090, § 1.01; p. 2719, § 13.16; St. 1935, p. 1498, § 1.01; p. 1500, § 13.16.

4. Building and loan associations ⇐42(16)

Where those seeking judgment against building and loan association and its liquidator on alleged claims against association failed to allege that there was any presentation of their claims, and books of association showed that claimants ceased to be certificate holders in the association between two and four years before association went into liquidation, claims were properly disallowed. St.1933, p. 1090, § 1.01; p. 2719, § 13.16; St.1935, p. 1498, § 1.01; p. 1500, § 13.16.

Appeal from Superior Court, Santa Clara County; Maurice T. Dooling, Jr., Judge.

Action by Mrs. W. A. Allen and numerous others against the California Mutual Building and Loan Association and another, as liquidator of the association, to obtain a judgment establishing the plaintiffs' alleged claims against the association in liquidation. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment reversed.

See, also, 40 Cal.App.2d 374, 104 P.2d 851.

D. T. Jenkins, of San Jose, and Patrick J. Kearns, of San Francisco, for appellants.

F. W. Sawyer, of Los Angeles, for respondents.

SPENCE, Justice.

This action was brought by numerous plaintiffs against defendant California Mutual Building and Loan Association and the defendant commissioner, as liquidator thereof, to obtain a judgment establishing their alleged claims against said association in liquidation. Plaintiffs had judgment and defendants appeal therefrom.

[1] There was a prior appeal in this action. Allen v. California Mut. Bldg. & Loan Ass'n, 40 Cal.App.2d 374, 104 P.2d 851. Plaintiffs rely upon the decision on the prior appeal and also upon the decision in what they term a "companion case" (Alexander v. State Capital Co., 9 Cal.2d 304, 70 P.2d 619) in support of the judgment entered herein. The main contention of defendants on this appeal, however, is that the evidence was insufficient to support the findings and judgment, and this contention may not be deemed settled by the decisions above mentioned unless the same issues and the same evidence were presented on said appeals. We shall hereinafter show that such was not the case.

The background of this litigation is indicated in the decisions to which reference has been made. The defendant association went into liquidation in 1933 and the then commissioner duly published notice requiring that all persons having claims against the association present the same on or before July 26, 1933, or thereafter be barred from participating in said liquidation. The numerous successful plaintiffs in the Alexander case duly presented their claims within the time provided and, after the rejection of said claims by the commissioner, filed

* Subsequent opinion 139 P.2d 321.

that action on December 18, 1933. The complaint in that action was entitled "Action to Establish Rejected Claims and to Enforce Payment of the Same in Liquidation." It was alleged in the complaint and admitted by the answer in that action that the successful plaintiffs therein had duly presented their claims, and the trial court so found. The question of the necessity of presenting such claims was therefore not involved in that case and was not referred to in the decision on the appeal therein. Said decision did hold that the evidence on the issue of fraud was sufficient. Substantially the same evidence on that issue was presented on the trial of the present action and, in the light of the decision in the Alexander case, defendants do not now question the sufficiency of the evidence on that issue. The points raised on this appeal are entirely different from those raised on the appeal in the Alexander case, and it is obvious that the decision in the Alexander case cannot be relied upon with respect to any points which were not raised on the appeal in that action.

The present action was not filed until February 28, 1936. Neither the original complaint nor any of the amended complaints alleged the presentation of a claim by any one of the numerous plaintiffs herein. Among the defenses relied upon by defendants were the statute of limitations and the failure of plaintiffs to present claims. The cause originally went to trial upon the second amended complaint. As appears in the opinion on the prior appeal, a judgment on the pleadings was entered in favor of defendants before any evidence had been introduced. Plaintiffs thereafter made a motion for a new trial, which was granted. The order granting the new trial was affirmed on appeal. Allen v. California Mut. Bldg. & Loan Ass'n, 40 Cal.App.2d 374, 104 P.2d 851. A reading of the opinion on the prior appeal makes it entirely clear that the question involved was that of the sufficiency of the allegations of plaintiff's second amended complaint, and that no question of sufficiency of evidence was involved.

After the remittitur went down following the first appeal, the cause again proceeded to trial. During that trial, plaintiffs filed a third amended complaint which, for the purposes of this discussion, was in all respects similar to the second amended complaint. In the second and third amended complaints, plaintiffs alleged certain facts upon the theory that said allegations showed that they were relieved from the necessity of having presented claims. These allegations are summarized in the opinion on the prior appeal.

Before discussing said allegations and the evidence offered in support thereof, which evidence is now claimed by defendants to be insufficient, we should refer to the statute requiring the presentation of claims.

At the time that the defendant association went into liquidation in 1933, section 13.16 of the Building and Loan Association Act (St.1933, p. 2719, see Deering's Gen. Laws Supp.1933, Act 986) provided for the publication by the commissioner of notice "to all persons having claims against it as creditors or investors or otherwise, to present and file same and make legal proof thereof at a place and within a time to be designated in such publication." The commissioner was required to prepare and file thereafter with the court "a full and complete schedule of all claims presented, specifying by classes those that have been approved * * *." Written notice was required to claimants whose claims were rejected and it was provided that any action to establish any rejected claim "must be brought and service had within four months from and after the date of filing of the schedule of claims with the proper court; otherwise all such actions shall be forever barred." Said section then continued as follows: "All claims of creditors, investors or other persons against the association or against any property owned or held by it must be presented to the commissioner in writing verified by the claimant or someone in his behalf within the period limited in the above-mentioned notice for the presentation of claims; and any claim not so presented shall be forever barred; provided, however, *that the claim of any investor, appearing upon the books of the association to be a valid claim,* presented after the expiration of the time fixed in said notice, shall be entitled to share in any dividends declared subsequent to the presentation of such claim." (Italics ours.)

In 1935 (Stat.1935, pp. 1497, 1502) the last quoted portion of the section was amended to read as follows: "All claims, demands or causes of action of whatever nature, and regardless of whether or not a suit shall be pending to enforce the same at the time of the taking possession of the assets of the association by the commissioner, of creditors, and persons other than in-

vestors against the association or against any property owned or held by it in trust or otherwise, must be presented to the commissioner in writing, verified by the claimant, or some one in his behalf, within the period limited in the above mentioned notice for the presentation of claims; and the commissioner shall have no power to approve any claim not so presented, and any such claim, demand or cause of action not so presented shall be forever barred. *Any investor, without presenting a claim,* shall be entitled, as to any dividends hereafter declared, to share in such dividends to the extent, and in the proper relative order of priority, of *any claim shown by the books of the association to exist in his favor against the association.*" (Italics ours.)

[2, 3] The general purpose of said provisions appears entirely clear. An orderly method of presenting claims was set up to the end that the validity, amount and priority of such claims might be determined at any early date. Such provisions were essential in order that liquidation might proceed in an expeditious and proper manner. Prior to 1935, the failure of any claimant to present his claim in the manner provided, forever barred the assertion of the claim except as to "the claim of any investor, appearing upon the books of the association to be a valid claim." As to such last mentioned claim, the investor could file his claim "after the expiration of the time fixed in said notice" but such filing only entitled the investor "to share in any dividends declared subsequent to the presentation of such claim." It is to be noted that the exception ran only in favor of the claim of any investor "appearing upon the books of the association to be a valid claim." The word "investor" was defined by section 1.01 of the act, both before and after 1935, St.1933, p. 1090, St.1935, p. 1498, as including "shareholder, stockholder and certificate holder." The 1935 amendment, above referred to, went into effect at a time when the liquidation of the defendant association had been in progress for more than two years. For the purposes of this discussion, we need only point out that an investor, whose claim was "shown by the books of the association to exist in his favor against the association," was the only claimant who was relieved by the amendment of presenting his claim. The Legislature no doubt felt that the books of an association in liquidation would be a safe guide to the commissioner in determining those who had the status of "investors," the extent of each investor's claim, and "the proper relative order of priority"; and that there was therefore no necessity of requiring the filing of claims by such investors. And it appears clear that the Legislature intended that no person, not even an investor, should be permitted to assert any claim without the presentation of the same, unless the claim so asserted was a claim of an investor asserted in conformity with such investor's rights as such rights appeared upon the books of the association.

Plaintiffs herein claim that their pleadings in this case and the pleadings in the Alexander case are "factually the same." This claim cannot be made seriously. As above indicated, the plaintiffs in the Alexander case alleged the due presentation of their claims, but plaintiffs in the present action failed to allege any presentation whatever. In fact, they concede that they did not present their claims. In the Alexander case, plaintiffs did not claim that they were "investors" in the association at the time of the liquidation, but alleged in their complaint that "Each person named as plaintiff herein *was formerly and originally* a creditor, depositor and investor of and in the said California Mutual Building and Loan Association. * * *" (Italics ours.) In the present case, plaintiffs alleged in their complaint that, prior to the liquidation, each of the plaintiffs "became and ever since has been and *still is an investor* in said association by the purchase of building and loan association invested certificates herein * * *" (italics ours), and further alleged that "The claim of each investor named in paragraph III herein fully appears upon the records and books of defendant California Mutual Building and Loan Association to be and as a valid claim against said association. * * *" This court held on the former appeal that the complaint stated a cause of action without alleging the presentation of claims. Allen v. California Mut. Bldg. & Loan Ass'n, supra, 40 Cal.App.2d page 379, 104 P.2d 851. The trial court found said last-mentioned allegations to be true and the main contention on this appeal is that the evidence was insufficient to sustain said findings.

[4] The record herein discloses, in conformity with the allegations of paragraph X of plaintiffs' complaint, that "during the early part of the year 1929 and to and including the year 1931" plaintiffs "did ex-

change their said investments in said California Mutual Building and Loan Association for capital stock of and in said State Capital Company * * *" If we assume for the purpose of this discussion that because of the alleged relationship between the two corporations and because of the alleged fraud, plaintiffs may be said to have remained "investors" in the defendant association despite the exchange which appeared upon the books, it seems clear that plaintiffs are not here asserting claims which appeared on the books to be valid claims but are asserting other and different claims from those which appeared on said books. The books of the defendant association showed that plaintiffs ceased to be certificate holders in said association between 1929 and 1931. The books of the State Capital Company showed that plaintiffs became stockholders in that company at or about the time that they ceased to be certificate holders in the defendant association and that they thereafter continued to be stockholders in said State Capital Company. Plaintiffs are now, in effect, asserting alleged claims in this action as certificate holders in the defendant association, but no books of the association showed such claims to be valid claims. The showing from the books was all to the contrary. We are therefore of the opinion that the evidence was insufficient to sustain the challenged findings, which were material findings under the circumstances.

In conclusion we may state that we believe that the entire purpose of the above-mentioned provisions relating to the presentation of claims would be defeated if plaintiffs were permitted to prevail in this action and to participate in the liquidation of the defendant association to the prejudice of those who duly presented their claims in 1933. Plaintiffs now claim to have been defrauded between 1929 and 1931 in transactions whereby their status as certificate holders then appearing upon the books of the defendant association was exchanged for that of stockholders appearing upon the books of the State Capital Company. But assuming that they were so defrauded, plaintiffs have slept upon any rights which they may have had. They did not attempt to rescind or to repudiate their status as such stockholders. Perhaps they believed that their status as such stockholders in the State Capital Company would be more advantageous to them than the status of certificate holders in the defendant association in liquidation; but in any event they presented no claim to the liquidator and filed no action for rescission or for any other purpose until 1936. Plaintiffs do not state the exact nature of their action, but whether it be considered as an action for rescission, or as an action for damages, or as an action to quiet title or for any other purpose, the claims asserted in said action did not appear upon the books and we are of the opinion that said claims were barred by the above quoted provisions relating to the presentation of claims in liquidation.

The judgment is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.



54 Cal.App.2d 637

Ex parte WHITE.
Cr. 1781.

District Court of Appeal, Third District, California.
Sept. 30, 1942.

1. Habeas corpus ⇐117(1)

Where in hearing before superior court of divorced mother's habeas corpus proceeding to obtain custody of minor son detained by paternal grandparents, no evidence was introduced relative to fitness of any of the parties to have custody of the minor or of the environment, and superior court made no finding, superior court's decision deciding only a question of law was not "res judicata" in similar proceeding involving the same parties subsequently instituted by mother in District Court of Appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Parent and child ⇐2(3)

The law presumes that the interest of a child will be best subserved by awarding its custody to a parent, unless such parent is unfit to have its care. Civ.Code, § 197.

3. Guardian and ward ⇐4

The law regards the parents as the natural guardians of their children. Civ. Code, § 197.

4. Parent and child ⇐2(3)

The natural right of a parent to custody of a minor child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection, but such right may be forfeited only upon proof that the parent is unfit to have such custody. Civ. Code, § 197.

5. Habeas corpus ⇐99(4)

Divorced mother who was shown to be able to care for and a fit person to have the custody of her six-year old son whose custody during each year had been divided by divorce decree between mother and father, was entitled to writ of habeas corpus awarding to her custody of the child as against its paternal grandparents. Civ. Code, § 197.

6. Divorce ⇐303(1)

Superior court granting a divorce decree has jurisdiction to modify such decree with reference to the custody of a minor child, in an appropriate proceeding for and upon evidence justifying such modification.

Habeas corpus proceeding by Grace White to obtain custody of Robert LaVoy White.

Writ granted.

See, also, 149 Cal.App.2d 160, 121 P.2d 100.

Pugh & Pugh, of Red Bluff, for petitioner.

Ware & Ware, of Chico, for respondents.

SCHOTTKY, Justice pro tem.

Petitioner asks, by her application for a writ of habeas corpus, to have the custody of Robert LaVoy White restored to her. A similar application was made to the superior court, in and for the county of Tehama, and denied.

It is alleged in the petition that William D. White and Leathy Beryl White, paternal grandparents of the minor, are illegally detaining said minor and restraining him of his liberty.

The petitioner was the wife of LaVoy White, who obtained a divorce from her, the final decree being entered on May 15, 1940. The minor is the son of said parties, his age being six years. By the terms of the final decree the custody of said minor was awarded to the parents equally, each to have his custody for one-half of every year. The father was ordered to pay $15 per month for the support of the child during the time he was with the mother.

Subsequent to the filing of the petition this court made an order appointing a referee to hear all the issues involved, and report his findings thereon. Thereafter, respondents grandparents filed a notice of motion to discharge said writ, upon the ground that the issues involved were adjudicated fully, adversely to petitioner herein, in the prior habeas corpus proceedings involving the same parties and the same child. Said motion was heard by this court, and in the opinion denying said motion (49 Cal.App.2d 160, 121 P.2d 100), this court said:

"Respondents rely upon In re Holt, 34 Cal.App. 290, 167 P. 184, where it was held that a prior hearing upon habeas corpus, under identical facts, in the superior court, is res adjudicata, where the custody of children is involved.

"Petitioner relies upon In re Livingston, 108 Cal.App. 716, 292 P. 285, where it is held that a prior hearing, in such a case, cannot be res adjudicata in an appellate court, if the decision of the superior court is based upon questions of law alone. We believe that the latter view must prevail here. Under no circumstances could it be said that respondents have any legal right to the custody of the minor. In the eyes of the law, they are mere interlopers who have no standing before this court. On the other hand, petitioner is the mother, and, under the terms of the decree, has a right to the custody at certain times. Her rights cannot be ignored, or lightly brushed aside. Furthermore, the petition recites that at the former hearing no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor, or of environment. The court made no findings, but merely denied the writ. The question decided by the superior court was therefore one of law alone. Petitioner is therefore entitled to a full hearing in this court upon the issues, set forth in her petition.

"The motion is denied and the referee directed to proceed with the hearing."

The referee then proceeded to take testimony in said matter, and after the report of the referee was filed, the return date on

the writ of habeas corpus was fixed by the court. Upon the hearing, counsel for respondent was granted leave to have petitioner sworn, and to interrogate her further, but the only new matter brought out was that petitioner had changed her employment since the hearing before the referee, and is now employed as an inspector by the Navy Department, at a higher compensation, and that instead of living at the home of her mother, she now lives in a new defense home, rented by her, with her grandmother and her three-year-old daughter. The referee found that the child's paternal grandparents, with whom the child is now living, had a comfortable home, and that the child was receiving proper care and attention at their hands, and that they were in all respects fit and proper persons to have the custody of the child. The referee likewise found that the petitioner was actuated by a mother's natural desire to have her small son and daughter with her, and that this was prompted by a real love for her children; and that the child would receive proper nourishment, care and education if he were entrusted to petitioner; and that petitioner was in all respects a fit and proper person to have the custody and control of the child. The referee thereupon recommended that the prayer of the petition be granted, and that the child be awarded to petitioner.

[1] No attack is made by respondents upon the sufficiency of the evidence to support the findings of the referee, and we hereby adopt said findings as the findings of this court. Respondents do, however, contend most earnestly that the writ should be discharged, because the issues involved in the petition therefor were fully adjudicated in the habeas corpus proceeding in the superior court of Tehama county. In view of the fact that this court has, in the opinion hereinbefore referred to, already denied the motion to discharge the writ upon that ground, we deem it unnecessary to discuss that contention further.

[2, 3] The law presumes that the interest of a child will be best subserved by awarding its custody to a parent, unless such parent is unfit to have its care. The law regards the parents as the natural guardians of their children, and section 197 of the Civil Code provides as follows:

"The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services, and earnings."

[4-6] The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody. In the instant case there is no evidence that petitioner abandoned the minor child, although it is true that, because of necessity, petitioner left the child with respondents in March, 1940. The father of the child is now at Pearl Harbor, and has taken no part in these proceedings, and apparently has not sought to secure the custody of the child. The petitioner is now remarried, and while her present husband is in the military service of the United States, she is employed in a responsible position and is apparently able to provide for the support of the minor child, even without any assistance from the father. The findings of the referee, which we have adopted, show that the petitioner is a fit and proper person to have the care and custody of said child. Under such circumstances we must hold that the respondents have no natural or legal right to retain the custody of said minor child as against petitioner. It is perhaps unnecessary to state that the superior court of Tehama county has the jurisdiction and power to modify the decree of divorce with reference to the custody of the minor child, in an appropriate proceeding therefor, and upon evidence which justifies such modification.

As was said in the case of Eddlemon v. Eddlemon, 27 Cal.App.2d 343, at page 344, 80 P.2d 1009, at page 1010:

"The question here presented has been before our courts in the cases of Newby v. Newby, 55 Cal.App. 114, 202 P. 891, and Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, in both of which it was held that before a court can take the custody of a minor child under the age of fourteen years away from its parent and place it in a stranger (in the Stever case, in its grandparents)

it must find that the parent seeking custody of the child is unfit to have such custody.

"These cases are controlling here. As there is no finding that the mother is unfit to have control of her minor daughter the trial court should not have deprived her of that custody by placing it in the grandmother."

For the reasons hereinbefore set forth, it is therefore ordered that the minor child, Robert LaVoy White, be discharged from the illegal detention and custody in which he is now held by respondents, and committed to the custody of petitioner herein.

THOMPSON, J., and ADAMS, P. J., concurred.



54 Cal.App.2d 712

HOGG v. REAL ESTATE COM'R.

Civ. 12148.

District Court of Appeal, First District, Division 1, California.

Oct. 5, 1942.

1. Brokers ⊂=3

The word "dishonesty", as used in the section of the real estate act enumerating grounds on which Real Estate Commissioner may suspend or revoke a broker's license, denotes an absence of integrity, a disposition to cheat, deceive or defraud, or deceive and betray. Gen.Laws 1937, Act 112, §§ 9, 12.

"Dishonesty" necessarily includes the element of bad faith and it means fraud, deception, betrayal, faithlessness.

See Words and Phrases, Permanent Edition, for all other definitions of "Dishonesty".

2. Brokers ⊂=3

Real Estate Commissioner erred in revoking real estate broker's license on ground that broker was "dishonest" because he in good faith retained down payment made to him by prospective purchasers of realty owned by the broker when prospective purchasers repudiated the agreement because a colored family lived about two blocks away from realty in question. Gen. Laws 1937, Act 112, §§ 9, 12(12).

See Words and Phrases, Permanent Edition, for all other definitions of "Dishonest".

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding, which by stipulation of the parties was to be treated as a mandamus proceeding, by F. W. Hogg against the Real Estate Commissioner of the State of California, to review the Commissioner's action in revoking the license of F. W. Hogg as a real estate broker. From a judgment denying the relief sought and dismissing the proceeding, F. W. Hogg appeals.

Judgment reversed.

Alfred J. Harwood, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant, F. W. Hogg, was the owner of certain real property in Redwood City. He was also a contractor and builder, and the holder of a real estate broker's license. On May 16, 1941, following negotiations extending over a period of two or three weeks, Christian Jachens and his wife entered into a written agreement with appellant as seller to purchase a lot belonging to appellant, upon which appellant was to construct a home for the Jachens. The full amount of the agreed purchase price was $4,575, and the Jachens made a down payment of $330. For reasons which will hereinafter appear, the sale was not consummated, and the Jachens demanded the return of the down payment. Appellant refused to pay back the money, and on August 2, 1941, Mrs. Jachens signed a verified complaint against appellant with the Real Estate Commissioner, and after a hearing appellant's license as a real estate broker was revoked. Thereupon, under the authority granted by the terms of the California Real Estate Act, appellant filed a petition for a writ of review in the superior court, but in view of the law as laid down in Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, the parties stipulated that the proceeding instituted by petitioner be treated as a pro-

ceeding in mandamus, and that it be submitted to the court for determination on a transcript of the evidence taken before the Real Estate Commissioner. Thereafter and on November 21, 1941, the court entered judgment denying appellant the relief sought and dismissing the proceeding. From said judgment this appeal was taken.

Section 12 of the California Real Estate Act, Stats.1919, p. 1252, as amended, Deering's Gen.Laws, 1937, Act 112, enumerates twelve separate grounds upon which the Real Estate Commissioner may suspend or revoke a broker's license after an investigation initiated on his own motion or upon the written, verified complaint of any person. The twelfth enumerated ground for suspension or revocation is that the licensee has "Acted or conducted himself in a manner which would have warranted the denial of his application for a license, or for a renewal thereof"; and section 9 of the act prescribing the qualifications of an applicant for a license requires that he shall be "honest, truthful and of good reputation." The commissioner's order revoking appellant's license was based on the conclusion, as stated in the order, "That defendant conducted himself in a manner *in this transaction* which would have warranted the denial of his application for a license, in violation of subsection 12 of section 12 of the California Real Estate Act (italics ours); and the basis of the trial court's judgment as set forth in the findings is that * * * from the evidence produced at the hearing the commissioner was entitled to find that in failing to refund or return the $330 deposit when the property could not be financed * * * the petitioner was dishonest."

With respect to the merits of the case, appellant took the position before the commissioner and the trial court and he now urges in support of his appeal that the transaction involving the purchase and sale of the property was carried on by and with him as owner, and not as a real estate broker; that the down payment was made to and accepted by him as owner, and that subsequently the agreement of purchase and sale was repudiated by the Jachens over his protest and without legal cause. Appellant contends, therefore, that the circumstances relating to the repudiation of the agreement by the Jachens reasonably justified the belief that he was entitled to retain the down payment, and if so, that his refusal to refund the same cannot be deemed to be an act of dishonesty as the word "dishonesty" is generally understood and defined.

It is our opinion that the undisputed facts of the case support the position so taken by appellant. In this respect the record shows the following: Sometime in April, 1941, Jachens opened negotiations with appellant regarding the purchase of a home on terms, explaining that he and his wife could not afford to make monthly payments in excess of $30. Appellant showed him several homes, but he said they were too small, and eventually Jachens and his wife picked out a lot belonging to appellant and appellant agreed to purchase twelve feet of the adjoining lot and build them a home on the combined property. On April 30, 1941, they paid appellant $100, and later $200 more; and on May 16, 1941, the parties signed a written agreement reading as follows: "Deposit Receipt for Purchase of Real Property. Redwood City, California, May 16, 1941. Received from Christian Jachens, the sum of $300.00, as a deposit for the purchase of the following described property situate in Redwood City County of San Mateo State of California, to-wit: East 27 ft. of Lot 15 and all of Lot 16—Block B of Oak Villa Homestead with house to be erected as per plans and specifications herewith submitted, for the full consideration of $4575.00. The remainder of the purchase price is to be paid within days from the date hereof, as follows, to-wit: $175.00 to be paid when house is completed and the balance to be a Housing loan. * * *" It was signed "F. W. Hogg, Seller" and at the end of the agreement was the following: "I agree to purchase the above described property on the terms and conditions herein stated." This was signed by Christian Jachens and his wife Johanna Jachens; and at the time of the signing thereof they paid appellant an additional $30. Thereupon the Jachens made application for a Federal Housing Administration loan (F. H.A.). Appellant prepared the application therefor, and the Jachens signed it, and it was presented to the First National Bank of San Mateo County at Redwood City. The application was dated May 20, 1941, and in due course was forwarded by the bank to the F. H. A. Later the F. H. A. agent sent the following communication to the bank: "Notice of Rejection of Application. * * * This is to advise that a [] preliminary examination, [x] final

examination * * * of your application for mortgage insurance, identified by the serial number above, indicates that the transaction does not qualify for insurance within the scope of the National Housing Act [12 U.S.C.A. § 1701 et seq.], for the following reasons: Based upon a loan of $3300, the maximum amount which we can insure, our processing indicates that the mortgagors will require approximately $1085 to close the transaction, and their financial statement indicates that such a sum is not available. We are returning herewith one set of Plans and Specifications submitted with the application." Thereupon and on June 17, 1941, the bank wrote the Jachens as follows: "Today we received from the Federal Housing Administration Notice of Rejection of your application for an F. H. A. loan, with the following notation: 'Based upon a loan of $3300, the maximum amount which we can insure, our processing indicates that the mortgagors will require approximately $1085, to close the transaction, and their financial statement indicates that such a sum is not available.' Also they state that the marketability is adversely affected by the class of occupants in the immediate neighborhood." As will hereinafter appear, the last sentence referred to the fact that a colored family was living about two blocks from the property.

On the day the bank's letter reached the Jachens' home, but before Jachens had seen it, appellant called on him at his work and told him that he would receive a letter from the bank rejecting the loan but not to "get worried about it, they never should have sent it," that "the property hasn't been rejected," that "it was just because I [appellant] have built some smaller homes there they don't want me to build big homes"; that he had resubmitted the application already without Jachens' knowledge, and that it would go through in about two weeks. Later on Jachens read the bank's letter, and after reading it told appellant that having learned through the F. H. A. that there were colored people living in the neighborhood they were no longer interested in buying the property and that the deal "was off." Meanwhile the application had been resubmitted by the bank to the F. H. A. and on June 24, 1941, the F. H. A. wrote the bank as follows: "We are in receipt of your letter of June 19, requesting further consideration of the above captioned application. We refer you to our letter which accompanied the Notice of Rejection, upon which it was stated: 'Marketability adversely affected by class of occupancy in immediate area.' Lacking information that would tend to change our decision in this regard, further consideration of this application is not warranted." The Jachens learned of the second rejection through inquiry at the F. H. A. offices, and thereupon they notified Mr. Morrish, the vice-president of the bank, that they wanted to withdraw their application; that they did not care to go ahead with the loan. Following the second rejection and prior to learning that the Jachens had withdrawn their application, appellant called at the F. H. A. offices in San Francisco to urge favorable action on the application for the loan, and according to appellant's testimony, which in this respect was not contradicted, Mr. McNamara, the official in charge told him: "We have already passed on that subdivision, there is no reason why there should be any objection to this at all, but if there is it can be easily overcome. All you have to do is for your banker to send in a letter along this line stating the reason and I personally will go down there and look at it and if there is any objection to the neighborhood you can go out and get them to sign they will not sell to anybody but the white race. But * * * in this case this is two blocks away from where that colored person lives, and I don't see why that should affect it because it isn't between them and town, it is farther out." Acting on this advice appellant addressed a letter to the bank, which on June 27, 1941, was presented to the bank by appellant's agent, but Morrish told him that Jachens had already called and requested not to have the application submitted again. Thereafter the Jachens made demand for the return of the deposit, and according to Jachens' testimony, appellant told him he would return the deposit if Jachens would resubmit the application again; but Jachens refused to do so; and on August 2, 1941, Mrs. Jachens signed the complaint asking the Real Estate Commissioner for the hearing, which resulted in the revocation of appellant's license.

[1] "Dishonesty" necessarily includes the element of bad faith. As defined in the dictionaries and in judicial decisions, it means fraud, deception, betrayal, faithlessness. See Webster's and Century Dictionaries; American Surety Co. v. Joy

Lodge No. 87, F. & A. M., 102 Ind.App. 82, 196 N.E. 356, 361; State ex rel. Hundley v. Jay, 104 Ind.App. 259, 10 N.E.2d 737, 741; Bank of California Nat. Ass'n v. Portland Hide & W. Co., 131 Or. 123, 282 P. 99, 104, citing numerous authorities. As put by the court in Alsup v. State, 91 Tex. Cr.R. 224, 238 S.W. 667, 670, " 'Dishonesty' denotes an absence of integrity; a disposition to cheat, deceive, or defraud; deceive and betray." And that such was the meaning intended to be given the word "dishonest" as used in section 12 of the Real Estate Act is apparent from the several subdivisions thereof prescribing the grounds for suspension or revocation of licenses, for all but two of them have as their basis acts involving bad faith; that is, misrepresentation, fraud, and deceit. The remaining ones relate to conviction of felony and commingling of funds and property.

[2] Here respondent makes no claim that appellant was guilty of any fraud, deceit, or bad faith of any kind in negotiating or securing the agreement of purchase and sale, or in the efforts made to obtain the loan for the Jachens. In fact, as the hearing before the commissioner was about to be concluded, the commissioner so stated. But it is contended that there was a failure of consideration, and therefore the Jachens were entitled to the return of the down payment; and that the refusal of appellant to refund it justified the finding that he was dishonest. In this respect the respondent in its brief goes on to say: "It appears to us that this is a case where both parties to a contract were prevented from performing by circumstances over which they had no control. That there was a failure of consideration which entitled the proposed purchasers to a return of their deposit and a failure to make such return by a real estate broker in Mr. Hogg's position, was dishonest dealing. * * *" And in support of such position respondent cites the rule "that where a seller cannot carry out his contract, a refund of the deposit is in order," citing Carr v. Lauritson, 41 Cal.App.2d 31, 106 P.2d 19. In other words, respondent's position is apparently based upon the assumption, first, that under the terms of the agreement between the parties appellant was obligated to obtain the loan, and secondly, that the failure to obtain the loan constituted a failure of consideration. However, as will be noted, the agreement contains no provision as to which of the parties thereto was to obtain the loan. It would appear, therefore, to be a debatable question as to whether or not appellant was obligated to do so, and obviously such question can be properly determined only in an action for the recovery of the down payment. Regardless, however, of the question as to which of the parties was obligated to obtain the loan, the evidence shows that before efforts to that end were exhausted the Jachens repudiated the agreement, not upon the ground that the loan had not been or could not be obtained, but upon the ground that having learned that a colored family lived in the neighborhood they did not want to buy the property; that is to say, they took the stand that even though the loan was obtainable they would not go on with the deal for the reason stated by them. In connection with the question of whether or not the loan was obtainable, it should be here stated that the vice-president of the bank testified that his experience had proved that the F. H. A. would very often not make a favorable commitment until after several resubmissions. It is apparent, therefore, that a second debatable question arose as to whether the Jachens, having repudiated the agreement on the ground mentioned, were entitled to a refund of the down payment, and that question also can be properly determined only in an action to recover the down payment. In those circumstances, and in the absence of any evidence showing bad faith, it is our conclusion that the finding that appellant was, in this transaction, dishonest, cannot be sustained. Stated another way, it cannot be held that appellant is guilty of "dishonesty" for refusing to pay back a sum of money which in good faith he claims he is entitled to retain. Whether or not the legal objections raised by appellant against refunding the down payment are well taken must be determined, of course, in an action which may be brought to recover that sum. They are not issues which may be here decided; and what has been here said should not be construed as indicating the expression of any views thereon.

The determination of the issues already discussed makes it unnecessary to inquire into the other grounds urged in support of the appeal.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.

54 Cal.App.2d 575

In re BROWN'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. Tum SUDEN.

Civ. 12177.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

Hearing Denied Nov. 27, 1942.

1. Husband and wife ⇐276(9)

Petition by executor of surviving widow asserting her one-half community share which attached at time of death of husband was not required to allege condition of estate as to general indebtedness under statutes regulating petitions for partial distribution to heirs, devisees, and legatees. Probate Code, §§ 201, 1000, 1001.

2. Executors and administrators ⇐194(1), 283

Petition by executor of deceased widow for payment to widow's estate of remaining portion of family allowance and of funds advanced by widow from her separate estate to pay legacies and to meet indebtedness and costs of administration of husband's estate was not required to be filed with and brought to hearing at the time of hearing or settlement of an account in husband's estate. Probate Code, § 952.

3. Executors and administrators ⇐194(1), 283

The purpose of statute providing that upon settlement of any account court should order payment of debts was to require approval and settlement of account showing claims allowed and condition of estate before an order for payment of any such claims can be made, and does not mean that petition for payment of remaining portion of family allowance and sums advanced by widow from her separate estate to estate must be done at one time or in one order. Probate Code, § 952.

4. Executors and administrators ⇐82

Administrator's complaint as to uncertainty of decree distributing certain assets of estate to executor of deceased widow of testator as widow's one-half community share and portion of family allowance and sums advanced by widow for benefit of estate should be directed to probate court in form of petition for instructions as a simpler and more speedy remedy than that of an appeal. Probate Code, § 588.

5. Executors and administrators ⇐194(7)

In proceedings by executor of testator's widow to recover difference between family allowance ordered paid to widow and amount actually paid by administrator of testator's estate, question as to whether it should be inferred that reductions were made with widow's consent and difference thereby waived, or that parties knew that until order was modified it retained its force as a judgment and was enforceable like any money judgment so that widow's delay in asserting her rights was not a waiver, was for trier of facts.

6. Appeal and error ⇐907(2)

Where appellant declared that evidence conclusively showed the existence of an alleged fact but failed to direct attention of appellate court to any such evidence and court did not find any, it assumed that such evidence was not in the record.

7. Executors and administrators ⇐283

Where note made by husband and payable to wife was basis of claim against husband's estate, and was allowed and approved within three years after date of making but was left unpaid for 12 years from date of making by reason of involved condition of husband's estate to which wife advanced funds out of her separate estate, and estate benefited by delay, estate could not urge "laches" as a bar to the collection of the note.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

8. Executors and administrators ⇐217 Husband and wife ⇐273(4, 6)

Where widow advanced funds to husband's estate to pay debts and special legacies, widow was entitled to credit in full for amount used to pay legacies but properly charged with one half of community debts.

9. Executors and administrators ⇐283

Where persons interested in estate had stipulated to settlement of accounts which included sums advanced by widow for benefit of estate and, on petition to repay such sums to widow, correctness of such items was not raised, the correctness thereof could not be challenged on appeal.

10. Executors and administrators ⇐515

Where persons interested in estate had stipulated to settlement of accounts which contained items covering sums advanced by widow for benefit of estate, such persons could not thereafter attack separate items of the approved account on the grounds that loans were voluntary contributions or made without prior sanction of probate court or were used to enhance the estate of widow.

11. Executors and administrators ⇐515

Those beneficially interested in an estate may stipulate to the settlement of an account, and, when the settlement is so made, the order or decree is binding upon them.

12. Husband and wife ⇐276(9)

Where widow's community share of one-half of estate and claims allowed greatly exceeded total amount available for distribution so that if testator's note payable to widow were charged with community liability and only half paid to widow there would still remain nothing to distribute to residuary legatees, any error in not charging community liability to such note was harmless as to such legatees.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceedings in the matter of the estate of Andrew A. Brown, deceased, by Peter tum Suden, as executor of the estate of Ada I. Brown, deceased widow of Andrew A. Brown, petitioner, against Bank of America National Trust and Savings Association, as administrator with the will annexed, and others, for distribution to petitioner of the widow's one-half community interest in the estate and for payment of certain claims in behalf of the widow's estate. From decree for petitioner, administrator and others appeal.

Affirmed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Weinmann, Quayle & Berry and Donald K. Quayle, all of Oakland, and George Olshausen, of San Francisco, for appellants.

Richard tum Suden and Walter K. Olds, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The administrator with the will annexed and several beneficiaries under the will appeal from an order or decree of the probate court directing the administrator to distribute to the executor of the deceased widow of Andrew A. Brown her one-half community interest in the estate, and also directing the administrator to pay to such executor specified amounts in satisfaction of claims in behalf of said widow's estate.

The facts upon which the order was based are fairly stated by respondent, and no substantial controversy is urged by appellants as to the evidence upon which respondent relies. Andrew A. Brown died testate on October 21, 1925, leaving surviving him his wife, Ada I. Brown, and no children. His estate consisted entirely of community property, and he so declared in his will. After provision was made for certain specific bequests, which are not involved in this controversy, the will bequeathed the residue to his wife in this language: "All the rest and residue of my property of whatever kind and nature, in case my said wife, Ada I. Brown, survives me, I give, bequeath and devise unto my wife, Ada I. Brown, to have, hold, use and enjoy the same with full power to invest and reinvest and to dispose of the same in any manner she may see fit, and to enjoy the rents, issues and profits thereof and so much of the principal thereof as may be necessary for her support and maintenance, of which she shall be the exclusive judge, and as to which no account shall be required of her, for and during the term of her natural life, free from the control of all courts or other residuary legatees whatsoever."

Provision was then made that if his wife survive him, the residue at her death of his one-half of the community property was to be placed in trust for the benefit of certain named nephews and nieces and of a sister of the testator. All of these nephews and nieces, and the heirs of said sister, since deceased, are the beneficiaries who join in the appeal.

The will of Andrew A. Brown was admitted to probate in November, 1925, and Joseph C. Atwood qualified as executor. He remained in that capacity until his death in 1937, when the Bank of America, one of the appellants herein, was appointed administrator with the will annexed. Mrs. Brown died testate in 1935, and the respondent herein qualified as executor under her will.

During the course of his administration, Atwood caused an inventory and appraisement to be made and filed showing a gross

estate of over $200,000. He filed in due order his first four accounts and reports, all of which were duly settled, allowed, and approved. His fifth account and report was filed on September 11, 1935. Before it was settled one of the beneficiaries intervened to reopen and examine the four previous accounts contending that he had been a minor when these four accounts were settled and had not reached his majority until April, 1935. The probate court having denied him this privilege, he appealed to this court, and the order was reversed. Estate of Brown, 24 Cal.App.2d 573, 75 P.2d 658. However, the record does not disclose that he proceeded further in reference to the first four accounts, but it does appear that he joined with all the other appellants herein at the time of the settlement of the fifth and sixth accounts in expressly withdrawing all objections to the fifth and sixth accounts; and these were duly settled and approved on September 27, 1938, without opposition of any of the parties to this appeal. On December 1st following, the order of settlement was amended to show that objections had been made to one item of $1,873, and this item was withdrawn from the settlement.

In March, 1938, the petition which is the subject of this appeal was filed, a demurrer thereto was overruled, issue was joined by answer, and the matter was submitted in January, 1940, after hearing in open court. In January, 1941, the order and decree appealed from was entered. In all these proceedings in opposition to the petition the administrator alone appeared, but after the order was made his counsel joined the beneficiaries under the will with the administrator as appellants.

There are eight grounds for reversal stated by appellants, the first three of which relate to the same question of the sufficiency of the petition. The respondent makes his own statement of nine questions involved—some of which are the same as those noted by appellants. We will first consider the questions stated by the appellants, but we will not discuss the special grounds raised by respondent that neither the administrator nor the beneficiaries have the legal capacity to prosecute this appeal because of circumstances arising in the probate court. We will assume that the appeal has been taken by the proper parties because the long delay in the settlement of the estate calls for an early decision of the controversy upon the merits.

[1] It is argued that the petition did not fulfill the statutory requirements for a petition for partial distribution, a petition to pay debts, or a petition for instructions. The respondent, while contending that the petition was sufficient, argues that the administrator waived the point by answering and contesting on the merits, and by stipulating to a submission upon the record. Briefly, appellants' arguments are that as a petition for partial distribution, the pleading is defective because it fails to allege the condition of the estate as to general indebtedness as required by sections 1000 and 1001 of the Probate Code; that, as a petition for an order to pay debts, it is defective because it was not brought to hearing at the time of the settlement of any account, as required by section 952 of the Probate Code; that, as a petition for instructions, it is defective because it was not filed by the administrator, as required by section 588 of the Probate Code. But the petition cannot be classed under any one of these three heads. It sought distribution of one-half of the remaining assets of the estate—not as an heir, devisee, legatee or other interested party mentioned in section 1000 of the code, but as the surviving widow asserting her one-half community share. This share belonged to the widow upon the death of the husband under the provisions of section 201 of the code, and did not come to her as an heir, devisee or legatee. Ownership of the community share having attached at the time of the death of the husband her right to seek clear title and possession arose from these sections of the code. But, if we should assume otherwise, section 1001 provides that if it appears, at the hearing, that the estate is but little indebted the petition may be granted. The form and substance of the petition is not stated in the section.

[2, 3] In addition to the prayer that this interest be set aside to the executor of the deceased widow, the petition sought payment of the remaining portion of the family allowance and of certain sums advanced by the widow from her separate estate and from the proceeds of insurance policies, these sums having been voluntarily contributed by her to pay legacies and to meet the indebtedness and costs of administration of her husband's estate. There is nothing indefinite or uncertain about these allegations, but appellants say it must be filed with and brought to hearing at the time of hearing or settlement of an account.

But section 952 of the code which they cite does not support the point. That section provides that "Upon the settlement of any account * * * the court shall order the payment of the debts * * *." It is manifest that the section does not mean that all these things must be done at one time or in one order. The clear purpose of the section is to require the approval and settlement of the account showing the claims allowed and the condition of the estate before an order for payment of any of those claims can be made. There would be no purpose and no reason for requiring that such order be made simultaneously with the approval of the account. But, if the section should be given the narrow interpretation for which appellants contend, it would take something in the nature of an express prohibition to justify a holding that the probate court was without jurisdiction to make an order for payment after the account had been settled as well as at the time of settlement. This would seem to follow from the language of the section that "the court shall order the payment of the debts, as the circumstances of the estate permit."

[4] The appellants argue (without noting it as one of the questions involved) that the form of the decree is indefinite and uncertain because it does not contain an accurate and definite description of the properties involved. If the administrator should find any difficulty in ascertaining these properties from the petition and the record he is permitted, under section 588 of the Probate Code, to ask for instructions. And this is a simpler and more speedy remedy than that of an appeal. This is the more pertinent since the appellants frankly state that the effect of the decree is to turn over to the respondent the whole of the estate, except the sum of $5,000 to be retained for expenses of administration. If there should be any cloud upon the title which the respondent takes, because of the form of the decree, that would be the concern of the respondent.

[5, 6] The next question stated relates to the propriety of the portion of the decree which awarded respondent $2,300, being one-half of the unpaid family allowance. The facts relating to this issue are that on November 5, 1925, the probate court granted the widow a family allowance of $600 per month. That during the years of financial depression, specifically from 1932 to 1935, the widow was paid less than the amount granted. Appellants argue that we must presume, or infer, that these reductions were made with the widow's consent, and that she must therefore be deemed to have waived the difference. The trier of the facts might have drawn such inference, but did not do so. The answer to the petition pleaded, on information and belief, that the lesser amounts were accepted by the widow in full satisfaction. But appellants made no proof of their allegation. The trial court could have justly drawn the inference that the parties knew the law that, until the order was duly modified, it retained its force as a judgment and was enforcible like any money judgment, and that the widow's delay in asserting her rights under the order was not a waiver of her right to demand further instalments. Estate of Nelson, 167 Cal. 321, 325, 139 P. 692. The appellants conclude their argument by the assertion that "the evidence conclusively shows an executed agreement to accept family allowance less than the amount fixed by the court." They do not direct our attention to any such evidence, and we have not found any, hence, we may assume it is not there.

[7] The next question stated is whether the trial court erred in directing payment of a note executed between husband and wife and left uncollected for twelve years. The reference to the twelve years in delay of payment is needlessly injected. The note was executed in 1923, the payor deceased in 1925; the note was included in a claim presented to his estate and duly allowed and approved in 1926. It was not paid because during the lifetime of the payee her husband's estate was badly involved and in need of funds, which Mrs. Brown advanced out of her separate estate. The claim of the widow was reported in an addenda to the first account which was duly settled and approved. It was also reported in the sixth account which was settled and approved after the appellants withdrew all objections and stipulated to the settlement. The grounds upon which this portion of the decree is attacked are that the claim was barred by laches, that it has the earmarks of a fictitious transaction, and that the agreement to let it run discharges the liability. There is no question of laches involved since the estate benefited by the delay. If this defense was raised by the demurrer to the petition, as appellants contend, it fell with the trial of the facts which disclosed that the necessary elements

of the plea of laches did not exist. The second ground is but a voluntary statement without evidentiary support. The third ground presents a question of fact which is concluded by the decree.

[8-11] Appellants object to the items totaling over $22,000 which were included in the order representing loans from Ada I. Brown, or her estate, to the Andrew A. Brown estate. It is conceded that the latter estate received for its benefit over $33,000 advanced from Mrs. Brown's separate estate to pay special legacies and obligations of the Andrew A. Brown estate. $11,000 of this sum was used to pay legacies of the Andrew A. Brown estate. This sum was credited to the Ada I. Brown estate in full. Of the remainder, which was used to pay debts, the widow was charged her community share. The appellants indirectly suggest that Mrs. Brown's community interest was not properly charged with one-half of the community debts and they argue at length on the question of law. But the probate court very properly assumed that there was no disagreement on that question and, in each instance, charged the widow's share in the estate with one-half of the community debts. Objections are made to some of the mathematical calculations by which the specific amounts were determined. But these objections were all waived at the time of the settlement of the accounts. It is not contended that the amounts included in the decree are any different than those specified in the accounts of the executor. Whatever objections or exceptions the appellants had to these items were all waived at the time the fifth and sixth accounts were heard for settlement and when respondent asked the court "to make the order approving those six accounts." To this request counsel for appellants replied, "No objection to the accounts." In the order of September 27, 1938, settling the sixth and final account and report of the executor (in which the items now under discussion were expressly included) we find the recital that counsel for these appellants had "upon stipulation in open court, withdrawn their said objections and exceptions to said Sixth and Final Account and Report and consented to the settlement, allowance and approval thereof. . . ." The order appealed from having been based upon this consent and agreement, the appellants may not be heard at this time to question the single items of that account and report since no issue was raised in the probate court as to the correctness of the several items when the order and report were settled and approved, and none was raised at the hearing of this petition—other than that the estate of Mrs. Brown was jointly liable for some of these advances, and that they were voluntary contributions made by her or by her estate for her benefit. But there has been no controversy, either in the probate court or on this appeal, over the liability of the widow's community interest for the payment of the debts of the community. This was taken as settled law and the accounts were approved and settled upon that basis. The only debatable question now presented is whether, having stipulated to the settlement of the accounts, the appellants can now attack the separate items of the approved accounts upon the grounds that the loans were voluntary contributions, that they were not made with prior sanction of the probate court, or that they were used to enhance the estate of the lender. This question does not present any difficulties. It has long been the rule that those beneficially interested may stipulate to the settlement of an account and that, when settlement is so made, the order or decree is conclusive and binding upon them. 11b Cal.Jur., p. 610; Grady v. Porter, 53 Cal. 680, 686; Estate of Grant, 131 Cal. 426, 429, 63 P. 731; Estate of Simonton, 183 Cal. 53, 56, 190 P. 442; Estate of Wear, 20 Cal.2d 124, 128, 124 P.2d 12. For these reasons the question of the propriety of the credits allowed and of the liability of the estate on account of the separate items is no longer debatable.

[12] This rule forecloses discussion as to the propriety of the separate items allowed and settled, as well as to the propriety of the portions of the order appealed from which direct repayment of those items. Though the question is not properly raised under the rules of appellate procedure, it is suggested in the briefs that the order did not take proper consideration of the community liability as to the promissory note payable to the Ada I. Brown estate or as to the item relating to the sale of the Redwood City property. In reference to those items, if we may assume that error occurred, it is apparent that no prejudice resulted to appellants. This is so because the appraised value of the estate for distribution was approximately $66,000; the order appealed from retained the sum of $5,000 for administration expenses; the

widow's share was thus approximately $31,000. The claims allowed in the order total more than $41,000. Hence, if the items allowed in full were deducted from the order appealed from and but one-half credited to the widow's estate, it would not make any difference in the result which would be of any benefit to appellants.

Other points discussed do not require consideration.

The order and decree is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 12127.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1942.

Rehearing Denied Nov. 7, 1942.

Hearing Granted Dec. 7, 1942.

1. Workmen's compensation ⇐939

"Willful misconduct" of employer, within Workmen's Compensation Act authorizing increase of compensation therefor, implies intentional doing of something with knowledge that serious injury is probable result thereof or with wanton and reckless disregard of its possible result. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Workmen's compensation ⇐1674

In proceeding to recover compensation for death of employee from injuries sustained when steel beams fell off truck load on which he was riding, evidence *held* insufficient to show "serious and willful misconduct" of deceased's foreman or employer in failing to provide safe equipment or to secure truck loads against displacement and permitting deceased to ride on load likely to shift and topple over, so as to authorize increased compensation. St.1937, p. 281, § 4553.

* Subsequent opinion 129 P.2d 718.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

3. Workmen's compensation ⇐1674

In proceeding to recover compensation for employee's death from injuries sustained when steel beams fell off truck load on which he was riding, where evidence showed that no executive, managing officer, or general superintendent of corporate employer was present when accident happened or knew of any facts connected therewith, Industrial Accident Commission's award of increased compensation for "serious and willful misconduct" of employer was erroneous as not supported by evidence of any act of commission or omission by any such executive, officer, or superintendent. St.1937, p. 281, § 4553, subd. c.

4. Workmen's compensation ⇐939, 941

Where corporate employer had rule that workmen should not ride on truck loads which might shift or topple over and never failed to enforce such rule on seeing violations thereof, and no executive, managing officer, or general superintendent of employer violated or knew of violation of such rule or Industrial Accident Commission's similar safety order, award of increased compensation for employee's death for "serious and willful misconduct" of employer was not justified on ground of employer's violation of such order. St.1937, p. 281, § 4553.

Proceeding by the Bethlehem Steel Company for a writ of review to annul an award of compensation under the Workmen's Compensation Act by the Industrial Accident Commission to Kenneth E. Brinkley, a minor, and others for the death of one Brinkley, petitioner's employee.

Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

STURTEVANT, Justice.

This is an application for a writ of review to have annulled an award made by the respondent commission. As will presently appear, the award under attack was predicated solely on the "serious and wilful misconduct" of the employer. The

facts stated by the petitioner, and not controverted by the commission, are as follows:

As a part of the program for immediate and urgent expansion of shipbuilding facilities in the national emergency declared by the President, the Bethlehem Steel Company took over the old Risdon plant, which adjoins its Union Iron plant at the foot of Twentieth Street in San Francisco. As a part of this Risdon plant, there was a long shed-like structure. It had heavy steel beams for the side supports and the cross-members which supported the roof were wide and heavy, being about thirty-six inches deep and ten inches wide and were somewhat like an I beam. It was necessary to dismantle this building so that different types of structures could be erected. Accordingly, some big cranes were used to take the building apart and lower the members onto the ground at the point where they were dismantled.

There was no officer of the Bethlehem Steel Company present at the work, but the work was entirely in the charge of Mr. Scanland, its superintendent. His office was on one portion of the grounds and he exercised the general supervision over all of the work. As the work was a rush job they had many different gangs working under subforemen under him.

To remove the dismantled members from the ground it was decided to pile them on one edge of the premises, which was about fifty feet from one corner of the dismantled building. One of the gangs that was doing this work was the one in which the deceased Brinkley was working. This particular gang was very fortunate because it had several men in it who were men of long experience as steel workers, and the foreman, Goucher, had been with the Bethlehem Steel Company for many years. He was a very experienced man and highly spoken of at the hearing, both by Mr. Scanland, the superintendent, and also the safety engineers of the Industrial Accident Commission.

A large truck with driver was engaged for the work of transporting the dismantled members to the storing ground. The truck came equipped with all of the needed paraphernalia, such as side stakes and ropes and chains. The removal was aided by the use of an auxiliary mobile derrick which traveled about with the truck and lifted the dismantled steel members onto the truck, leaving the only work for the men the mere guiding and loading of the beams. The truck would hold about eight beams of the type that were being moved at the precise time of this accident. Different types of beams would have to be loaded on differently, and different types of precautions would have to be taken with the differently shaped beams or cross-members. The ones in question were, as stated above, of the large I beam type, and Mr. Goucher, the foreman, in loading it put three members on their ten-inch edge and then bound them together by laying flat on top of them another large beam. The flanges on the edge of the beam on top appeared to bind the three together as a unit, and in his judgment made it a more stable load. Two units of three each were thus bound together by the fourth one on top, making a load of eight beams.

The evidence is overwhelming that all equipment necessary for tying the load down or otherwise securing it was available to be used in any manner found necessary by the foreman and crew. There was equipment that came with the truck and there was also full equipment supplied by the Bethlehem Steel Company. The way of securing each load was dependent upon the type and shape of the members that were being transported. For instance, those that were of an uneven surface would have to be secured differently from those of the I beam type.

As these loads were being made up the truck would move from one beam to the next until the full eight beams were put on the truck by the derrick in the manner described. Some of the men were on the ground and two men worked on the truck. It was the practice that when loaded the two men who were on the truck making the load would dismount and the truck would proceed to the place of storing the discarded beams. The mobile crane would also go to the storing ground and do the unloading, in the same manner it had loaded the truck.

The evidence is that the men were not allowed to ride the load after it started to go across the lot to the place of discharge. Sometimes the distance was only fifty or sixty feet. Other times when it was at the other end of the building it would be around 400 feet. Many loads had been moved and among them some fifty or sixty loads of I beams had been taken across to the discharge place and the load in question was the last load of this type of beam. No load

had shifted at all in the transfer up to that time. Mr. Goucher stated that he considered the load well secured by the interlacing of the beams as mentioned above. He stated the men were not allowed to ride on the load and that he personally had taken Brinkley, the deceased employee, off the load on two or three occasions and reprimanded him for "riding the load." That this rule was enforced was confirmed by several witnesses.

At the time in question Foreman Goucher supervised the loading of the beams, and just as the last beam was placed in position on the load, he turned and started to go to the place of discharge. He had proceeded a short distance and was out of sight behind some obstruction when he heard the noise of the accident. Rushing back, he found that the truck had followed its usual course, which it had taken many times across the lot onto an old roadway in the lot and, in turning onto this roadway, a portion of the beams had fallen off. He found out for the first time then that Brinkley and the other workman, Black, instead of getting off the load when it was finished and walking to the place of discharge, had "ridden the load". Brinkley was fatally injured when the steel members on his side of the truck fell off.

It was shown without any conflict whatever that the truck had made the same type of turn onto this road many times with a similar load, with no untoward developments. The exact cause of this accident was never established. It was thought, however, that the load was shifted on this occasion because the inside wheels of the truck hit a chuckhole as the outside wheels mounted the road, causing an unbalanced load to occur, and some beams fell off.

Mr. Goucher stated that he had worked in the steel business for many years; that he knew that loads should be secured and he thought he had firmly secured the present load because of the width of the members and their weight and the low center of gravity. In his judgment the placing of one member flatside across the other member tied them together and held them down. The successful transportation of fifty or sixty loads without any shifting whatever confirmed his belief that he had secured the load firmly. All in all, he had taken about 100 loads off the lot with his gang. Some of the loads had to be tied down with ropes or chains because of uneven surfaces, but the beams in the particular load were flat and low and heavy and he thought were perfectly safe to ride on this flat, wide truck, particularly so when they had been interlaced with another beam on top.

He testified that he had told the men not to ride the load after it was fully loaded and that he had personally put Brinkley off the load several times when he persisted in riding. On the occasion in question he didn't see him riding because he had turned and started away just before the load started. They were landing the last girder on the truck as he turned about to go to the point of discharge. He stated that ordinary side stakes would not hold a heavy load like this after it starts to shift and that it could only be held down after it starts to shift by some sort of chain or ropes. That he loads each load according to his best judgment as to how to secure them.

Basing its award on said facts the commission made the award under attack. It provides in the second division, in part, as follows:

"2. Said injury herein was proximately caused by the serious and wilful misconduct of the employer herein, as follows:

"(a) That at the time of the injury and death sustained by the deceased employee herein, the employer, through its executives, managing officers and general superintendents, did knowingly and wilfully fail, refuse and neglect to provide and furnish the deceased employee, in his said employment, with safe equipment, properly secured against displacement.

"(b) * * * did knowingly and wilfully fail, refuse and neglect to secure against displacement loads transported by truck.

"(c) * * * did knowingly and wilfully permit and require workmen, including the deceased employee, to ride on loads transported by truck, which load or loads were likely to and did shift, topple over and become unstable, thereby proximately causing death to the deceased employee.

"(d) * * * did knowingly and wilfully fail, refuse and neglect to exercise that degree of prudence and caution which a prudent employer would have exercised in securing loads transported by truck against displacement.

"(e) * * * did knowingly and wilfully fail, refuse and neglect to exercise that degree of prudence and caution which a prudent employer would have exercised

in permitting and requiring workmen to ride on loads transported by truck, which load or loads were likely to, and did, shift, topple over and become unstable.

"(f) * * * did knowingly and wilfully fail, refuse and neglect to comply with Construction Safety Order 1168, subdivisions (d) and (e) thereof, issued by the Industrial Accident Commission of the State of California, and in full force and effect at the time of, and prior to, the injury and death as found herein, towit:

"Order 1168. Transportation by Trucks.

"(d) Workmen shall not ride on top of loads that may shift, topple over, or become unstable.

"(e) All loads shall be secured against displacement."

[1, 2] The petitioner asserts that the facts above recited may possibly constitute negligence on the part of Mr. Goucher but that they do not show "serious and wilful misconduct" on his part nor on the part of his employer. Parkhurst v. Industrial Acc. Comm., 20 Cal.2d 826, 129 P.2d 113; Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35; Hyman Bros., etc., Co. v. Industrial Acc. Comm., 180 Cal. 423, 181 P. 784; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279. In the case last cited, 132 Cal.App. at page 129, 22 P.2d at page 281, it is stated: "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result." That passage has been cited and followed in many cases and is now the settled rule in this state. Under its provisions the facts in the instant case fail to show an act of "serious and wilful misconduct" on the part of Mr. Goucher or his employer. Labor Code, § 4553, St.1937, p. 281.

[3] The petitioner also vigorously stresses the fact that, whatever occurred out in the yard at the time of the accident, the evidence does not show that any act of commission or omission on the part of "an executive, managing officer, or general superintendent" of petitioner was involved. Labor Code, § 4553, sub. c. The second point so stressed must also be sustained. The record shows affirmatively that no "executive, managing officer, or general superintendent" of the petitioner was present or knew of any of said facts hereinabove stated.

[4] It was contended before the commission and is now contended that the petitioner violated "Safety Order 1168". Among other things it provides: "(d) Workmen shall not ride on top of loads that may shift, topple over, or become unstable. (e) All loads shall be secured against displacement." Division (d) is apparently addressed to employees. Assuming, for all the purposes of this decision, that it was addressed to employers, the record shows the employer had a rule to the same effect, which decedent violated; that, when the employer saw such violation it enforced the rule; that it never failed to do so, and, in the instant case its "executive, managing officer, or general superintendent" did not violate said rule or said order or know it was being violated.

The award under attack is annulled.

NOURSE, P. J., and SPENCE, J., concurred.



54 Cal.App.2d 769

COURTNEY v. BYRAM, Tax Collector.

Civ. 13674.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1942.

1. Taxation ⇐1

A "tax" is a charge on personal property to raise money for public purposes, and is not a "debt" which is a sum of money due by contract express or implied, and a tax does not establish a "debtor and creditor relationship" between the taxpayer and the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt", "Debtor and Creditor Relationship" and "Tax".

2. Assignments for benefit of creditors ⇐23

The statute relating to assignments for benefit of creditors is designed for the

government of citizens of the state rather than for the state itself. Civ.Code, §§ 3449–3473.

3. Statutes ⇐233

The state will not be bound by general words of a statute unless it clearly appears that such is the intent of the statute.

4. Taxation ⇐509

The obligation to pay taxes is generally superior to the obligation of private debts.

5. Assignments for benefit of creditors ⇐334(1)
Taxation ⇐631

Taxes owed by a debtor who made an assignment for benefit of creditors were not a "debt" nor a "lien" within the statute relating to assignments for benefit of creditors, and tax collector was authorized to sell the debtor's land for taxes, notwithstanding the assignment. Civ.Code, §§ 3449–3473, 3468.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

6. Action ⇐6

The declaratory relief statute may not be invoked against the state or its political subdivisions. Code Civ.Proc. § 1060.

7. Action ⇐6

An action by assignee for benefit of creditors against county tax collector for declaration of respective rights of the assignee and the tax collector would in fact be an action against county and could not be maintained. Code Civ.Proc. § 1060.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by T. Frank Courtney, as assignee for the benefit of creditors of Clyde Hillis, against H. L. Byram, as Tax Collector of Los Angeles County, for an injunction restraining proposed tax sale and for other relief. From judgment sustaining demurrer without leave to amend, plaintiff appeals.

Judgment affirmed and restraining order dissolved.

T. Frank Courtney in pro per., for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

By proceedings regularly taken under sections 3449–3473, inclusive, of the Civil Code, plaintiff as assignee for the benefit of creditors of Clyde Hillis, an insolvent debtor, took possession of his property, including certain realty upon which city and county general taxes were long delinquent and which the tax collector of Los Angeles County was about to sell in the manner provided by law for the collecting and enforcing of taxes. Confronted with this situation, plaintiff-assignee assumed the position that the tax obligation was simply one of the "debts" or "liens" of the debtor for the benefit of whose creditors he was acting, and that the county with its tax claim was to be relegated to the same position as another "creditor." He sought by injunctive remedy to halt the proposed tax sale and to subject the county's tax claim to the proceedings under the assignment for the benefit of creditors. Defendant tax collector filed a general demurrer. Injunction was denied and the demurrer was sustained without leave to amend. Plaintiff appeals.

Appellant formulates as follows the only question involved upon this appeal: "Whether delinquent general taxes on real property secured by a lien thereon in this state are a debt and a lien for securing the payment of a debt owing by a debtor to the county and state as creditor, within the meaning, intention and provisions of the last two paragraphs of section 3468 of the Civil Code?" Or, as stated by respondent: "Does an assignment of property for the benefit of creditors discharge such property from the prior lien of taxes thereon and relegate such taxes to a mere parity with the general debts of the assignor?"

Unquestionably the lower court correctly sustained the demurrer without leave to amend.

[1] It is true that appellant has discovered many decisions in which a tax is spoken of as a "debt", e. g.: "* * * A tax constitutes a debt owed by the person upon whom such tax has been legally imposed". (National Ice, etc., Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, at page 291, 79 P.2d 380, at page 384); "* * * in a popular sense a tax duly levied becomes a * * * debt due * * *" (People v. Sischo, 31 Cal.App.2d 345, 87 P.2d 862, 863); "A tax on land, when imposed, becomes a debt of the tax-payer." (Mayor, etc., of City of Nashville v. Cowan, 10 Lea, Tenn., 209); "As to the taxes the state

stands in the relation of a creditor who has obtained judgment against his debtor, and seized his property under the judgment." Succession of Mercier, 42 La.Ann. 1135, 8 So. 732, 737, 11 L.R.A. 817. But the Supreme Court of this state has clearly pointed out that taxes are not debts within the technical meanings of the two terms. "A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-payer and State." Perry v. Washburn, 20 Cal. 318, 350. See, also, San Francisco v. Liverpool & London, etc., Ins. Co., 74 Cal. 113, 15 P. 380, 5 Am.St. Rep. 425; People v. Skinner, 18 Cal.2d 349, 115 P.2d 488; 26 Ruling Case Law, 25-26.

[2, 3] Furthermore, as emphasized by respondent, statutes such as the one under consideration are commonly designed for the government of citizens of the state rather than for the state itself, and the state will not be bound by general words of a statute unless it clearly appears that such is the intent of the statute. C. J. Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676; 23 Cal.Jur. 625.

[4] By statutory provision, as indeed by the harsh law of necessity, taxes have been made a first lien upon property. They are a primary obligation of the citizen, and the flow of this "life blood of government" may not be interrupted. Generally, therefore, the obligation to pay taxes is superior to the obligation of private debts. Dougherty v. Henarie, 47 Cal. 9; People v. Central Pac. R. Co., 83 Cal. 393, 23 P. 303.

[5] Measured by the statute itself, interpreted in the light of pronouncements upon cognate or similar tax problems and guided as well by reasons of sound public policy, it must be held that the statute here in question cannot be resorted to in order to prevent the sale of property to satisfy the claim of tax delinquency. The statute, enacted for the benefit of debtors and creditors, cannot be used as a means of depriving the state of its essential revenue.

[6, 7] A second count of the complaint asked for declaratory relief, praying the court to declare the respective rights of the plaintiff-assignee and the tax collector under the circumstances set forth in the complaint. It has been held that the declaratory relief statute (§ 1060, Code Civ. Proc.) may not be invoked against the state or its political subdivisions (Bayshore Sanitary District v. County of San Mateo, 48 Cal.App.2d 337, 119 P.2d 752); and it must be held that this action, though directed against the county tax collector is in fact an action against the county of Los Angeles. Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387.

Upon appellant's motion and with the consent of respondent the trial court entered an order restraining respondent from selling the real property in question for nonpayment of taxes, pending the final determination of the appeal herein. In view of our decision upon the appeal that restraining order should be dissolved.

The judgment is affirmed and the restraining order dissolved.

MOORE, P. J., and W. J. WOOD, J., concurred.



54 Cal.App.2d 641

PEOPLE v. QUITORIANO et al.

Cr. 1802.

District Court of Appeal, Third District, California.

Sept. 30, 1942.

1. Criminal law ⇐1130(2)

Where appellant's brief, raising only question of sufficiency of evidence to sustain her conviction, cites no authorities, makes no adequate citations to transcript, and does not point out in what respect evidence is insufficient, appellate court would be justified in refusing to search record for purposes of opinion.

2. Homicide ⇐254

Evidence *held* sufficient to sustain convictions of two defendants for second degree murder.

3. Criminal law ⇐1141(1)

All intendments are in favor of upholding trial court's judgment on appeal therefrom.

4. Criminal law ⇐742(1)

In murder trial, it was for jury to determine which of one defendant's conflicting statements should be believed.

5. Criminal law ⇐1159(3)

If any one of several conflicting statements by accused or any combination of such statements is sufficient to sustain verdict of conviction, appellate court cannot hold evidence insufficient for such purpose.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Cering Quitoriano and Alice Avila were convicted of second degree murder, and they appeal.

Affirmed.

E. R. Vaughn and Geo. E. Foote, both of Sacramento, for appellants.

Earl Warren, Atty. Gen., and J. Quincy Brown, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendants herein were charged with the crime of murder and found guilty of murder of the second degree. Motions for a new trial were denied and both defendants appealed. On the day set for hearing in this court defendants' counsel moved for dismissal of the appeal as to defendant Quitoriano and the motion was granted. The appeal as to defendant Avila was submitted without argument, on briefs to be thereafter filed.

[1] The brief filed by counsel for defendant Avila consists of but two scant pages and cites no authorities. The only question raised is the sufficiency of the evidence to sustain the verdict as to this defendant. No adequate citations to the transcript are made nor is it pointed out in what respect the evidence is insufficient. Under such circumstances the court would be entirely justified in refusing to search the record for the purposes of an opinion. People v. Vivian, 50 Cal.App.2d 533, 123 P.2d 613; People v. McLean, 135 Cal. 306, 309, 67 P. 770.

[2] However, it is apparent from the evidence pointed out by counsel for the People that same was ample to sustain the verdict as to both defendants. The victim of the homicide was one Augustine Villairin, with whom defendant Avila had been, according to her own admission, on terms of sexual intimacy. At the time of the killing, Avila was living with defendant Quitoriano in a cabin at a camp near Isleton. On December 15, 1941, decedent drove to Isleton from Suisun and joined Quitoriano and Avila at the cabin occupied by them. After lunching together in the cabin the three of them drove in decedent's car to Rio Vista where they visited at the home of friends until after 11 p. m. About that time defendant Avila left with the intention of hitch-hiking back to Isleton, and Quitoriano followed her. They were picked up on the highway, stopping on the way home to buy wine. After they had returned to their cabin decedent arrived there about midnight. As to what happened thereafter the testimony is conflicting.

Defendant Quitoriano made three statements, the third one being made jointly with Avila. Avila herself made three different statements before the joint one made with Quitoriano. All were made freely. In her first statement she averred that she shot Villairin; that she shot to kill him; that the gun with which she shot him belonged to her; that at the time decedent arrived Quitoriano had left the cabin in search of cigarettes; that decedent then stated that if he could not have her (Avila) no one else could, and that when he advanced upon her she shot him four times. Both she and Quitoriano admitted that the decedent did not draw a gun but that after he was killed they took a gun out of his overcoat pocket and put it into his right hand, where it was found when the officers arrived.

At the trial Alfred Silva, a watchman at the cabins, who knew both Quitoriano and Avila well and who lived in an adjoining cabin, stated that one of the shots came through his window and imbedded itself in his cabin; that after the shooting Quitoriano came over to his cabin and asked him to come over to the house and have a glass of wine; that when he arrived there he found Villairin dead and that Quitoriano said "Look at what my wife did"; that Avila then started to laugh; that she said that she had killed Villairin in self-defense when he was trying to attack her.

Edward Reyes, former chief of police at Isleton, testified that he received a call about three o'clock in the morning of December 16, 1941, from Quitoriano, and that he arrived at the cabin about five minutes later; that on his arrival he asked Avila what had happened and she stated that she

had sent Quitoriano out for some cigarettes and after a while decedent came in and said he wanted her and also that if he could not have her nobody else could; that thereupon she had reached underneath the bed and seized the gun and when decedent grabbed hold of her foot she had shot herself in the toe, and when Quitoriano came in she had shot him in the thigh; and that she then had pushed Villairin away and shot him; that she shot him four times and he said "Oh, Alice," as he went down.

The testimony further showed that defendant Avila was wounded in the toe and that a bullet had entered Quitoriano's thigh from the inside of the leg and was imbedded there. In a subsequent statement Avila was not sure whether she had shot herself or whether Quitoriano had shot her.

In her third subsequent statement to the officers she apparently attempted to change her testimony, and then stated that there was an argument between decedent and Quitoriano which occurred prior to the shooting; that Quitoriano had done the shooting and that when the first shot was fired she had crawled under the bed. In one statement she said that she was the one that had put decedent's gun into his hand after his death, though Quitoriano stated that he had done this himself. In their joint statement Quitoriano at first stated that Avila did the shooting and killing, but subsequently he stated that he had done it. At first appellant had stated that she secured the gun from underneath the mattress of her bed, but in the joint statement she asserted that Quitoriano had it stuck in the front of his trousers. In his final statement Quitoriano said in substance that an argument started between him and the decedent; that he, Quitoriano, fell down and that defendant Avila got the gun and shot him and then shot Villairin. He, however, admitted hitting decedent on the head with the revolver barrel. He also stated that there were no threats from decedent of any kind, and he was quite definite that there had been no previous quarrels with decedent. There was some evidence that the bullet which wounded Quitoriano had passed first through the body of decedent. If such was the case, obviously the shot was not fired by Quitoriano.

From the conflicting stories of the two defendants and from the physical facts it appears clearly that appellant liked Quitoriano better than she did decedent; that she lived openly with Quitoriano and had never lived openly with decedent; that there was a certain amount of jealousy between the two men and that she and Quitoriano kept themselves armed with the 38-caliber revolver with which Villairin was killed, which was kept in the mattress of their bed, fully loaded; that there had been no particular altercation that evening among the parties upon which could have been predicated any theory of an attack by the decedent; that defendants' cabin door was not locked after they returned, and if the revolver which was found in decedent's hand belonged to him at all, that he did not draw it nor was it at any time used by him during the encounter. Since both defendants admitted that this gun was placed in decedent's hand after death to make it look as though he had been the aggressor this evidence tends strongly to negative any theory as to any aggression upon Villairin's part.

[3-5] The foregoing, in our opinion, discloses ample evidence upon which the jury could base a verdict against appellant Avila. It is not now urged that she acted in self-defense. Because of the prior relationship between decedent and defendant Avila any contention that she was defending herself from his advances seems unreasonable. She apparently made no effort to cry out or to run to the home of Mr. Silva next door at any time during the altercation. Also it seems more probable that the earlier statements made by her at the time of the killing are nearer the truth than those made after she had had an opportunity to think the matter over and decide what kind of a tale would furnish the best defense. All intendments are in favor of upholding the judgment of the trial court. People v. Shannon, 28 Cal.App.2d 677, 680, 83 P.2d 302; People v. Dukes, 90 Cal.App. 657, 266 P. 558. It was for the jury to determine which of Avila's statements was to be believed, and if there is any one of them alone or in any combination of statements sufficient to sustain the verdict it cannot be said that the evidence is insufficient for that purpose. People v. Crimm, 19 Cal.2d 314, 121 P.2d 1.

The judgment and order denying a new trial are affirmed.

THOMPSON, J., and SCHOTTKY, J., pro tem., concurred.

54 Cal.App.2d 661

ROBERTSON v. DODSON.

Civ. 12069.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1942.

1. Appeal and error ⇐931(1)

Where evidence in purchaser's action against vendor to recover a sum paid as a deposit under a contract for sale of realty was conflicting with reference to who had duty of procuring a loan, on vendor's appeal from judgment for purchaser, the District Court of Appeal was bound to assume that it was vendor's duty to procure loan.

2. Contracts ⇐167

All applicable laws in existence when a contract is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms.

3. Evidence ⇐65

Where parties to a contract for the sale of realty agreed that a loan was to be obtained from a specified building and loan association, the parties were presumed to know all existing laws governing transactions between such associations and their borrowers. Gen.Laws 1937, Act 986, § 9.13.

4. Building and loan associations ⇐34(1)

The statute providing that, whenever a borrower from a building and loan association is in arrears in payment of his interest or loan installments, the whole loan shall become due at association's option, is not only for benefit and protection of association but for the investing public as well. Gen.Laws 1937, Act 986, § 9.13.

5. Vendor and purchaser ⇐180

Where parties to a contract for the sale of realty agreed that a loan was to be obtained from a specified building and loan association, and acceleration clause in note for balance of purchase price was required by statute governing transactions between such associations and their borrowers, the inclusion of clause in note did not justify purchaser's refusal to execute note and accompanying deed of trust. Gen.Laws 1937, Act 986, § 9.13.

6. Customs and usages ⇐13

Where parties to a contract for sale of realty agreed that the purchase-money loan was to be obtained from a building and loan association with a provision for installment payments and interest at the rate of 6 per cent. per annum, note and deed of trust submitted to purchaser containing provisions for compounding of interest in event of default could not be justified on the ground of custom and usage where there was no evidence thereof or that the parties contracted with reference thereto.

7. Customs and usages ⇐12(1)

A person is not bound by a custom or usage unless he had actual knowledge thereof or it is so general or well known in the community as to give rise to a presumption of such knowledge.

8. Customs and usages ⇐12(1)

A custom or usage which is confined to a particular trade or business is binding upon those not engaged in the calling only in case they have either express or implied knowledge of its existence.

9. Customs and usages ⇐12(1)

A custom, if any, of building and loan associations to require provisions in their contracts for compounding interest was not binding upon purchaser under a contract for sale of realty, which was to be financed by a loan from a building and loan association, where purchaser was unfamiliar with real estate transactions and the financing thereof, and there was no showing that he had actual knowledge of alleged custom or that it was so well known in the community as to give rise to a presumption of such knowledge. Gen.Laws 1937, Act 986, § 9.13; Act 3757, § 2; Code Civ.Proc. § 1870, subd. 12.

10. Interest ⇐60

The compounding of interest is not favored in California.

11. Customs and usages ⇐11, 15(1)

Custom and usage may be used as an instrument of interpretation but not to create a contract. Code Civ.Proc. § 1870, subd. 12.

12. Vendor and purchaser ⇐180

Where purchaser acted promptly in controversy as to whether note and accompanying deed of trust delivered to purchaser for signature complied with contract

for sale of realty, and purchaser's refusal to accept note and deed of trust in form submitted was justified, purchaser did not "waive" discrepancies between such instruments and contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by R. R. Robertson against L. Polk Dodson, Jr., to recover the sum of $500 paid as a deposit under a written contract to purchase real property owned by defendant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lorenz Costello, of Palo Alto, for appellant.

Theodore M. Monell, of San Francisco, for respondent.

WAGLER, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff in an action to recover the sum of $500, paid as a deposit under a written contract to purchase certain real property owned by defendant.

The contract in question was executed on October 5, 1936; it acknowledged the receipt of the sum of $500 on account of an agreed purchase price of $8,000. Other provisions of the purchase agreement pertinent to this appeal read as follows:

"The balance of the purchase price is to be paid within ten (10) days from date hereof, as follows, to-wit: On completion of financing and recording of deed Fifteen Hundred ($1500.00) Dollars in cash, and, subject to obtaining a first encumbrance from the Palo Alto Mutual Building and Loan Association, the sum of Six Thousand ($6000.00) Dollars, payable ~~on or before~~ twelve (12) years from date of recordation, to-wit: October 15, 1948; said note to be written calling for monthly payments of Fifty-eight and 60/100 ($58.60) Dollars, including interest at the rate of six (6%) per cent per annum. * * *

"And It Is Hereby Agreed: First—That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase, as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages."

A note and deed of trust in the form customarily used by the Palo Alto Building and Loan Association, bearing date of October 10, 1936, were subsequently delivered to the plaintiff. These documents the plaintiff refused to sign on the ground that certain of the provisions were not in accordance with the terms of the purchase contract. Plaintiff so notified the defendant on October 14, 1936. Three days later plaintiff, through his attorney, notified defendant that if loan papers, in accordance with the terms of the purchase agreement, were not presented by October 23, 1936, the contract would be considered breached. The defendant refused to submit any other note and deed of trust; he also refused to refund plaintiff's deposit. It is defendant's contention that the note and deed of trust presented complied with the conditions of the purchase agreement in all respects.

The trial court found that the terms of said note and deed of trust contained provisions not covered by the terms of the agreement of the plaintiff and defendant, in that said note and deed of trust securing same contained provisions for accelerating the maturity of said note, in the event of any default therein and for compounding of interest in such event, contrary to the provisions of said agreement, and that it was the understanding of the parties that the defendant should secure the loan in question; that defendant was unable to secure such loan in accordance with the terms of the contract between plaintiff and defendant, and that plaintiff's refusal to execute the note and deed of trust was justified.

[1] Defendant concedes that the note contained the provisions for acceleration of maturity and for compounding of interest. With reference to whose duty it was to procure the loan, the evidence was conflicting. On this appeal we must assume, therefore, that this was the duty of the defendant.

In support of his position that the note and deed of trust complied with the conditions of plaintiff's offer, defendant contends that, even though the purchase agreement was silent as to the rights of the parties in the event of plaintiff's default, the provisions of the note and deed of trust to which plaintiff objected were by implication as much a part thereof as if fully expressed therein.

[2] With reference to the acceleration clause, we believe there is merit to defend-

ant's contention. "Everyone is presumed to know the law. And all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal.Jur. 310, § 186; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Long v. Newman, 10 Cal.App. 430, 102 P. 534.

[3] It was agreed in this case that a loan was to be obtained from a specified building and loan association. The contracting parties were, therefore, presumed to know all existing laws governing transactions between such associations and their borrowers. Long v. Newman, supra.

Section 9.13 of the Building and Loan Association Act, Deering's Gen.Laws 1937, Act 986, § 9.13, added by Stats. 1933, p. 1114, reads as follows: "Whenever a borrower shall be in arrears in the payment * * * of his interest or loan installments, or shall be in default under the terms of any pledge, deed of trust or mortgage securing his loan, the whole loan shall become due at the option of the association."

[4, 5] This section is not only for the benefit and protection of the "association," but for the investing public as well. The acceleration clause to which plaintiff objected was both authorized and required by the statute. The inclusion of this clause, alone, would not justify plaintiff's refusal to execute the documents.

[6, 7] Defendant seeks to justify the provisions dealing with the compounding of interest, on the grounds of usage and custom. This contention cannot be sustained. The record is void of any evidence of such usage or custom, or that the parties contracted with reference thereto. A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well-known in the community as to give rise to the presumption of such knowledge. 25 Cal.Jur. p. 419; Latta v. Da Roza, 100 Cal.App. 606, 280 P. 711, 281 P. 655; Hanley v. Marsh & McLennan, etc., Ltd., 46 Cal.App.2d 787, 117 P.2d 69.

[8-10] The evidence shows that defendant was employed by a bank. The custom of building and loan associations, if any, to require provision in their contracts compounding interest, may, or may not have been known to him. However, the plaintiff, according to the evidence, was entirely unfamiliar with real estate transactions and the financing thereof. A custom or usage which is confined to a particular trade or business, is binding upon those not engaged in the calling only in case they have either express or implied knowledge of its existence. Latta v. Da Roza, supra. Moreover, the compounding of interest has never been looked upon with favor in this state. Doe v. Vallejo, 29 Cal. 385; Yndart v. Den, 116 Cal. 533, 48 P. 618, 58 Am.St.Rep. 200; Schneider v. Turner, 10 Cal.2d 771, 76 P.2d 668.

It should also be noted that the Legislature has expressly provided that "in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest *unless an agreement to that effect is clearly expressed in writing* and signed by the party to be charged therewith." (Emphasis ours.) Deering's Gen.Laws 1937, Act 3757, § 2.

[11] How the defendant expects the court to imply an agreement to pay compound interest in view of this statute, he does not explain. Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract. Rottman v. Hevener, 54 Cal.App. 485, 202 P. 334; Great Lakes Coal & Dock Co. v. Seither Transit Co., 8 Cir., 220 F. 28, 136 C.C.A. 110; Thompson v. Riggs, 5 Wall. 663, 72 U.S. 663, 18 L.Ed. 704. This rule is expressed by section 1870 of the Code of Civil Procedure as follows: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation."

[12] There is no merit to defendant's suggestion that plaintiff may have waived the discrepancies between the note and deed of trust and the purchase agreement. The record shows that the plaintiff acted with despatch in connection with all phases of the controversy, and that his refusal to accept the note and deed of trust in the form submitted was justified.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concurred.

SOUZA et al. v. CORTI et al.*

Civ. 12131.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

Hearing Granted Nov. 27, 1942.

1. Appeal and error ⇐1010(1)

In action against owner and driver of automobile for injuries sustained in collision, whether owner gave driver permission, either express or implied, to use automobile was a question of fact, and, when trial court found that such permission was not given, recovery could not be had under the statute against owner where substantial evidence supported such finding. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles ⇐195(6)

In action against automobile owner, the driver, and owner's son for injuries sustained in collision, recovery against owner was properly denied where evidence sustained finding that owner, in permitting son to use automobile, had expressly forbidden anyone to drive other than the son. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles ⇐197(5)

In action against automobile owner, the driver, and owner's son for injuries sustained in collision, denial of recovery against the son was proper where evidence supported finding that, at the time of accident, the driver was not acting as agent of the son who alone had been given permission to drive automobile. Vehicle Code, § 402, St. 1937, p. 2353.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Theresa Souza and another against John Corti, Joseph Gigli, and Art Gigli, to recover for injuries sustained in automobile collision. Plaintiff recovered judgment against the defendant Corti, driver of one of the automobiles, and, from that portion of the judgment which denied the plaintiffs relief against other defendants, plaintiffs appeal.

Affirmed.

Van A. Neher, of San Francisco, and Phillips & Munck, of Oakland, for appellants.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to recover damages for injuries received in a collision of two motor vehicles. They joined as defendants Joseph Gigli, the owner of one of the vehicles, Art Gigli, his son, and John Corti, a friend of the latter who was operating the car at the time of the collision. The cause was tried by the court without a jury and judgment went for the plaintiffs against John Corti alone. The plaintiffs appeal from that portion of the judgment which denied them relief against the other two defendants.

There is no substantial dispute in the evidence, but we will state the essential facts in the light most favorable to respondents. Art Gigli borrowed the car from his father to go on a pleasure ride. The father gave him explicit instructions not to let anyone else drive it. The son had borrowed the car on numerous occasions in the past, but always with the instruction that he alone should drive it. Art Gigli took his friend John Corti to a night spot where they picked up two girls. The four decided to drive to another place for dancing. One of the girls to whom Art Gigli had become attached had a car of her own which she chose to drive. Art Gigli did not want to lose his girl or leave his car behind so he gave Corti possession to drive it to the other meeting place. On this drive the collision occurred and Corti's negligence is not disputed.

The question stressed on this appeal is the imputed negligence of the owner under section 402 of the Vehicle Code, St.1937, p. 2353, which reads in part: "Every owner of a motor vehicle is liable and responsible for * * * injury to person * * * resulting from negligence * * * by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner * * *." The trial court found that "the said defendant John Corti at said time and place was driving and operating the said automobile owned by defendant Joseph Gigli wholly without the knowledge of, and without the consent or permission, express or implied, of the said defendant owner, Joseph Gigli." It was also found that "at

* Subsequent opinion 139 P.2d 645.

the time and place of the collision aforesaid the defendant John Corti was not acting as the agent, servant or employee of either or both of the defendants, Arthur Gigli and Joseph Gigli."

[1, 2] It is apparent that the imputation of negligence as to the owner rests upon his permission, express or implied, to the use of the car by the one who was at the time operating it. This permission, or consent, is a question of fact, the proof of which is just as important as any other fact upon which recovery depends. When the trial court has found that such permission was not given no recovery can be had against the owner if there is any substantial evidence to support the finding. Here the evidence was direct and positive that such permission was not given. This is not controverted by appellants, but they contend that the trial court should have inferred that permission was given. But, an inference is a permissive deduction which may be drawn from the facts proved, and when the inference supporting the judgment is a reasonable one, and supported by substantial evidence, the function of the appellate court ends.

The authorities interpreting this section of the Vehicle Code are not in conflict. When the trial court or jury has drawn the inference against the claim of permissive use the finding has not been disturbed. Many of these cases are discussed in Engstrom v. Auburn Auto. Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059. Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581, and Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, 454, are cited with approval, particularly the portion of the latter opinion reading: "Section 1714¼ [now 402 of the Vehicle Code, St.1937, p. 2353] places upon the owners of automobiles a statutory liability which otherwise would not exist. Before this section can be applied, it must appear by the proof that the vehicle was used or operated 'with the permission, express or implied, of such owner.' The existence of such permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved as an essential element of the cause of action. Such proof must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied. Where the evidence does not warrant either of such inferences, section 1714¼ does not apply as a matter of law."

Appellants rely upon Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447, and cases from other jurisdictions, which, at first glance, would appear to be in conflict. But these cases merely support the statutory imputation of negligence where the trier of the facts drew the inference that permission to use the vehicle had been given. They can have no bearing here where the trial court inferred and found to the contrary.

[3] Appellants assert that Corti was acting as agent for Art Gigli in driving his car to the next stopping place because Art Gigli did not wish to leave his car behind. This also is a question of fact which the trial court found upon adversely to appellants. It is not contended that there is no evidence to support the finding—merely that there was evidence which would have supported a contrary finding. As we have said in reference to the first point raised, since there is substantial evidence to support the findings made, the function of the appellate court there ends.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



54 Cal.App.2d 777

WEAVER v. STATE BOARD OF MEDICAL EXAMINERS et al.

Civ. 13819.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1942.

1. Physicians and surgeons ⇐11(3)

Upon the filing of a verified complaint with the secretary-treasurer of the board of medical examiners charging unprofessional conduct, such official must forthwith issue a citation returnable at next regular session of the board which is then empowered to conduct hearings and take disciplinary action with reference to the

charges. St.1937, p. 1272 et seq., § 2360 et seq.

2. Prohibition ⇐17

Where upon conviction of physician of criminal offense, complaint was filed with board of medical examiners charging unprofessional conduct and citation was issued, and such complaint and citations were only pleadings before the board, and no other proceedings had been taken and physician had not asked board to continue hearing until the disposition of appeal from judgment of conviction, physician was not entitled to writ of prohibition to compel board to so continue its hearing. St.1937, p. 1272 et seq., § 2360 et seq.

3. Officers ⇐103

One may not appeal to the courts for relief from the act of an administrative body until he has exhausted his remedies before such body.

4. Prohibition ⇐6(1)

A writ of "prohibition" may be issued to arrest proceedings before any tribunal or board exercising judicial functions but not to prevent the exercise of administrative functions. Code Civ.Proc. § 1102.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

5. Prohibition ⇐6(2)

The board of medical examiners in exercising its jurisdiction over disciplinary matters on complaints of unprofessional conduct exercises "administrative" and not "judicial functions" and hence a writ of prohibition cannot issue in connection with any such disciplinary proceeding. Code Civ.Proc. § 1102.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Function" and "Judicial Function".

Prohibition proceeding by Darrington Weaver, petitioner, against State Board of Medical Examiners and others, respondents, to prohibit respondents from taking further action on a complaint to revoke his license to practice medicine by reason of conviction of a criminal charge until disposition of appeal of such conviction.

Writ denied.

Lloyd C. Griffith, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Allen L. Martin, and Bayard Rhone, Deputy Attys. Gen., for respondents.

W. J. WOOD, Justice.

Petitioner was convicted in the superior court on a criminal charge and thereafter appealed from the judgment of conviction, the appeal being now pending in this court. A complaint was filed with the respondent Board of Medical Examiners of the State of California, based upon the conviction of petitioner in the superior court. In accordance with the provisions of section 2365 of the Business and Professions Code, St.1937, p. 1272, a citation was issued requiring the appearance of petitioner before respondent board on July 28, 1942, to show cause why his license should not be suspended or revoked. Petitioner now seeks to prohibit respondent board from taking further action on the complaint and citation until the disposition of the appeal in the criminal action.

[1-3] When a verified complaint is filed with the secretary-treasurer of the Board of Medical Examiners charging unprofessional conduct it is the duty of the secretary-treasurer to forthwith issue a citation to be made returnable at the next regular session of the board. The Board of Medical Examiners is given power by the Business and Professions Code (§ 2360 et seq.) to conduct hearings upon the filing of complaints and to take disciplinary action with reference to the charges. The board has complete jurisdiction over these matters, including the power to suspend or revoke licenses. From the record before us it appears that the complaint and citation constitute the only pleadings before the board; that no hearing has been conducted and that no evidence has been received either in support of or in resistance to the charge contained in the complaint. Petitioner may properly ask respondent board to continue its hearing until the disposition of the appeal from the judgment of conviction in the criminal case. In any event, he may not appeal to the courts until he has exhausted his remedies before the administrative body. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. Manifestly petitioner has not exhausted his remedies before the board.

[4, 5] There is an additional reason for the denial of a writ of prohibition in this proceeding. A writ of prohibition may be issued to arrest proceedings before any tribunal or board exercising judicial functions. Code Civ.Proc. § 1102. The Board of Medical Examiners of the State of California does not exercise judicial functions. A writ of prohibition may not issue to prevent the exercise of its administrative functions. Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1.

The alternative writ heretofore issued is discharged.

MOORE, P. J., and McCOMB, J., concurred.



54 Cal.App.2d 587

PEOPLE v. SMITH.

Cr. 2232.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

1. Indictment and information ⇐111(1)

Informations which charged that accused unlawfully furnished a third person with preparation of opium and unlawfully transported a preparation of opium contrary to Health and Safety Code were not defective for failure to allege exceptions made in the Code when narcotics have been secured under a medical prescription. St.1939, p. 758, § 11160.

2. Indictment and information ⇐71

Informations which alleged that accused unlawfully furnished third person with preparation of opium and unlawfully transported preparation of opium sufficiently informed accused he was charged with unlawfully furnishing a third person with, and transporting, "opium", which was penalized by the Health and Safety Code. St.1939, p. 758, § 11160.

3. Poisons ⇐9

Evidence sustained convictions of unlawfully furnishing a third person with opium and unlawfully transporting opium. St.1939, p. 758, § 11160.

4. Poisons ⇐9

In prosecution for unlawfully furnishing a third person with a preparation of opium and for unlawfully transporting a preparation of opium, testimony of chemist that substance in package submitted to him was opium was sufficient identification of the package of opium alleged to have been transported and sold. St.1939, p. 758, § 11160.

5. Criminal law ⇐1137(5)

Where without objection, arresting officer testified that accused when arrested was wearing a fraternal emblem and that accused asked officer to refrain from making the arrest, and accused denied that anything of the kind occurred, officer's rebuttal testimony that accused displayed a fraternal emblem and gave the "distress signal" of the fraternity was not ground for complaint by accused, since the error if any was invited.

Appeal from Superior Court, City and County of San Francisco; Everett Clay McKeage, Judge.

Earl Smith was convicted of unlawfully furnishing a third person with a preparation of opium and of unlawfully transporting a preparation of opium, and he appeals from the judgments and from the orders denying a new trial.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener and Allen L. Martin, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried upon two informations—one charging him with unlawfully furnishing a third person with a preparation of opium, the other charging him with unlawfully transporting a preparation of opium—both in violation of section 11160 of the Health and Safety Code, Stats. 1939, p. 758. A jury's verdict found him guilty of both offenses "as charged in the information." The appeal is from the judgments and from the orders denying a new trial.

Certain police officers in the city and county of San Francisco, having arrested

a third person for possession of narcotics, took him to the city prison, made a thorough search of his person to see that he had no more in his possession, and arranged with him to make contact with the defendant who was on parole from a federal court upon a prior narcotic conviction. The officers gave the informer some marked money, took him to a certain location within the city where, within the view of the officers, he met the defendant. Soon after the informer met the defendant he was searched by the officers and a package of opium was found, but none of the money was in his possession. Upon his arrest the defendant admitted that he had sold opium and appealed to one of the officers to let him off upon the basis of their membership in a fraternal order.

[1, 2] Appellant first attacks the informations as insufficient because they did not allege the exceptions made in the code section when narcotics have been secured under a medical prescription, and because they charged possession of a "preparation" of opium. Both points have been ruled against appellant in People v. Bill, 140 Cal. App. 389, 35 P.2d 645. See, also, 14 Cal. Jur., page 52.

[3] Appellant argues that the evidence is insufficient. We have heretofore given a brief summary and, if the jury accepted this evidence and rejected the testimony in support of appellant's plea of an alibi, the verdict cannot be said to be without evidentiary support.

[4] Appellant's criticism of the order admitting in evidence the package of opium alleged to have been transported and sold is not sound. The exhibit was properly identified; it had been submitted to a chemist who testified that the substance in the package was opium.

[5] The appellant complains of the admission of evidence relating to membership in a fraternal order. Without any objection from the appellant, one of the arresting officers testified that when he made the arrest he was wearing an emblem of a fraternal order and that appellant displayed a card or receipt showing that he had been a member of the same fraternity. He then testified that the appellant appealed to him on the basis of such membership to refrain from making the arrest. Appellant as a witness denied the incident. In rebuttal the arresting officer testified that the appellant displayed a Masonic emblem on his coat and cards showing that he had been a member of that order some fifteen years previous, that he gave him the "distress signal of the Masonic Order" and asked him to "give him a chance and not book him." The appellant objected to the testimony and moved to strike out that part relating to the "distress signal." In denying the motion the trial judge stated that there "would be no difference between saying he gave the distress signal or asked him to go easy on him. * * *" The admission of the evidence, and the ruling on the motion are assigned as error. But the whole circumstance was invited by appellant while he was a witness. He denied that anything of the kind had occurred. This permitted the state to cross-examine him on the occurrence and to present the rebuttal testimony. We find no error in the record.

The judgments and the orders are affirmed.

STURTEVANT, and SPENCE, JJ., concurred.



MILLER v. McKENNA et al.*

Civ. 12009.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1942.

Rehearing Denied Oct. 31, 1942.

Hearing Granted Nov. 28, 1942.

1. Taxation ⇐658(3), 638

Tax deeds were not void because notices of sales for delinquent taxes did not separately state the amount of the taxes, penalties and costs for which the property was to be sold but on the contrary stated the total amount, since the irregularity was not a "jurisdictional irregularity" and was avoided by curative act which in its terms was retroactive. St.1929, p. 745.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdictional Irregularity".

2. Quieting title ⇐10(2)

In action to quiet title plaintiff who became owner of interest sold under execution

* Subsequent opinion 147 P.2d 531.

following foreclosure of mortgage was not entitled to judgment against defendants who deraigned their title from one who owned property prior to execution of mortgage.

3. Mortgages ⇐497(2)

Judgment in mortgage foreclosure proceeding could not be relied on as a bar to claims of defendants in action to quiet title where no one of the defendants was a party to the mortgage foreclosure action.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title by Edwin J. Miller against Catherine A. McKenna and others wherein Daniel B. Flenner filed a cross-complaint. From a part of the judgment, plaintiff appeals.

Portion of judgment appealed from affirmed.

Edwin J. Miller in pro. per., and Ralph W. Miller, both of Los Angeles, for appellant.

W. Verne Ahrens, Ernest M. Best, Ratzer & Bridge, and Glenn A. Lane, all of Los Angeles, for respondents.

STURTEVANT, Justice.

This is an appeal by the plaintiff from a part of the judgment rendered in an action to quiet title. The plaintiff in his complaint sought to have his title quieted to 103 lots in the Ela View Tract in the city of Los Angeles. He named many defendants. Of those so named D. B. Flenner, F. G. Hall, Katharina Haug, Mary Voelker, Guadalupe and Francisca De Los Rios filed answers. D. B. Flenner also filed a cross-complaint. That pleading was answered by the plaintiff. On the issues so framed the action was tried before the trial court sitting without a jury. Each party introduced evidence purporting to show a paper title. The court made findings in favor of the plaintiff as to all of the lots excepting ten. As to those ten lots it made findings in favor of the defendants whom we have specifically named. Insofar as the judgment rests on the findings last mentioned the plaintiff has appealed and has brought up the judgment roll and a bill of exceptions.

Each of said defendants herein specifically named presented a claim of title based on a tax deed. The findings of fact and conclusions of law show that the trial court held that such title, under all of the facts and the law applicable thereto, was valid. In legal effect the plaintiff contends such holding was erroneous. We think he is clearly mistaken.

The record shows that the city and county taxes on the lots, the title to which was confirmed in defendants Guadalupe and Francisca De Los Rios, for the year 1917, were not paid, that the property was later sold therefor, that by mesne conveyances the said defendants became, and are now, the owners of such tax titles. The same facts exist as to each of the other defendants except their tax deeds rest on the nonpayment of the city and county taxes for the year 1911.

[1] Both parties admit that each tax title was irregular, but the plaintiff goes further and claims each tax title was void. In the last mentioned claim rests the vice in his reasoning. The particular facts on which he makes his claim as to the invalidity of the tax deeds based on the levy for 1911 and the levy for the year 1917 are as follows. The notices of the tax sales for taxes delinquent in 1911 and 1917 did not separately state the amount "of the taxes, penalties, and costs" for which the property was to be sold. But, on the contrary, said notices stated the total amount. In Gottstein v. Kelly, 1929, 206 Cal. 742, 276 P. 347, the Supreme Court held such recital was insufficient and deeds based on such recitals were invalid. Relying on that decision this plaintiff contends the same ruling should be made in the instant case. However he concedes that a curative act was passed. Stats.1929, p. 745. But that act he claims was not applicable in the instant case. He concedes the trial court held otherwise but he claims that in so holding the trial court erred. We think not. The trial court was merely following the decision entitled Clayton v. Schultz, 1935, 4 Cal.2d 425, 50 P.2d 446. That decision answers against him every contention which this plaintiff makes. It holds that the irregularity above mentioned was not jurisdictional, that the irregularity could be avoided by a curative act, that the act of 1929 above mentioned was such an act, that in terms it was retroactive, and that it was applicable to deeds made prior to the enactment of said statute. Therefore it does not appear that said tax deeds were void.

[2] In 1915, George M. Pearson and wife claimed to own all of the 103 lots in-

volved in this action. In that year they executed a mortgage thereon. They fell in default. The mortgage was foreclosed, the property was sold under execution, and this plaintiff became the owner of the interest so sold under execution. He made no attempt to show that he was ever in possession and he made no attempt to trace title back to any earlier date. In 1911 the property was assessed to Charles M. Simpson who was presumably the then owner. The record shows that all defendants except Guadalupe and Francisca De Los Rios deraigned their title from Charles M. Simpson. Under such facts the plaintiff was not entitled to a judgment against the defendants D. B. Flenner, F. G. Hall, Katharina and John Haug, and Mary Voelker. San Diego Imp. Co. v. Brodie, 215 Cal. 97, 100, 8 P.2d 1027.

[3] The plaintiff relies on the judgment in the mortgage foreclosure proceedings as a bar. But it is sufficient to state that no one of the defendants was a party to that action and therefore no one of them was barred by said judgment. Other points presented in the briefs need not be discussed.

The portion of the judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



54 Cal.App.2d 773

FARES v. MORRISON.

Civ. 13705.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1942.

1. Appeal and error ⇐907(4)

Where engrossed bill of exceptions neither set forth the evidence in full nor all evidence with respect to findings, reviewing court was precluded from considering any objection as to insufficiency of evidence, and, under rule that all intendments favor correctness of findings, was bound to assume that there was sufficient evidentiary support for findings.

2. Evidence ⇐370(4)

The acknowledgment of a deed and certification thereof by a notary constituted "prima facie evidence" of execution of deed and entitled it to be read into record without further proof. Code Civ.Proc. §§ 1948, 1951.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

3. Quieting title ⇐47(1)

In suit to quiet title to realty, whether presumption raised by the due execution of a deed had been overcome was for trier of fact. Code Civ.Proc. §§ 1948, 1951.

4. Fraudulent conveyances ⇐87(1)

Consideration for a deed, although consisting of the cancellation of an antecedent obligation of debtor-grantor to one other than grantee, was "sufficient consideration", and debtor's transfer of property to one creditor in preference to another was not of itself fraudulent, being at most an act which might be avoided by bankruptcy or other appropriate proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Sufficient Consideration".

5. Appeal and error ⇐907(2)

In suit by purchaser at execution sale to quiet title to realty against judgment debtor's wife to whom debtor had deeded his interest in realty, a finding that debtor was not insolvent when he deeded his interest to wife could not be attacked on appeal, where the evidence was not set forth in the record.

6. Vendor and purchaser ⇐213(2)

An unrecorded deed passes title against a subsequent attachment, even though attachment is procured by a creditor of grantor.

7. Fraud ⇐50

One who alleges fraud assumes burden of establishing his charge, and the presumptions of honesty and fair dealing must be overcome by evidence of convincing force.

8. Appeal and error ⇐1011(1)

The District Court of Appeal will not interfere with trial court's conclusions as to the weight to be given to conflicting evidence.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Jo Fares against Catherine C. Morrison to quiet title to an undivided interest in a parcel of real property and to set aside a deed thereof. From a judgment for defendant, plaintiff appeals.

Affirmed.

J. M. Sinclair, of Los Angeles, for appellant.

John F. Bender and Robert E. Rosskopf, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

This is an action to quiet title to an undivided interest in a parcel of real property and to set aside a deed thereof, allegedly given in fraud of creditors.

In the year 1937 Catherine C. Morrison and her husband, Robert V. Morrison, were the owners of the property in question as joint tenants. Robert V. Morrison was operating a grocery store and was heavily in debt, his creditors including his wife's father, L. A. Cowper, to whom he owed $460.03, and W. M. Jenkins, with a claim in excess of $1,000. About May, 1937, Morrison signed a memorandum agreeing to "turn over" his interest in the real property to his wife for value received from L. A. Cowper, and it was testified that the consideration of the transfer was to be the cancellation of the existing indebtedness to Cowper, as well as a debt of unspecified amount owing by Morrison to his wife. A deed, dated October 29, 1937, was prepared by Cowper, who handed it to defendant with instructions to her to get her husband to sign it. The testimony before the trial court was that defendant did not leave the Cowper home and her husband did not come there that day. The deed, however, bore an acknowledgment of a notary public under his seal and certificate that it was subscribed and sworn to before him October 29, 1937. Cowper next saw the deed November 10, 1937, at which time it was fully executed. This deed was not recorded until after the levy of the attachment hereinafter referred to.

Meanwhile, on November 1, Jenkins filed action upon his claim, levied an attachment on the real property here involved November 2, recovered judgment November 25, 1938, levied execution against the interest of Morrison in said property December 1, 1938, and on January 10, 1939, at execution sale, plaintiff bid in the property, thereafter receiving a deed therefor from the Marshal of the Municipal Court of the City of Los Angeles after the period for redemption had expired. This action to quiet his title and to set aside a fraudulent conveyance followed, and defendant Catherine C. Morrison in her answer asked affirmatively that her title be quieted against plaintiff's claim.

Defendant prevailed and plaintiff appeals.

[1] It is urged that there was insufficient evidence to sustain the court's finding that the deed from Morrison to his wife was executed and delivered prior to the levy of attachment. It is true that the record before us shows that the deed was written October 29, that it was given by Cowper to Mrs. Morrison to present to her husband for his signature, and that he did not come to the house that day, nor did she leave the house. However, this does not negative the fact that the deed may have been transmitted to the husband by other means. And appellant is confronted by the state of the record brought up to this court, which, in an engrossed bill of exceptions, purports to correctly set forth "certain proceedings had during the trial of said cause." We are therefore precluded from considering any objection as to insufficiency of the evidence. Inasmuch as the bill of exceptions neither sets forth the evidence in full, nor all the evidence with respect to the findings, concerning which it is claimed there is insufficient support in the evidence, this court, under the rule that all intendments favor the correctness of the findings, cannot hold that the evidence was insufficient. Loewenberg v. Schneider, 14 Cal.2d 305, 93 P.2d 1014; City of Los Angeles v. Moyer, 108 Cal.App. 4, 290 P. 1073. Even if the record here presented does not show sufficient evidentiary support for the findings, there may have been, and we must assume that there was, other evidence produced at the trial and considered by the court qualitatively and quantitatively sufficient to justify its findings and conclusions. This single consideration disposes of appellant's specifications of alleged error that there was insufficient evidence to support the findings that the deed to Catherine C. Morrison was delivered prior to November 2, 1937, the date of the attachment, that the deed was accepted

by her before that date and that Cowper canceled the Morrison indebtedness before the attachment was levied.

[2, 3] But in addition to the foregoing, respondent's position is fortified by certain factors which appear from a study of the facts developed at the trial. The acknowledgment of the deed and certification thereof by the notary public constituted prima facie evidence of the execution thereof and entitled it to be read into the record without further proof (§§ 1948, 1951, Code Civ.Proc.); and it cannot be said as a matter of law, under the record presented to us, that the presumption raised by due execution has been overcome.

[4, 5] The consideration for the deed, although the cancellation of an antecedent obligation of the grantor to one other than the grantee, was sufficient (26 C.J.S., Deeds, p. 191, § 17), and the debtor's transfer of property to one creditor in preference to another was not of itself fraudulent, being at most an act which might be voided by bankruptcy or other appropriate proceedings. All argument against such transfer, moreover, must be predicated upon the assumption that the grantor was insolvent at the time of making such transfer, and in the instant case we are confronted with the court's finding that Morrison was not insolvent when he deeded his interest in the property to his wife, and such finding may not be attacked in the present state of the record herein.

[6] As to the fact that the deed was unrecorded at the time the attachment was levied against Morrison's interest in the property, it has been repeatedly held that an unrecorded deed passes title against a subsequent attachment, even though the attachment be procured, as in this instance, by a creditor of the grantor. Commercial National Bank v. Roberts, 49 Cal.App. 764, 769, 194 P. 751, and cases there cited.

[7, 8] Where fraud is alleged, as by appellant here, he assumes the burden of establishing his charge, and the presumptions of honesty and fair dealing must be overcome by evidence of convincing force. Hedden v. Waldeck, 9 Cal.2d 631, 72 P.2d 114. Conceding the utmost to appellant's arguments and disregarding for the moment the inadequate state of the record herein, there is disclosed nothing more than a conflict in the evidence offered before the trial court, and the court resolved that conflict against appellant. With the conclusions of the trial court as to the weight to be given to conflicting evidence this court will not interfere.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



54 Cal.App.2d 585

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12257.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1942.

Rehearing Denied Oct. 29, 1942.

Hearing Denied Nov. 27, 1942.

1. Workmen's compensation ⇐1540

In compensation proceeding for exacerbation of a pre-existing hernia condition, claimant's testimony sustained award in his favor, notwithstanding that reputable physician, who was in regular attendance on the claimant, testified that claimant's condition was the same as when he was first employed.

2. Workmen's compensation ⇐848

The "odd lot doctrine" which rests on a showing that injured employee is only fitted to do odd jobs, or special work, not generally available, was not applicable in compensation proceeding, where claimant was fully recovered from his injury and was able to do work of a general nature of the same kind which he had been habitually employed to do.

See Words and Phrases, Permanent Edition, for all other definitions of "Odd Lot Doctrine".

3. Workmen's compensation ⇐11

The purpose of the compensation act is not to provide general insurance or compensation for those who are unemployed through no fault of their own, but such benefits are paid under the Unemployment Insurance Act. Gen.Laws 1937, Act 8780d.

4. Workmen's compensation ⇐1631

Where compensation claimant testified that he was able to return to work on

April 27 when hearing was held and physician who had treated claimant discharged him on April 20 as fully recovered, an award of compensation for unemployment from April 28 and indefinitely thereafter until a specific employment was open to him, was improper.

Proceeding under the Workmen's Compensation Act by the Bethlehem Steel Company, employer, to review an award of the Industrial Accident Commission in favor of Harvey Lemons, compensation claimant.

Portion of award annulled, and remainder affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner seeks to annul an award of compensation for injuries claimed for exacerbation of a pre-existing hernia condition, and to annul a separate award for weekly compensation for an indefinite period.

On December 15, 1941, one Lemons was employed by petitioner as a shipfitter's helper following a physical examination which disclosed incipient hernias on both sides. On January 6, 1942, the employee left his place of employment in the hold of a ship and as he passed through a man-hole to reach the deck he claimed to have suffered pain. He was given an immediate examination by a reputable physician, who testified that his condition was the same as when first employed. On March 9, 1942, following another examination, the hernia was surgically treated.

[1] The evidence upon which the award of compensation was based was in direct conflict. The applicant was his own witness and gave testimony which was controverted by the expert testimony of the physician who was in regular attendance upon the patient. The commission elected to accept the testimony of the applicant, and that puts an end to the controversy here.

As to the award of indefinite weekly compensation for unemployment there is no conflict. The undisputed evidence shows that the applicant was physically able to perform the light work of a shipfitter's helper, which was his usual occupation. The applicant testified that he was able and ready to go back to work at the time of the hearing. The award seems to be based upon the theory that there was no direct evidence that a specific job was open to him, and that the burden of such showing was upon the employer.

[2, 3] The respondents suggest that the "odd lot" doctrine might be followed to sustain this position of the award. This doctrine is not applicable here because it rests upon a showing that the injured employee is only fitted to do odd jobs, or special work, not generally available. Where, as here, the injured employee is fully recovered from his injury and is able to do work of a general nature of the same kind in which he had been habitually employed there is no room for the doctrine which the courts have established for the benefit of those whose injuries have left them physically handicapped and unable to continue in their customary employment. But it is not the purpose of the Workmen's Compensation Act to provide general insurance or compensation for those who are unemployed through no fault of their own. Such benefits are paid under the Unemployment Insurance Act. Deering's Gen. Laws 1937, Act No. 8780d.

[4] Here the applicant testified that he was able to return to work on April 27, 1942, when the hearing was held. The physician who had treated him discharged him on April 20th as fully recovered. The award of compensation for unemployment was made to run from April 28th, and indefinitely thereafter. This portion of the award is not fairly defendable on any theory. The case is closely alike Witt's Dairy v. Industrial Acc. Comm., 37 Cal. App.2d 16, 20, 98 P.2d 812, 815, where, in annulling a similar award, the court said: "In the last analysis the case presents the bald question whether this employee was physically able, on May 22, 1939, to return to the same kind of work he had performed before he was injured. It does not present the question sometimes encountered—and discussed in respondents' brief—whether an injured employee has recovered to such an extent that he can do other work, less onerous than that which formerly he was able to do, and actually locates himself in such other job. There seems to be a rule covering such cases (see Schneider, supra, pp. 1344, 1345), but these facts do not call it into play. If, in the instant case, the employee was, in fact, physically able to resume his former job, then his temporary total disability would have ended, physically

and legally, and in such case there would be no legal justification for holding—contrary to the fact—that it had not ended. The unfortunate circumstance that the job was not open certainly would not prove that he was not physically able to fill it, but simply that there was no job to be filled."

The portion of the award giving compensation for the unemployed period subsequent to April 27, 1942, is annulled. Otherwise the award is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



54 Cal.App.2d 625

PEOPLE v. AVERETT.

Cr. 3624.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1942.

1. Homicide ⇐244(1)

Evidence sustained conviction for murder in the first degree as against claim of self-defense.

2. Criminal law ⇐1159(2)

Reviewing court could not disturb a verdict of guilty of murder in the first degree which had sufficient support in the evidence.

3. Criminal law ⇐1169(1)
Witnesses ⇐255(2)

Reporter's transcript of questions asked accused at police station and his answers thereto, which transcript was not signed by accused, should have been used merely to refresh the memory of witness who testified that the questions were propounded and answers were given as shown in the transcript, but where such transcript was admitted in evidence and read to the jury without objection, accused consented to such procedure and accused was not prejudiced thereby.

4. Criminal law ⇐713

District attorney was not chargeable with "misconduct" for using the word murder in the presence of court and jury during murder trial, in the absence of anything in accused's brief to point out in what manner such conduct was improper, or in what respect accused was prejudiced thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Criminal law ⇐1119(4)

Accused's contention that district attorney was guilty of misconduct in using a gun on accused while testifying was not substantiated by record which merely showed that accused and his attorney did not like the way district attorney was handling the weapon while cross-examining accused without disclosing how weapon was being handled or in what direction it was being pointed.

6. Criminal law ⇐956(1)

Alleged misconduct of district attorney not disclosed in the record could have been called to trial court's attention as a ground for new trial by way of affidavits showing what actually took place.

7. Criminal law ⇐718, 1171(1)

In prosecution for murder, district attorney's statement in argument to jury that there would be no reversal in the event of accused's conviction was improper, since it had no bearing upon any of the issues to be decided by the jury, but it did not appear that such improper argument was prejudicial to accused.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Hugh R. Averett was convicted of murder in the first degree, and from the judgment of conviction and order denying a new trial, he appeals.

Judgment and order affirmed.

Leonard Wilson, of Los Angeles, and Gordon M. Gale, of Bell, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

A jury found defendant guilty of murder in the first degree and fixed the penalty at life imprisonment. Defendant has appealed from the judgment of conviction and from the order denying his motion for a new trial.

In support of his contention that the evidence is insufficient to support the verdict defendant argues that there is no evidence of premeditation or malice, but a statement of the more important facts established by the evidence discloses that this contention is without merit.

It is conceded that on January 13, 1942, defendant shot and killed Bennett Shaffer, who had been his son-in-law. Defendant claimed, however, that he shot in self defense. The daughter of defendant, Teresa Shaffer, died on September 18, 1941, from arsenic poison. The following month defendant appeared at police headquarters in the city of Glendale and stated that Shaffer was a murderer and that he knew his daughter had come to her death through foul play. The police officers informed him that a physician's examination and the verdict at the coroner's inquest showed that Teresa Shaffer had come to her death through arsenic poison taken with suicidal intent. About two weeks later defendant again appeared at the police station with a small bottle which had contained Kellogg's ant paste. He placed the bottle on the desk and said, "Here, if you God dam cops had made an investigation you would have found this." He stated that he had found the bottle "on top of the garage in back of Mr. Shaffer's home" and said, "I want a thorough investigation made of that. I think it was foul play." A police officer told him that the investigation was closed, whereupon defendant stated that he would go to the district attorney's office to see if he could get action. He was told to go ahead and see if he could get any action, and as he departed he turned and said, "Well, if I can't get action over there, I am going to see to it myself that justice is done." In the following January defendant walked into the police station and said, "I have just killed my son-in-law. Lock me up." Officers went to the Shaffer residence and found Shaffer's body lying partially in the kitchen and partially in the room between the kitchen and the bedroom. One bullet had pierced Shaffer's chest from the front and another bullet had pierced his neck from the rear. The revolver with which the shooting had been done was found on the top of the washing machine in the room between the kitchen and the bedroom.

In a statement made to the police officers concerning the shooting defendant stated that Shaffer had had an argument with defendant's wife and later in the day defendant had reproached Shaffer for calling his wife a dirty name; that thereupon Shaffer had drawn a revolver, calling defendant a dirty name, and had asked him what he was going to do about it; that Shaffer laid the revolver on the sink and started to get a drink of water; at that time defendant saw the opportunity to get the gun so he grabbed it and shot Shaffer twice. At the police station defendant further stated:

"Q. Mr. Averett, just where were you standing in the room at the time the gun was actually pulled out of Mr. Shaffer's pocket and he placed it on the sink? A. I was standing by the stove and he was at the sink.

"Q. How far is the stove from the sink? A. About six feet.

"Q. Was he facing you or did he have his back to you? A. He was facing me when he pulled the gun. He had a drink of water in his hand and had laid the gun on the sink and I reached over and grabbed it.
* * *

"Q. Mr. Averett immediately after you shot at your son-in-law, Mr. Shaffer, did he make any remarks? A. No.

"Q. Did he try to get away or ward off the shots? A. He started like he was going to the bathroom. That was the way I saw it, he reeled and fell and I shot him again.

"Q. Was that after he had started to go to the bathroom? A. Yes.

"Q. Was he still on his feet when you fired the second shot? A. No, I don't think he was."

[1, 2] The jury could reasonably conclude that defendant had charged Shaffer with the murder of his daughter and that he had made threats against Shaffer. From the circumstances of the shooting, not only from the bullet wound in the back of Shaffer's neck but from the statement made by defendant concerning the shooting, the jury could reasonably conclude that defendant did not shoot in self defense and that the killing was done with malice and premeditation. Since the verdict of the jury finds sufficient support in the evidence the reviewing court may not disturb it.

[3] Defendant complains of the action of the trial court in permitting the use of a document containing questions asked of the defendant at the police station and his answers thereto, the document not having been signed by defendant. When defendant

was examined at the police station the questions and answers were taken down by a reporter and later transcribed. At the trial the circumstances of the conversation were shown in evidence and a witness testified that the questions were propounded and answers were given as shown in the document. The document was admitted in evidence without objection from defendant and was read to the jury. The approved practice in such situations is to use the document to refresh the memory of the witness. People v. Amaya, 44 Cal.App.2d 656, 658, 112 P.2d 942. If defendant had objected to the practice followed in this particular instance the trial court doubtless would have ruled that the document could be used for the purpose of refreshing the memory of the witness. By his failure to object defendant must be deemed to have consented to the reading of the document to the jury, which resulted in a saving of time. He was not prejudiced by the procedure followed.

Defendant contends that the court erred in giving certain instructions and in refusing to give other instructions which he had requested, but he does not make the slightest attempt to comply with the rule of the court which requires that where the giving or the refusal to give instructions is claimed to be erroneous all of the instructions bearing on the subject must be printed in the appellant's brief. The trial court fully and fairly instructed the jury on the rules of law applicable to the issues and nothing has been called to our attention to indicate that defendant has been prejudiced by the giving of any instruction or by the refusal to give any instruction requested.

[4-6] Defendant contends that the district attorney was guilty of misconduct in several instances, without setting forth in his brief the acts which he claims were error and without showing wherein he was prejudiced. At one place in his brief he claims that the prosecutor's conduct was reprehensible "in that he used the word 'murder' in the presence of the court and the jury." Surely the word, murder, could properly be used by the prosecutor in a trial in which the defendant was charged with murder. Defendant has not pointed out in his brief in what manner the conduct of the prosecutor was improper or in what respect he was prejudiced. In another place in his brief defendant refers to the "conduct of the district attorney using a gun on the witness, and appellant while testifying, and using a threatening manner in such way as to interfere with the testimony of said witness." The charge that the prosecutor "used a gun" on defendant at once arrests attention. In this instance defendant has referred to the page and lines of the transcript to support his charge and upon turning to the transcript we find the following:

"Q. At any rate, after he made this statement, you shot him? A. I didn't shoot him until he got in the crouching position and I felt my life was in danger, and then I pulled the trigger.

"Q. At the time that you picked the gun —. A. Don't point that at me, please (indicating gun).

"Q. I am sorry, I thought you couldn't hear. At the time you picked the gun up—.

"Mr. Wilson: Just a moment. If he can't hear it won't help him any to point a gun at him.

"The Court: There is nothing before the Court. You may proceed, Mr. Galliano." We find nothing in the record to substantiate the charge that the prosecutor was "using a gun on the witness." The most that can be said, as far as the record discloses, is that defendant and his counsel did not like the way the prosecutor was handling the weapon at the time of the cross-examination. It does not appear from the record how the weapon was being handled or in what direction it was being pointed. The trial court did not find that the occasion called for an admonition to the prosecutor and did not direct any change in his actions. If indeed there had been prejudicial misconduct on the part of the prosecutor during the course of the trial the matter could have been called to the trial court's attention as a ground for a motion for a new trial. The way was open to defendant to present affidavits showing what had actually taken place at the time of the incident of which complaint is made but he did not see fit to file affidavits on this point. The serious charge made by defendant on the subject of "using a gun" must be held to be groundless.

[7] Defendant complains of the following statement which was made by the prosecutor during his address to the jury: "I want to also state to you the same statement that Mr. Wilson has made to you that is, that it is up to you to decide the facts in this case and I will assure you that if you convict this defendant on the evidence that has been introduced here there

won't be any reversal of this case." That part of the statement in which the prosecutor stated that there would be no reversal in the event of the conviction of the defendant cannot be considered as legitimate argument, as it had no bearing upon any of the issues to be decided by the jury. In a part of the statement the jury were told that it was their function "to decide the facts." We fail to see how the statement of the prosecutor resulted in prejudice to defendant.

Other points made by defendant are not of sufficient importance to call for discussion herein. We are satisfied that the defendant was given a fair trial and that the conviction should be sustained.

The judgment and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concurred.



BASCH v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 11918.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1942.

Hearing Granted Nov. 28, 1942.

1. Banks and banking ⇐148(1)

As between a bank and its depositors, payment of forged checks by it is made at its peril and cannot be charged against depositor's account unless some negligent act or conduct of depositor has contributed to induce such payment, the bank itself being free from negligence, or unless by conduct depositor is estopped to deny correctness of such payments.

2. Banks and banking ⇐148(3)

When a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries to report them, failing in which he cannot, if his failure results in detriment, dispute the correctness of payments thereafter made by bank on similar checks.

3. Banks and banking ⇐148(3)

When by the exercise of proper care a bank could have discovered forgeries of checks, it must bear the loss, notwithstanding that depositor failed in his duty to examine his passbook and canceled checks.

4. Banks and banking ⇐148(3)

Where commercial bank depositor had employed a stranger without investigation and continued him in charge of depositor's banking business after the stranger had cashed a fictitious check with depositor, and depositor did not examine his canceled checks and monthly bank statements or check them with his account books, depositor was negligent so as to preclude recovery from bank, as to checks forged by the stranger if bank were free from negligence, when the forged checks were listed on the statements and included with the returned canceled checks.

5. Banks and banking ⇐148(3)

Where checks forged by employee to whom commercial bank depositor had intrusted his banking business were listed on bank's monthly statements which were sent to depositor, and the forged checks were included in returned canceled checks, depositor had a duty to examine the statement and canceled checks and to reconcile them with his account books, and that the duty had been delegated to a dishonest employee would not excuse depositor from performing it.

6. Banks and banking ⇐154(6)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, bank had burden to prove freedom from negligence in failing to exercise reasonable care in detecting the forgeries to be entitled to assert depositor's negligence as a defense.

7. Banks and banking ⇐154(8)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, evidence established that some of the forgeries should have been detected by bank's employees, entitling depositor to recover notwithstanding his negligence in failing to examine returned statements and canceled checks.

* Subsequent opinion 139 P.2d 1.

8. Appeal and error ⇐931(1)

On appeal by bank from judgment for commercial depositor for payments made from his account by bank under checks forged by his employee, conflicts in the evidence as to whether bank's employees should have detected some of the forgeries were required to be resolved against appellant bank.

9. Banks and banking ⇐154(9)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, conflicting evidence as to whether bank's employees should have detected some of the forgeries so as to authorize recovery notwithstanding depositor's negligence was for jury.

10. Appeal and error ⇐999(1)

Where negligent commercial depositor sought recovery from bank for payments made from his account by bank under checks forged by his employee and bank had full opportunity of establishing burden of proof that its employees were not negligent in failing to detect some of the forgeries, jury's finding for depositor on such issue was binding on appeal.

11. Estoppel ⇐96

Where negligent commercial depositor had lost checks forged by his employee and returned to depositor by bank and it was necessary for bank to establish freedom from negligence in honoring the lost checks by a showing from the checks themselves, the depositor was "estopped" to deny correctness of payments made under the lost checks.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

12. Estoppel ⇐72

Application of doctrine of "equitable estoppel" against a depositor seeking to recover for forged checks paid by bank depends upon the facts of the particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

13. Trial ⇐191(2), 253(3)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, instruction that, if bank were negligent in failing to detect the first month's forgeries, jury might consider such fact in determining whether it was the proximate cause of the forger continuing his wrongdoing, was not improper as an assumption or as failing to recognize depositor's imputed knowledge as to existence of the forgeries.

14. Appeal and error ⇐1064(1)
Banks and banking ⇐154(9)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, instruction that depositor's negligence in failing to examine his monthly statements and canceled checks constituted no defense if bank were negligent in failing to detect the forgery was proper as applied to the checks produced at trial and was not prejudicial where bank was not liable for payments under missing forged checks.

15. Banks and banking ⇐154(9)

In commercial depositor's action against bank to recover payments made from his account by bank under checks forged by his employee, instruction failing to require bank to show freedom from negligence to invoke depositor's negligence as a defense was properly rejected.

16. Banks and banking ⇐154(9)

Instruction that if depositor was negligent in failing to examine bank's monthly statements and canceled checks, jury must find for bank as to all forged checks cashed during time depositor continued negligent provided bank was free from negligence subsequent to lapse of reasonable time after the first statement including some forgeries had been returned was properly refused since bank was not entitled to invoke depositor's negligence unless bank was free from negligence in cashing the checks during the first month.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Carlo Basch against Bank of America National Trust & Savings Association to recover payments from plaintiff's commercial account by defendant under forged checks. From a judgment for plaintiff, defendant appeals.

Judgment modified, and as modified affirmed.

Louis Ferrari, G. D. Schilling, and James S. De Martini, all of San Francisco, and Hugh L. Preston, of Ukiah, for appellant.

Belli & Leahy and Marshall E. Leahy, all of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Carlo Basch, owned and operated Basch's Pharmacy in San Francisco, and for many years maintained a commercial account in the name of the pharmacy with the defendant bank at its main office at No. 1 Powell Street. In May, 1938, he hired Herbert C. Lahr as part-time bookkeeper and between November 3, 1938, and September 11, 1939, Lahr forged plaintiff's name to a series of 127 checks payable to himself, all but four of which called for the payment of $37.50 each. He cashed the checks in various places, and in due course the checks were presented to the main office of the bank and paid out of plaintiff's account. Plaintiff did not examine or check the bank's monthly statements or his cancelled checks; he delegated that duty to Lahr; consequently plaintiff did not discover that any of his checks were being forged until the early part of September, 1939. Prior thereto he realized his profits were decreasing, but he attributed the decrease to poor business. Upon discovery of the forgeries he notified the bank and demanded that it make good the total sum paid out on the forged checks; but after investigating the matter the bank refused so to do; thereupon plaintiff brought this action against the bank to recover said sum. The bank pleaded several special defenses, among them being negligence on the part of plaintiff in failing to examine or check the bank's monthly statements and his cancelled checks, and entrusting his banking affairs to Lahr without making any inquiries at the time he hired him as to his reputation for honesty and integrity. The cause was tried before a jury and a verdict rendered against the bank for $4,740, the total amount of the forgeries. From the judgment entered thereon the bank appeals. Insufficiency of the evidence to support the verdict and judgment and the giving and refusal to give certain instructions are urged as the grounds for reversal.

[1-3] The law governing the relative rights, duties and responsibilities of bank depositors and banks in cases of forged checks is set forth in Glassell Development Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 1013, 28 A.L.R. 1427, as follows: "As between the bank and its depositors the payment of forged or altered checks by it is made at its peril and cannot be charged against the depositor's account unless some negligent act or conduct of his has contributed to induce such payment—the bank itself being free from negligence, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 P. 704, 41 L.R.A., N.S., 529; 4 Cal.Jur. 215, 216, §§ 103, 104; 7 C.J. 683. And the weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. 7 C.J. 687; California Vegetable Union v. Crocker Nat. Bank, 37 Cal.App. 743, 174 P. 920; Morgan v. United States Mortgage & Trust Co., 208 N.Y. 218, 101 N.E. 871, L.R.A.1915D, 741, Ann.Cas.1914D, 462. This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts." (Citing numerous authorities from other jurisdictions.) The court then goes on to quote approvingly the following from Ruling Case Law (vol. 3, pp. 537, 538): "The majority of the suits brought by depositors to recover payments made on forged or fraudulently altered checks, result from the crimes of some trusted employee of the depositor, and usually the court has to deal with a long series of successful forgeries. In such cases, after his passbook has been balanced and returned to a depositor with any of the forged or fraudulently altered checks, the authorities practically agree that in the absence of negligence on the part of the bank the failure of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered

will, if the delay is caused by his negligence in not using due care and diligence in examining the pass-book and vouchers, or in giving notice, if he had discovered the forgeries, constitute a defense by the bank to the depositor's suit for the money subsequently paid out on similar checks. * * * A bank is under an obligation to its depositor to use care in scrutinizing checks paid, to discover forgeries and render its accounts to prevent the perpetration of frauds upon its depositor. And if the bank's officers, before paying forged or altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of his account. In every case where suit is brought by a depositor to recover from a bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments, because of conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payments. If it was negligent, if its officers are found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his pass-book and vouchers with reasonable care and report to the bank in a reasonable time any errors or mistakes, will constitute no defense, and it is generally a question for the jury whether the bank was negligent in paying a forged or fraudulently altered check."

The subject is treated more fully and additional and later authorities are cited in 7 American Jurisprudence, pages 364–371, and many of the legal principles above stated are to be found in Union Tool Co. v. Farmers', etc., National Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417; also in the earlier case of California Vegetable Union v. Crocker National Bank, 37 Cal. App. 743, 174 P. 920, 923, wherein it is pointed out that what is said concerning the duty of a depositor to examine his balanced pass-book applies with equal force to the modern statements furnished by a bank to its depositors from time to time on balancing their accounts and returning the canceled checks to them.

[4] The application of the foregoing legal principles to the undisputed facts here presented demonstrates beyond question that plaintiff was guilty of negligence not only in failing to exercise ordinary care and common prudence in entrusting Lahr with his banking affairs, but in failing to perform the duty imposed upon him by law to examine his canceled checks and the bank's monthly statements or to check the same with his own books of account. In this regard the record shows the following: Lahr was a stranger to plaintiff when he hired him, and plaintiff asked him nothing about his antecedents or previous employments. He hired him, at a salary of $25 a month on the recommendation of his, plaintiff's nephew by whom Lahr had been employed for a short time. But immediately upon the discovery of the forgeries plaintiff learned that Lahr had a previous criminal record as a forger and embezzler; that he had served several jail terms therefor, and that at the very time plaintiff hired him he was posted in police headquarters as wanted by the state division of criminal identification as a parole violator after having been convicted of forgery in El Dorado County. Furthermore it was revealed that prior to obtaining employment with plaintiff Lahr had been dismissed from other clerical jobs in San Francisco for reasons showing want of confidence in him. In fact soon after he entered plaintiff's employ he cashed a fictitious check with plaintiff drawn on an Indiana bank, which plaintiff compelled him to make good; nevertheless plaintiff continued him in his service. Among the duties plaintiff assigned to Lahr when he hired him were to prepare the bank checks for plaintiff's signature, to keep certain books of account in connection with the bank account, and upon receipt of the monthly bank statements and canceled checks to check and reconcile the same with plaintiff's books of account. The leaves of the checkbooks used by plaintiff consisted of three checks attached to stubs, the checks and stubs bearing corresponding printed consecutive numbers. The name and address of the pharmacy was printed in the upper left hand corner of the checks, the name and address of the bank in the lower left hand corner, and in the lower right hand corner was printed "Basch's Pharmacy," with a printed line for plaintiff's signature. One of the books of account plaintiff required

Lahr to keep was a "combination cash journal and bank account." Each leaf thereof was divided into columns; and in one of the double columns entitled "Bank" Lahr was supposed to enter the dates and amounts of the bank deposits, and the dates, amounts and numbers of the checks drawn against the deposits; and to enter the total amounts of the deposits and withdrawals at the bottom of each column. Being thus entrusted by plaintiff with his banking business, Lahr was able to carry on his criminal enterprise without detection in the following manner: He would extract a whole page of blank checks from the checkbook and destroy the stubs; he would then place a piece of carbon paper and a canceled check bearing plaintiff's genuine signature over the blank check and trace the genuine signature with a pencil; then trace the carbon impression of Basch's signature with pen and ink and afterwards erase the carbon marks from the spurious checks and any pencil marks from the canceled check used for the tracing. Thereupon he filled in the body of the check, making it payable to himself. But he made no entry of the forged checks in the cash journal and bank account; and upon receipt of the bank's monthly statements and the accompanying canceled checks he immediately sorted out and removed from the package of canceled checks all of those that were forged, some of which he destroyed, and after reconciling the genuine checks with the stubs and the entries in the cash journal and bank account in which he had listed only the genuine checks, he entered false totals at the bottom of the column and in the checkbook to correspond with the balances appearing on the bank's statements, placed the genuine checks back in the envelope and marked it "O. K."

In September, 1939, Lahr gave one of the forged checks for $37.50 to an airline company in payment of his fare to Los Angeles, telling the company it was his salary check. After the plane took off the company phoned to Basch's pharmacy to verify the genuineness of the check and was informed by plaintiff that the check was a forgery and would not be honored. Upon the arrival of the plane in Los Angeles Lahr was told he had passed a bad check and he made good the amount to the company and was allowed to depart. Immediately upon receiving the phone message from the airline company plaintiff, with the assistance of the police and an accountant, investigated his bank statements, canceled checks and books of account, and the investigation at once revealed the other forgeries. In the meantime he notified the bank thereof. Lahr was subsequently arrested and sentenced to imprisonment in the penitentiary. He gave his testimony at the present trial by way of deposition.

[5] Lahr cashed four of the forged checks in November, 1938, the first for $40, the second for $35, the third for $37.50, and the fourth for $27.50; and another in January, 1939, for $25. All of the rest of them called for the payment of $37.50 each, four being cashed in December, 1938, six in January, 1939, nine in February, ten in March, ten in April, fifteen in May, eighteen in June, twenty-two in July, twenty-three in August, and six in September; and each of them was listed on the bank's monthly statements sent to plaintiff and all were included in the packages of canceled checks returned to him with the statements. At the bottom of each statement was printed "Please examine this statement at once. If no error is reported in ten days the account will be considered correct. All items are credited subject to final payment." But as stated plaintiff did not examine or check any of the bank's monthly statements or the canceled checks, nor did he attempt to reconcile the same with his books of account or the check stubs. He left that matter entirely to Lahr. Under the law as laid down in the authorities above cited, it was plaintiff's legal duty, as a depositor, so to do; and obviously if he had performed that duty he would have at once uncovered the forgeries, and the discovery of the first or any of them would have avoided a repetition. As said in California Vegetable Union v. Crocker National Bank, supra: "If depositors may regularly at frequent intervals receive their vouchers and be notified, as was the appellant here, of reduced balances of their accounts in banks consequent upon the unfaithfulness of trusted employés during a period of nearly a year, and by neglecting to exercise reasonable supervision over their own business fail to discover fraud which has been perpetrated upon them and the bank, and may thus leave the bank in ignorance of the frauds thus committed, and charge the bank with the losses thus occasioned, then banks and their paying tellers face hard conditions indeed. We do not feel

justified in establishing any such rule in this state."

Nor does the fact that plaintiff delegated the duty thus imposed upon him by law to a dishonest employee serve as legal excuse for not performing that duty himself, for when the agent to whom the duty of examination is entrusted is a dishonest employee who by forgery has obtained from the bank funds of his employer, and who does not disclose to his employer the circumstances which would naturally have been disclosed by a proper examination, the principal is chargeable with such information as an honest employee, unaware of the fraud, would have acquired from the pass-book and vouchers. (7 Am.Jur. p. 368; see also 15 A.L.R. 162; 67 A. L.R. 1124; 103 A.L.R. 1148.) "In such instances," says the court in First National Bank of Philadelphia v. Farrell, 3 Cir., 272 F. 371, 376, "the cases hold that knowledge of a dishonest agent of fraudulent entries and incorrect balance is equally the knowledge of his principal, with the qualification, however, that the principal is chargeable, not with the knowledge of wrongdoing the agent possessed from the fact that he himself was dishonest, but with knowledge of such facts as an honest agent, unaware of the wrongdoing, would acquire when examining the statements within the scope of his employment. The dishonesty of the agent does not change his relationship to his principal, and accordingly does not change the rule charging his principal with knowledge of such facts." (Citing numerous authorities.) In other words, in such cases the mere designation of an agent to discharge the duty resting primarily upon the depositor cannot be deemed the equivalent of performance by the latter. Leather Manufacturers' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811.

[6] But as set forth in the authorities above cited, in cases such as this negligence on the part of the depositor is available as a defense to the bank only where it appears that the bank itself is free from negligence in failing to exercise reasonable care in detecting the forgeries; and in Sommer v. Bank of Italy, etc., Ass'n, 109 Cal.App. 370, 293 P. 98, it is held that the burden of so proving is on the bank. It is plaintiff's contention that the evidence shows the bank was negligent in the following respects: that its "system was wrong" in that it gave no instructions to its employees "relative to detecting forgeries, or in handwriting"; that it assigned duties to employees who were not competent "to discharge the system set up" by the bank; and that its employees were negligent in the performance of the duties assigned to them.

There is no merit in plaintiff's first two points. The uncontradicted testimony shows that the bank's system of scrutinizing checks and training its employees to that end is substantially the same as that carried on in all San Francisco banks, and is considered to be the established modern system. Briefly outlined, it is as follows: All depositors' accounts are divided into alphabetical divisions and three employees, consisting of two bookkeepers and a teller, are assigned to each division; each of whom has been given previous training by instruction and experience in detecting altered or forged checks, and who have made a thorough study of the genuine signatures of the depositors whose checks pass through that particular division to which such employees are assigned. When the checks are received at the bank they are sorted into alphabetical divisions and each check is scrutinized by those employees in rotation; first by one bookkeeper, then by the teller, and the next day by the second bookkeeper. If the check receives the approval of all three it is then charged against the depositor's account by the second bookkeeper. In scrutinizing the checks each employee is required to examine the signature, the numerical and the written amounts, and the date; and his instructions are that if he has any reason to doubt the genuineness of the maker's signature he shall at once compare the signature on the check with the specimen signature of the maker as contained on the original signature card which is kept in a swivel file drawer within reach of the teller and the bookkeeper; and if he then has reason to doubt the genuineness of the signature he must refer the check for final action to an officer of the bank. The teller who was assigned to the division handling plaintiff's checks had twelve years' experience in that kind of work and for the last four or five years had been assigned to that particular division; and the bookkeepers serving in that division during the period these forgeries were being committed by Lahr were young men of previous experience ranging from twen-

ty months to several years in the kind of work they were assigned to perform.

[7-10] The evidence does establish, however, that by the exercise of proper care and skill the bank's employees could and should have detected some of the forgeries. In this respect the record shows that eighty-three of the forged checks were produced by plaintiff at the trial and were received in evidence; that a dozen or more of those so produced were shown to the teller of the division handling plaintiff's checks, and after examining the same he admitted that several of them bore evidence of forgery, and should not have been honored. Three of those so designated by him were of the series of four forged and cashed during the first month, November, 1938; and two of them were previously honored as genuine by said teller himself. Moreover, one or two of the others which he stated bore evidence of forgery were previously honored by him. It is true, other witnesses gave testimony to the effect that they would have passed these same checks; but on appeal such conflicts must be resolved against the appellant. The evidence shows also that it was the standard practice of the bank that tellers should not honor checks which were post-dated or without date, or which showed evidence of erasures; that all such checks were to be referred to an officer of the bank; and here it appears that one of the forged checks produced at the trial was not dated, another was post-dated, and some of them showed evidence of erasures. As to the remaining forged checks produced at the trial, certain witnesses called by the bank testified that the signatures attached thereto were "excellent facsimiles" of the genuine signature. But in the final analysis that was a question of fact for the jury to determine, and apparently it was not convinced that the bank employees were free from negligence in failing to detect that they were forgeries. Therefore, since the burden was upon the bank so to establish, and it had the full opportunity of doing so, the conclusion arrived at by the jury on that issue as to the eighty-three checks produced before the jury is binding on appeal, and the bank should be held responsible for the payment thereof.

[11] But as to the remaining forty-four checks which were not produced at the trial a different situation is presented. They consisted of all the forged checks cashed during the months of December, 1938, and January, February, March and May, 1939, and the total amount thereof was $1,637.50. All of them had been theretofore delivered to plaintiff by the bank with his monthly statements; and their loss was due to plaintiff's negligence in failing to exercise reasonable supervision over his banking affairs. It is apparent that the negligent loss of the checks by plaintiff operated to the manifest prejudice of the bank for this reason: Under the law, in order to absolve itself from liability for the payment of said checks upon the ground of plaintiff's negligence, it was necessary for the bank to establish that it was free from negligence in honoring them; and this could be done by showing by the checks themselves that there was no want of exercise of proper care and skill on the part of its employees in failing to detect that the signatures thereon were forgeries. But obviously the loss of the checks by plaintiff deprived the bank of any opportunity to make such showing. Stated another way, it appears that plaintiff seeks to invoke against the bank the disputable presumption of negligence created by judicial decision, when by his own negligence he has made it impossible for the bank to meet the burden of overcoming that presumption. In those circumstances the bank in our opinion is entitled to the application against plaintiff, insofar as the missing checks are concerned, of the equitable estoppel provided for in the second exception to the general rule as set forth in the Glassell case, supra. As there stated, the payment by a bank of forged checks is made at the bank's peril "unless some negligent act or conduct of his [the depositor's] has contributed to induce such payment—the bank itself being free from negligence, *or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments.*" (Italics ours.)

[12] The inability of a depositor to produce forged checks at the trial does not, of course, in all such cases justify the application of the doctrine of equitable estoppel, because no absolute rule can or should be laid down to govern all such cases, any more than it can or should be in other classes of cases involving the doctrine of equitable estoppel. The application of such doctrine depends entirely upon the facts of the particular case,

and admittedly cases are to be found wherein judgments in favor of depositors have been sustained notwithstanding that the forged checks were not produced at the trial. But in those cases to which plaintiff has called attention, particularly First Nat. Bank of Weslaco v. Patty, Tex.Civ.App., 62 S.W.2d 629, the precise point here presented as to the effect of the negligent loss by the depositor of the forged checks upon which he sought to recover apparently was not urged; at least it was not discussed or determined in the decisions. In the California case, Sommer v. Bank of Italy, etc., Ass'n, supra, cited by plaintiff, a nonsuit was granted and on appeal it was held merely that the question of whether the bank was free from negligence was one of fact and that in view of the evidence there produced should have been submitted to the determination of the jury. It seems to be plaintiff's contention that since the evidence shows that the bank's employees failed to exercise proper care and skill in scrutinizing the checks that were produced, especially those cashed during the first month, the inference may be drawn therefrom that they were likewise negligent in scrutinizing the checks not produced. Assuming that such an inference could be drawn, the answer to the contention is that as to the checks that were produced the bank was afforded an opportunity of overcoming the inference; whereas as to the missing checks it was deprived of so doing by the plaintiff's negligence. For the reasons stated, that portion of the judgment based on the missing checks cannot be sustained.

[13] With respect to the matter of the instructions, we find nothing in the points urged by the bank which call for a reversal of the judgment. The first objection is directed against the latter portion of an instruction wherein the jury was instructed that if it found that the bank was negligent in failing to detect the November, 1938, forgeries, then the bank would be responsible for all loss to the plaintiff proximately caused by its negligence, and that the jury "may consider, under such a finding of negligence" the question of whether that negligence "was the proximate cause of the forger being enabled to continue his wrongdoing on any or all future checks and as well, in determining whether or not the bank was negligent in its examination and payment of subsequent forged checks. * * *" The term "proximate cause" was fully and correctly defined in the next instruction. The bank contends that even though it was negligent in the payment of the first month's checks, such fact in no event could be legally considered by the jury as the proximate cause of the forger continuing his wrongdoing; furthermore that the instruction was misleading in that it erroneously assumed that evidence was introduced so showing. An examination of the entire instruction discloses, however, that it does not embody such assumption. It states merely that if the jury found as a fact that the bank was negligent in cashing the November checks the jury "may consider" such fact in determining whether it was the proximate cause of the forger continuing his wrongdoing; and the first portion of the bank's contention is answered by the case of Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529, (cited and emphasized by the bank herein on another point) wherein the court stated in substance that it may well be found that if the bank had not been negligent in failing to detect the first forgeries, the forger would not have been able to continue his criminal enterprise in forging the subsequent checks. See, also, Deer Island Fish & Oyster Co. v. First National Bank, 166 Miss. 162, 146 So. 116. The third objection made to this same instruction is that it erroneously failed to give recognition to the legal effect of the plaintiff's imputed knowledge as to the existence of the forgeries; but a reading of the entire instruction shows that the objection is not well taken. Moreover, in several other instructions proposed by the bank, and which the court gave, the jury was amply and correctly instructed on that subject.

[14] The second instruction assailed was to the effect that if the jury found that the bank was negligent in failing to detect "the forgery of Basch's checks" then the subsequent negligence of Basch in failing to perform the duty imposed upon him by law to examine his monthly statements and canceled checks constituted no defense to the bank. As applied to the forged checks which were produced at the trial, the instruction clearly stated the law as laid down in all of the authorities hereinabove mentioned; and in view of the conclusion we have reached as to the non-liability of the bank for the payment

of the missing checks, the instruction cannot be said to have operated in any manner to the prejudice of the bank.

[15] Defendant's proposed instruction quoted on pages 41–42 of its opening brief was properly refused because of the erroneous statement of law embodied in the opening sentence thereof which read: "In determining whether or not the bank failed to exercise ordinary care and prudence in the payment of the forgeries in this case, you are instructed not to take into consideration the forged checks charged to the statement of account delivered to plaintiff by defendant on or about December 1, 1938." The succeeding instruction quoted on page 42 of said brief was properly rejected for the reason that it omitted entirely any reference to the legal proviso that in order to invoke the defense of the depositor's negligence the bank must show that it was free from negligence.

[16] The third instruction proposed by defendant and refused by the court also embodied an erroneous statement of the law. It was to the effect that if the plaintiff was negligent in failing to examine the bank's monthly statements and canceled checks, the jury must find in favor of the bank as to all forged checks cashed by the bank during the time plaintiff "continued to be negligent," provided the bank was free from negligence "subsequent to the lapse of a reasonable time after December 1, 1938." Under the authorities above cited and in the absence of facts justifying the application of the doctrine of estoppel, the bank was not entitled to invoke the defense of negligence on the part of plaintiff unless it proved that it was free from negligence in cashing the checks during the first month, November, 1938.

In accordance with the views herein expressed, it is ordered that the judgment be and it is hereby modified by reducing the amount thereof $1,637.50, representing the total amount of the missing checks; and as so modified it is affirmed, the plaintiff to recover his costs of appeal.

WARD, J., concurred.

PETERS, Presiding Justice.

I concur in the majority opinion insofar as it affirms the judgment based upon the eighty-three checks introduced in evidence; I dissent from the opinion insofar as it reverses that portion of the judgment based on the forty-four missing checks.

The facts are correctly set forth in the majority opinion. So far as the fundamental law applicable to the liability of banks for paying forged checks is concerned, the majority opinion correctly sets forth the applicable legal principles. The difficulty with the majority opinion is that it disregards reasonable inferences from the evidence, and fails to apply the appropriate legal principles to the admitted facts.

The fundamental legal principle applicable to the liability of banks for paying forged checks is that the bank is absolutely liable to the depositor—it pays such checks at its peril. Glassell Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427. To that rule there are two limited exceptions. First, if the depositor has been negligent, and if the bank has not been negligent, the depositor cannot recover. Glassell Dev. Co. v. Citizens' Nat. Bank, supra. The negligence referred to in this rule that will bar the depositor is negligence prior to the forgeries such as the hiring of a dishonest employee without the exercise of reasonable care. But even if the depositor is negligent in this respect the bank is still liable if it too was negligent.

The second exception is a corollary of the first. It is that the depositor will be barred if, after the forgeries, he is guilty of conduct constituting an estoppel. An obvious example of such conduct exists where the depositor negligently fails to examine his statements and report back to the bank. But just as in the case of the first exception, a condition precedent to the application of the rule is that the bank itself must be free from negligence. If it is negligent in cashing the forged checks no estoppel can or should be applied against the depositor. Glassell Dev. Co. v. Citizens' Nat. Bank, supra; Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417; Leather Manufacturers' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811; First National Bank v. Farrell, 3 Cir., 272 F. 371; National Dredging Co. v. President, etc., Farmers' Bank, 6 Pennewill, Del., 580, 69 A. 607, 16 L.R.A.,N.S., 593, 130 Am.St.Rep. 158.

The majority opinion holds that negligence on the part of the bank bars the bank from relying on negligence of the depositor as a defense, but holds, in ef-

fect, that negligence on the part of the bank does not bar the defense of estoppel. Stated another way, the majority opinion holds that, although the bank was negligent, as a matter of fact, in cashing the missing forty-four forged checks, the depositor, as a matter of law, is estopped because of his negligence in failing to discover the forgeries. What possible basis can exist for such a distinction between the two defenses? No authority is or can be cited for such a distinction, while the authorities above cited hold to the contrary.

The distinction made by the majority opinion between the defenses of negligence and estoppel is artificial and not based upon reason. The two exceptions, although frequently stated separately, are simply different statements of the same fundamental rule. The law imposes an absolute liability on banks for paying forged checks. It cannot be excused from that liability no matter how careful it may have been, or how skillful the forgeries. But if the bank is free from negligence, and the depositor was negligent, either before the forgeries, by carelessly hiring a dishonest employee or otherwise, or afterwards, by failing to examine his statements, he, in equity and fairness, should bear the loss. But the fundamental basis of that rule is that the bank must be free from negligence. If it is negligent, in fairness and equity, it should not be relieved from its absolute liability on forged instruments.

If I am right in these conclusions there can be no doubt but that the majority opinion is wrong in holding that, as to the missing checks, the depositor is estopped as a matter of law.

The law is clear, and is so stated in the majority opinion, that the depositor makes out a prima facie case by showing that the bank has made payment from his account on forged checks and has refused upon demand to pay to him the amount of the forged checks. Sommer v. Bank of Italy, etc., Ass'n, 109 Cal.App. 370, 293 P. 98. If the bank desires to rely upon negligence or estoppel of the depositor it must plead the same, and the burden is upon it to prove these defenses. Sommer v. Bank of Italy, etc., Ass'n, supra. As already pointed out, an integral part of such defense is allegation and proof that it was free from negligence. Whether it was free from negligence, and whether the depositor was guilty of negligence or is estopped, are questions of fact for the jury. Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116; National Dredging Co. v. President, etc., Farmers' Bank, supra; Leather Manufacturers' Nat. Bank v. Morgan, supra.

Applying these fundamental principles to the facts of this case there can be no doubt that there is evidence and inferences therefrom that support the implied finding of the jury that the bank was negligent in paying the forty-four missing checks.

For the purposes of this discussion, it may be conceded that the evidence shows, as a matter of law, that the plaintiff was guilty of negligence. It may also be conceded, although the point is not beyond dispute, that the system set up by the bank to detect forgeries, as a matter of law, was consonant with its duty to exercise due care. The evidence clearly shows, however, that the bank's employees were negligent in enforcing that system. If the system set up was reasonably calculated to detect patent forgeries there can be no escape from the conclusion that the bank employees were negligent. One of the bank's own employees testified that although several of the checks had been passed by him they were so obviously forgeries that he would not pass them again. A post-dated and undated forged check were passed. As to the eighty-three checks introduced in evidence, the majority opinion holds, and holds correctly, that the jury was justified in finding negligence on the part of the bank. The evidence is recited in detail and need not be repeated here. The forger testified his modus operandi was the same with all of the forged checks, that is, he traced the signature from a good check onto the forged check. That raises a reasonable inference that the checks destroyed by the forger were substantially similar to those admitted in evidence. Moreover, the checks forged in the first month were in evidence. As to several of these, the bank's own employees conceded they were palpable forgeries and should not have been passed. Had the bank not then been negligent, the subsequent forgeries could not have occurred. That is an important factor in determining whether the doctrine of estoppel should be applied. Critten v. Chemical Nat. Bank, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529. All of the checks were payable to the same payee, and all but four of the one hundred and

twenty-seven were in the same amount. That is a suspicious circumstance that should have put the bank on notice, and may support, under proper circumstances, a finding of negligence on the part of the bank. Frankini v. Bank of America, etc., Ass'n, 12 Cal.App.2d 298, 55 P.2d 232. The majority opinion concedes that it is a reasonable inference from this evidence that the bank was negligent in cashing the missing forged checks. This being so, the jury's implied finding is conclusive.

Stated in its simplest terms, we are here faced with a situation where we may assume that the depositor was negligent, and where the bank was likewise negligent. The majority opinion holds that, as a matter of law, the depositor is estopped as to the missing checks, but is not estopped as to the balance of the checks. That is not and should not be the law. If the bank is negligent it has no defense, and the rule of absolute liability applies. For that reason I believe the judgment in its entirety should be affirmed.



54 Cal.App.2d 739

BILGER v. BILGER (two cases).

Civ. 12030.

District Court of Appeal, First District, Division 1, California.

Oct. 6, 1942.

Hearing Denied Dec. 3, 1942.

1. Divorce ⇐150(2)

The statute requiring trial court to file its decision and conclusions of law in divorce action as in other cases, and if it determines that no divorce shall be granted, to enter final judgment thereupon accordingly, demands that there be specific findings as to the acts relied on as grounds for divorce. Civ.Code, § 131; Code Civ. Proc. § 632.

2. Divorce ⇐150(2)

Where trial court denied wife's complaint seeking divorce on ground of extreme cruelty, wife, in order to present merits of her appeal, was entitled under statute to definite findings from which it could be determined whether trial court disbelieved her testimony concerning her husband's acts and conduct and denied divorce on such grounds, or did believe her testimony but nevertheless concluded that such acts did not constitute extreme cruelty, or that there had been a condonation of the cruel course of conduct. Civ. Code, § 131; Code Civ.Proc. § 632.

3. Divorce ⇐150(2)

Under statute requiring trial court to make findings of fact in divorce action as in other cases, the findings of fact may be waived. Civ.Code, § 131; Code Civ.Proc. § 632.

4. Divorce ⇐150(2)

One who files a complaint for divorce which does not plead specific acts relied upon as constituting extreme cruelty as authorized under statute and does not thereafter make request for findings as to specific facts, "waives" such findings and will be deemed to have consented to a finding following the language of the complaint. Civ.Code, § 131; Code Civ.Proc. §§ 426b, 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Divorce ⇐150(2)

Wife seeking divorce on ground of extreme cruelty did not "waive" her right for findings by trial court as to specific facts by reason of filing a complaint which did not plead specific acts relied upon as constituting extreme cruelty as authorized under statute, where a request for such findings was made. Civ.Code, § 131; Code Civ.Proc. §§ 426b, 632.

Appeal from Superior Court, of Los Angeles County; Carl A. Stutsman, Judge.

Action by Ruth Joughin Bilger against Carl Henry Bilger for a divorce consolidated with a separate divorce action by Carl Henry Bilger against Ruth Joughin Bilger. From an adverse judgment, Ruth Joughin Bilger appeals.

Reversed.

Amend & Amend and James B. Salem, all of Los Angeles, for appellant.

J. Thomas Russell, of Hollywood, for respondent.

KNIGHT, Justice.

The respondent and the appellant brought separate actions for divorce. The complaints were filed on the same day. Appellant, the wife, charged extreme cruelty, and subsequently amended her complaint by adding a second cause of action charging wilful neglect. The husband also charged extreme cruelty, and in the wife's action filed a cross-complaint charging cruelty. The cross-complaint was afterwards dismissed, the two actions were consolidated for trial, and it was agreed that the wife's answer to the husband's cross-complaint should constitute her answer to the husband's original complaint. Subsequently the husband withdrew his request for a divorce and offered evidence only in denial of his wife's charges. After a lengthy trial, the reporter's transcript containing more than 580 pages, the trial court denied the wife a divorce, and she has appealed. We are of the opinion that the wife is entitled to a reversal upon the ground that the trial court refused after proper demand by appellant to make specific findings upon the evidence relied on by appellant as constituting extreme cruelty, the obvious effect of which refusal has been to deprive the wife of the right to present her appeal on the merits as to that cause of action.

[1] Section 131 of the Civil Code, since 1903, has declared that "In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. * * * " And section 632 of the Code of Civil Procedure, dealing with "other cases," declares: "In superior courts * * * upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated. In all cases written findings of fact and conclusions of law shall be deemed waived by a party by failure to appear at the trial." In interpreting said section 131 of the Civil Code it has been held that the requirement that findings be made "as in other cases" demanded that there be specific findings as to the acts relied on as grounds for divorce, since whether or not those acts had been committed was the material issue of fact in such cases. Franklin v. Franklin, 140 Cal. 607, 74 P. 155; Perkins v. Perkins, 29 Cal. App. 68, 154 P. 483; Nelson v. Nelson, 18 Cal.App. 602, 123 P. 1099; Cargnani v. Cargnani, 16 Cal.App. 96, 116 P. 306. In Franklin v. Franklin, supra, the court denied the wife a divorce upon the following finding: "That the acts of the defendant alleged in the complaint did not inflict upon the plaintiff grievous bodily injury or grievous mental suffering." The court said that this was not a finding of fact, but a conclusion of law, that it left open and undecided the essential question, which was whether defendant had committed the acts relied on by plaintiff as constituting cruelty. In Perkins v. Perkins, supra, and Nelson v. Nelson, supra, it was held that specific findings were required although there was a default, in view of section 130, Civil Code. That section requires proof of the facts alleged although the defendant defaults. These decisions were overruled by Waldecker v. Waldecker, 178 Cal. 566, 174 P. 36, insofar as they held that findings are required in default cases, but they have never been impugned to the extent that they hold that where findings are required, they must be specific, as in other cases, and find on all material issues. To the same effect as Waldecker v. Waldecker, supra, see, Azadian v. Superior Court, 88 Cal.App. 296, 263 P. 298; Cohn v. Cohn, 47 Cal.App.2d 683, 691, 118 P.2d 903.

[2] In the present case the record shows that at the close of the evidence the trial court filed an order for judgment denying the divorce, wherein among other things it directed "Counsel for plaintiff in cause No. D-187,745" (the wife's action) to prepare findings and decree accordingly. Pursuant to such directions, counsel for the wife prepared and submitted a full set of findings based on her claim as to the truth of the evidence introduced by her concerning the specific acts and conduct of her husband, upon which she relied as constituting extreme cruelty. Furthermore she filed written exceptions to the set of so-called consolidated findings proposed and submitted by counsel for the husband. The court rejected the wife's set of specific findings and made a general finding as to her cause of action for extreme cruelty which was in effect the same as the one dealt with in Franklin v. Franklin, supra, and which the court there said was not a finding of fact but was a conclusion of law. The finding here was as follows: "That

it is not true that the defendant, Carl Henry Bilger, in action number D 187745, was, is or has been guilty of extreme cruelty to the plaintiff, Ruth Joughin Bilger, and consequently the health of the plaintiff in said action has not been adversely affected in any manner by the conduct of the defendant and husband in said action." From a finding in this form it cannot be ascertained whether the court disbelieved the wife's testimony concerning the acts and conduct of her husband upon which she relied as cause for divorce, or was of the view that although said acts had been committed as testified to by her, nevertheless they did not constitute extreme cruelty. The basis of the trial court's decision should appear from the findings. A reading of the testimony given in the case demonstrates that if the husband pursued the course of conduct to which the wife testified, she was clearly entitled, as a matter of law, to a divorce on the ground of extreme cruelty. Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; Donnelly v. Donnelly, 26 Cal.App. 577, 147 P. 582. In the case of Perkins v. Perkins, supra, the court said [29 Cal.App. 68, 154 P. 486]: "We agree very completely with the statement made in the brief of counsel that trial judges have not the duty in divorce cases to do anything except to see that the law is strictly and fairly complied with. A suitor in a divorce action must, as a litigant, stand in as favorable a light before the law as the plaintiff in a suit on a promissory note. Our Legislature has declared the policy of the law as it shall affect actions for divorce, and has provided that relief shall be granted to parties when certain grounds have been established." In the present case the trial judge very frankly stated that he did "not agree with the philosophy of that case." But even so, the appellant, in order to present the merits of her appeal, was entitled, under the law, to definite findings from which it could be determined whether the trial court disbelieved her testimony concerning her husband's acts and conduct and denied the divorce on that ground, or did believe her testimony but nevertheless concluded that such acts and conduct did not constitute extreme cruelty. Of course in any case it may appear from the evidence that there has been a condonation of the cruel course of conduct, but if so a plaintiff is entitled to a direct finding on that issue.

Respondent takes the position that where as here a plaintiff under the authority of section 426b of the Code of Civil Procedure, as enacted in 1939, filed a complaint for divorce which does not plead the specific acts relied upon as constituting extreme cruelty, such plaintiff is not entitled to specific findings. It is to be noted, however, that the Legislature has not indicated an intention to modify the terms of Civil Code, section 131, which expressly provides that "In actions for divorce, the court must file its decision and conclusions of law as in other cases * * *." Nor has it been held in any case, so far as our attention has been called, that the enactment of section 426b of the Code of Civil Procedure has the effect of excluding from the operation of said section 131 of the Civil Code, actions for divorce brought pursuant to the provisions of said section 426b of the Code of Civil Procedure.

[3-5] Findings of fact may, of course, be waived (24 Cal.Jur. 954); and a plaintiff who adopts the form of pleading sanctioned by section 426b, Code of Civil Procedure, and makes no request for findings as to specific facts, doubtless waives such findings and will be deemed to have consented to a finding following the language of the complaint. In the case herein, however, a request for such findings was made. Plaintiff filed proposed specific findings, to which defendant filed objections. The court sustained the objections and finally directed the defendant to prepare findings. The findings as adopted are those submitted by the defendant; and plaintiff's objections thereto were overruled. On her evidence she has demonstrated conduct on the part of the husband constituting extreme cruelty. The husband's testimony was in sharp conflict with that of the wife on most points. In the circumstances she had the right to specific findings as to whether the husband had committed the acts to which she testified. If so, she was entitled to a divorce. In the present form of the findings it cannot be ascertained whether the court accepted the husband's version, in which event a divorce was properly denied, or, believing the wife, nevertheless erroneously denied her a divorce.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.

PEOPLE v. VERTLIEB et al.*

Cr. 3582.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1942.

Hearing Granted Oct. 29, 1942.

1. Gaming ⇐75(1)

Under statute denouncing as a crime the keeping or occupancy of any room, tenement, etc., with books, papers, or other devices or paraphernalia for purpose of recording or registering bets or wagers on the result of any horse race, it is not actual making of bets, but occupancy of a room with book or books, paper, or papers, etc., for purpose of recording such bets, which constitutes offense denounced. Pen. Code, § 337a, subd. 2.

2. Gaming ⇐98(5)

Evidence that defendants occupied an apartment containing two telephones with different numbers and racing paraphernalia used by bookmakers was sufficient to establish "corpus delicti" of offense of keeping or occupying of any room, tenement, etc., with books, papers, or other devices or paraphernalia for purpose of recording or registering bets on the result of any horse race. Pen.Code, § 337a, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jack Vertlieb and another were convicted of keeping and occupying a room with paraphernalia used for purpose of recording and registering bets on horse races contrary to statute, and they appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellants were charged by an information with keeping and occupying a room in an apartment house in the city of Los Angeles with paraphernalia used for the purpose of recording and registering bets on horse races contrary to subdivision 2, section 337a of the Penal Code. The trial court, sitting without a jury, found appellants guilty as charged, and denied their motion for a new trial. The proceedings were suspended, appellants were granted probation, whereupon they appealed from the order denying their motion for a new trial, relying upon the following grounds: (1) Insufficiency of the evidence to sustain the conviction and lack of substantial evidence to establish the corpus delicti; (2) error of the court in admitting evidence received over the telephone in violation of the Federal Communications Act of 1934, section 605, 47 U.S.C.A. § 605.

On May 23, 1941, Police Officers Laurence W. Cork and W. R. Morgan went to an apartment house in the city of Los Angeles to make "an investigation" of that particular place, and when they entered a bedroom on the second floor thereof they found appellants. The room contained a bed, two chairs and a table, and on the east side was an open window. On the table were two telephones and some blank betting markers, and on the bed was a publication known as the "American Turf Authority Racing Form". The telephones immediately began to ring and Officer Cork asked appellants for betting markers and scratch sheets, saying, "I don't want to tear this house up, tell me where are the markers and the scratch sheets." Appellant Berkowitz replied: "I will get them. * * * I threw them out the window on the garage roof." Officer Cork left the room, went downstairs and picked up some betting markers from the ground, crawled up a clothesline pole and found some more betting markers on the garage roof, some of which contained marks and notations.

Said Officer Cork, who qualified as an expert, having handled bookmaking matters for the police department for a period of ten months, testified that the racing form (People's Exhibit 2) found in the bedroom was one used by bookmakers in carrying on their business, but on voir dire admitted it was used by the public generally, as well as by bookmakers; that he compared the betting markers found by the officers with said racing form, but owing to the fact that the racing form contained no numbers for the horses and the betting markers had numbers but no names for the horses, it was not possible for him to determine which horse represented by a marker was

* Subsequent opinion 137 P.2d 437.

the one shown on the racing form. Said witness then compared the said betting markers (People's Exhibit 1) with information contained in "American Daily Handicap Scratch Sheet" (People's Exhibit 3), which it was admitted by the prosecution was not found in appellants' possession) and stated that such comparison disclosed that certain names appearing on the betting markers also appeared on said scratch sheet, and that these names represented various horses running races at various tracks throughout the country.

Officer Cork answered the telephones, which were continuously ringing, and testified that: "At 4:42 P. M., Walnut 3734 * * * rang, and a voice said: 'Here is the winner, 32, 28, 37, 19.60, 8.85, 4.40, 9.40, 4.60 and 4.40.' At 4:45 P. M. the telephone rang and the voice said, 'Jack, who won the seventh race?' I replied, 'Not in yet'. And the party said, 'Is this Jack?' I said, 'No, it isn't.' That was on Whitney 1533. * * * At 4:46 P. M., Whitney 1533 rang, and the voice said, 'Sam, 751 won across.' At 4:47, Walnut * * * 3734, the party's voice said, 'H. R. is it too late for the eighth?' * * * No, I will take it. The party said, '742, one to win.' At 5:03 the telephone rang and the voice said, 'Is this Jack?' And I said, 'No, Sam.' And he said, 'Where is Jack?' I said, 'Gone home early.' The voice said, 'O. K., thanks Sam.'" The appellants' names were "Jack" and "Sam."

In connection with their first point, appellants insist that the "corpus delicti of the offense defined in subdivision 2 of Penal Code, section 337a, is not established, even prima facie, by evidence showing that the accused were tenants of a bedroom and that officers found in said room two telephones on a table and several blank papers which they designated as 'betting markers'." It is also urged, as hereinbefore mentioned, that the court erred in permitting the telephonic messages to be received in evidence for the reason that it was violative of section 605 of the Federal Communications Act of 1934. This precise point is an issue in People v. Kelley, —— Cal.App.2d ——, 122 P.2d 655, in which case the Supreme Court granted a hearing on March 27, 1942, and it is now pending before that court.

In answer to appellants' brief, respondent urges that: "Exclusive of the evidence pertaining to the telephone messages, we have these incriminating circumstances which tend to establish the corpus delicti: 1. Two telephones in a one-room apartment; 2. Blank betting markers and a racing form in the apartment; 3. Filled-in betting markers outside the window, which (according to Officer Cork's testimony) were thrown there by one of the appellants; 4. Marks and notations on the betting markers identical with those commonly used by bookmakers;" 5. The frequency of the calls coming in on the two telephones within a short period of time; and "6. Testimony of the landlady that one of the appellants came to the apartment every day and stayed all day, and that a lot of telephone calls were made."

Subdivision 2 of section 337a of the Penal Code provides that anyone who, "whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any * * * place * * * or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets * * * upon the result * * * of any trial * * * or contest * * * Is punishable * * *."

[1] The evidence adduced at the trial of the instant prosecution established conclusively that appellants occupied an apartment containing: two telephones with different numbers, and racing paraphernalia used by bookmakers. In the case of People v. Manning, 37 Cal.App.2d 41, 43, 98 P.2d 748, 749, a prosecution under the same section of the Penal Code, it was declared: "The offense with which appellant was charged is complete when it is shown that the accused occupied a room or enclosure with papers, etc., for the purpose of recording a bet or bets on the result or purported result of any horse race or purported horse race.

"It is not the actual making of the bets, but the occupancy of a room with a book or books, paper or papers, etc., for the purpose of recording such bets, which constitutes the offense denounced by subdivision 2 of section 337a of the Penal Code."

[2] Eliminating from consideration the testimony regarding the messages received over the two telephones by the officers, this court is of the opinion that there still remains in the record sufficient evidence to establish the corpus delicti and appellants' connection with it, and that therefore the

order appealed from is necessarily supported by such evidence.

For the reasons stated, the order denying motion for a new trial is affirmed.

DORAN and WHITE, JJ., concurred.



BURLINGHAM et al. v. STOCKHOLDERS PUB. CO. et al.*

Civ. 2968.

District Court of Appeal, Fourth District, California.

Oct. 1, 1942.

Hearing Granted Nov. 28, 1942.

1. Appeal and error ⇐773(2)

Where defendants had filed separate notices of appeal from an adverse judgment but failed after due notice to pay the filing fee in the appellate court, and did not file briefs or points and authorities therein, the attempted appeals were dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 5.

2. Automobiles ⇐194(2)

A news dealer's contract with newspaper publisher which required dealer to sell to subscribers, transients and sub-news dealers and to pay promptly bills for prizes used in publisher's circulation methods, to be responsible for his own acts and the acts of his subordinates, and which declared that dealer is engaged in an independent business, and which reserved to publisher the right to suspend the agreement if the dealer caused circulation to decrease, created relationship of "independent contractor" precluding recovery from publisher for death caused by a sub-dealer's negligence in driving automobile while delivering papers.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

3. Evidence ⇐368(7)

In action against newspaper publisher as employer of sub-dealer driving automobile striking plaintiffs' decedent, trial court did not abuse its discretion in ruling as insufficient an oral notice to produce an alleged agreement between publisher and another allegedly showing the relationship between publisher and dealer as employer and employee, where notice was given at trial, dealer under examination had no control over the alleged agreement, there had been no other demand, offer of proof, or foundation laid for admission of a copy thereof, and dealer's answer that the agreement was in publisher's office had been stricken. Code Civ.Proc. § 1000, 2055.

4. Evidence ⇐368(5)

The sufficiency of a notice to produce a paper shown to be in the possession of a party is a question of discretion. Code Civ. Proc. § 1000.

5. Evidence ⇐424

Strangers to a written contract of employment may show that the instrument does not disclose the full character of the relationship between the parties.

6. Master and servant ⇐301(1)

In action against alleged employer of a wrongdoer while prima facie the relation of the parties to a written contract of employment is that expressed by the writing, to determine their true relation, such contract should be considered in view of the circumstances under which it was made and of the conduct of the parties while the work is being performed.

7. Master and servant ⇐330(1, 3)

That wrongdoer was performing work for alleged employer at the time of the injury is "prima facie evidence" of employment and such person is presumed to be an employee in absence of evidence to the contrary.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

8. Master and servant ⇐330(1)

After plaintiff has established a prima facie case, the burden shifts to defendant alleged employer to prove that defendant employee was an independent contractor.

9. Master and servant ⇐301(1), 302(1)

The doctrine of "respondeat superior" applies only when the relation of employer and employee is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at

* Subsequent opinion 137 P.2d 9.

the time and in respect to the transaction out of which the injury arises.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

10. Master and servant ⇐330(1)

Where plaintiff seeks to recover against defendant upon theory of respondeat superior, plaintiff has burden of proving the relation of employer and employee between defendant and the wrongdoer.

11. Master and servant ⇐318(1)

In determining whether one person is an "employee" of another or whether the former is an "independent contractor", the test to be applied to the factual situation is the right of control and when the parties' essential object is performance of certain work, the relation of "employer and employee" does not exist unless the employer reserves the right to direct the mode in which the work shall be done.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Employer and Employee".

12. Automobiles ⇐197(7)

Where newspaper publisher had no right to control sub-dealer employed by dealer to deliver newspapers, the relationship of "employer and employee" between sub-dealer and publisher did not exist, so as to authorize recovery against publisher for death of one struck by sub-dealer while driving an automobile to make a delivery for dealer.

13. Master and servant ⇐301(2)

An employer is not liable to a third person for negligence of an unauthorized stranger procured by an employee to assist him in the scope of his employment when the services of the stranger are performed out of the presence of the employee, when the services are not within the scope of the employee's employment, or when the assistance is secured contrary to the employer's direct instructions.

14. Automobiles ⇐197(7)

Where independent contractor dealer was not authorized by newspaper publisher to employ a sub-agent to deliver a specified bundle of papers and carrying of the extra bundle by sub-dealer hired by dealer to deliver papers was only incidental to sub-dealer's main employment, sub-dealer was not an "employee" or "servant" of publisher, so as to authorize recovery against publisher for death of one struck by sub-dealer while driving automobile to make the delivery on ground that dealer was publisher's employee authorized to employ a sub-agent. Civ.Code, §§ 2349–2351; St. 1937, p. 261, § 3000.

See Words and Phrases, Permanent Edition, for all other definitions of "Servant".

15. Appeal and error ⇐1001(1)
Master and servant ⇐332(1)

Generally, it is the jury's province to pass upon the facts upon which the relationship of master and servant is claimed to exist, but if the evidence shows without conflict that the relationship does not exist, a contrary determination is not conclusive upon an appellate court.

16. Master and servant ⇐332(1)

If the facts as to employment are admitted or are susceptible of only one meaning, trial court must declare the law upon the facts.

17. Trial ⇐139(1)

A directed verdict is proper unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case, and where no other reasonable conclusion is deducible from the evidence, and if a verdict in favor of plaintiff would have to be set aside by a reviewing court because of absence of substantial supporting evidence, trial court may direct a verdict for defendant.

18. Appeal and error ⇐1001(1)

The "scintilla evidence doctrine" does not apply in reviewing the propriety of the trial court's action in directing a verdict.

See Words and Phrases, Permanent Edition, for all other definitions of "Scintilla Evidence Doctrine".

19. Automobiles ⇐197(7)

Where dealer, an independent contractor under written agreement with newspaper publisher, was authorized, under oral agreement to see that a bundle of papers was delivered for a specified weekly compensation, to do the actual work in any manner he saw fit, he did not fall within the relationship of "employer and employee" so as to authorize recovery against publisher for death of one struck by automobile driven by sub-dealer employed by dealer to make the delivery.

20. Master and servant ⇐301(1)

In determining whether the relationship of employer and employee exists between an alleged employer and the wrongdoer, the relationship must be determined from the whole situation, and not from isolated facts considered as constituting the whole.

Appeals from Superior Court, Orange County; George K. Scovel, Judge.

Action by Winifred E. Burlingham and others against Stockholders Publishing Company and others for death of Wade Earl Burlingham in an automobile accident. From a judgment upon a directed verdict for named defendant, plaintiffs appeal, and defendants John W. Gray and others file separate notices of appeal from an adverse judgment.

Attempted appeals dismissed. Judgment affirmed.

Dorothy Thompson and Raymond Thompson, both of Fullerton, for plaintiffs and appellants.

J. E. Walker and Geo. E. Bradley, both of Santa Ana, for defendants and appellants.

Blodget & Tobias, of Santa Ana, for respondent.

GRIFFIN, Justice.

On January 1, 1941, at about 2:30 o'clock in the morning, Wade Earl Burlingham, husband of plaintiff Winifred E. Burlingham, and son of the other plaintiffs, was driving his motorcycle in a northerly direction on Highway 101 near Anaheim. As a result of a collision with an automobile driven by defendant John W. Gray, a minor, Wade Earl Burlingham was killed. Defendants Lewis R. Gray and Alice D. Gray became liable by reason of the fact that they signed the application for the minor's operating license.

The main point presented on the perfected appeal before us relates to the question of employment relationship. Evidence concerning the cause of the accident has been deleted from the transcript by stipulation. At the time of the fatal accident, defendant John W. Gray was delivering "The News," a paper published by the respondent Stockholders Publishing Company, a corporation. Defendant Stanley C. Porter was a general distributor of "The News" in certain portions of Orange County. His employment was predicated on a written agreement. After the trial the jury found a verdict in favor of plaintiffs and against the defendants John W. Gray, Alice D. Gray and Stanley C. Porter. The trial court, however, directed a verdict in favor of the defendant Stockholders Publishing Company, owner of the newspaper. Plaintiffs appealed from the judgment upon the verdict directed against them and in favor of the defendant and respondent Stockholders Publishing Company. The main issue here presented is whether the court erred in so instructing the jury.

[1] The defendants John W. Gray, Lewis R. Gray, Alice D. Gray and Stanley C. Porter filed separate notices of appeal from the judgment against them. They have failed to properly perfect their appeals. After due notice they have failed to pay the required filing fee in this court and have not filed any briefs or points and authorities herein. Their attempted appeals from the judgment against them should be dismissed. Rule 5 of the Rules for the Supreme Court and District Courts of Appeal.

The written agreement between the respondent Stockholders Publishing Company and the dealer, Porter, in reference to their relationship, indicates that the relationship thereby created was one of independent contractor rather than that of employer and employee. Appellants recognize this fact. In their brief they state their position and recite that "the written contract between Porter and the publishing company is drawn with the evident purpose of creating the appearance of an independent contractor relationship, and, taken by itself, with nothing to explain or modify it, it would probably be successful in creating such relationship. There are certain differences between the written contract in the instant case and the written contracts involved in the cases of Bohanon v. James McClatchy Publishing Co., 16 Cal.App.2d 188, 60 P.2d 510, and Batt v. San Diego Sun Publishing Co., Ltd., 21 Cal.App.2d 429, 69 P.2d 216. However, for the purpose of argument, we will assume that were we bound by the written contract alone, the instant case could not be distinguished from the cited cases. In both of the above cited cases, the appellate court was confined to a consideration of the written contract alone in determining the employment relationship. There is no discussion of any evidence which might have altered the written con-

tract. We submit that in the instant case there is abundant evidence which explains and modifies the written contract to such an extent that the legal effect is entirely changed." Citing Luckie v. Diamond Coal Co., 41 Cal.App. 468, 478, 183 P. 178.

The written contract provides generally that the dealer (Porter) agrees "to use his earnest and conscientious effort to promote the circulation of 'The News' * * * by frequent and thorough canvasses among the inhabitants of his district, and by frequent distribution and display of such advertising matter concerning 'The News' * * * as may from time to time be sent to the dealer by the Company * * * To sell * * * to regular subscribers and to transient buyers of his district at prices fixed by the company, the dealer's profits to consist of the difference between the retail price of said newspapers fixed by the company and the wholesale price thereof, also fixed by the company. * * * To sell copies * * * to sub-news dealers, * * * To pay promptly all bills for supplies, prizes or other merchandise, commonly used in connection with circulation methods, furnished by the company to him. * * * To act as dealer in said city * * * and to be responsible for *his own acts and of his substitutes and subordinates during the life of this agreement.* The dealer hereby declares that he is engaged in an independent business, and that he personally hires and pays all persons assisting him in the distribution of said newspapers and in the collection of all money therefor in the district aforesaid, and has *sole and exclusive control over his said employees.* The Dealer hereby agrees that the company shall not in any event be liable for any loss, damage or injury to the person or property of the Dealer, or to the person or property of any of his employees or to the person or property of any of the public, * * * To furnish the Dealer with copies of 'The News' * * * at prevailing wholesale prices fixed by the company * * * that the company may, without notice and when necessary, suspend this agreement in case of * * * change in the retail or wholesale prices * * * the Dealer is incapable or unsatisfactory in any manner or is responsible through neglect or inattention to business for causing the company's circulation in said district to decrease." (Italics ours.)

[2] The trial court's construction of this written agreement that it, considered alone in and of itself, created only a relationship of independent contractor must be sustained. Batt v. San Diego Sun Publishing Co., Ltd., supra; Bohanon v. James McClatchy Publishing Co., supra.

We will therefore set forth the additional evidence offered which appellants claim changed this construction of the relationship to that of employer and employee as between respondent publishing company and John W. Gray and Porter. Admittedly, John W. Gray was hired by the dealer, Porter, and paid $50 per month for his services and use of Gray's automobile in delivering "The News" in a certain territory prescribed by Porter. Just before the accident in question Gray had left several of such papers with a customer of Porter's at Anaheim. The evidence is clear that Porter, in connection with the distribution of the papers in the district assigned to him, prescribed the duties of and had control over all of his assistants and carriers, who numbered about fifteen.

Called under section 2055 of the Code of Civil Procedure, the dealer Porter testified that in 1936 the circulation manager for "The News" contacted him in reference to being a dealer for that paper in that territory; that the circulation manager told him that he would be responsible for Santa Ana and the growth of the circulation in that territory; that the circulation in that territory should later increase; that the circulation manager instructed him that the papers "should be delivered by six o'clock in the evening and the best service possible"; that the road man for "The News" only saw him three or four times a year; that the only time he saw the circulation manager was when he would go to Los Angeles, which would be about every two or three months; that the only thing the road man would ask of him would be if he had "any idea as to building up the circulation and how we are getting along"; that at times he (the road man) had contests in circular forms and that he either mailed them to him or "brings them down personally and tells me to have the boys work on contests such as Catalina trips and trips to get subscriptions," that is "if a carrier—for instance—receives ten subscriptions he gets (from the News) one day out at Catalina, including his meals and the round trip"; that the carrier turned the orders in to him and he sent them in to Los Angeles and they in turn issued tickets for the trip or whatever contest they were

putting on; that as to carrying out these suggestions he just assumed he was supposed to do it; that another method to gain circulation employed by "The News" was to furnish metal stands or racks which he (Porter) put on street corners; that his compensation as a dealer consisted of the profit between the price he paid for "The News" and the resale price to the carriers; that he received extra compensation from "The News" ($2.00 per week) for picking up a bundle at Anaheim and taking it to the Orange agent, re-spotting it for the Orange agent; that a representative of "The News" suggested that he (Porter) attend a meeting in Los Angeles in reference to the sale of an insurance policy along with "The News" and that his cooperation would be appreciated; that "The News" took out hospitalization, accident and health insurance on its employees, which insurance he (Porter) also carried.

The record indicates that on the particular night in question John W. Gray was transporting, together with several bundles of "The News" destined for two other stations, one bundle of papers that was ordinarily sent from Anaheim to the agent at Orange. After the accident Porter completed the delivery of this bundle himself. This was the bundle of papers for the delivery of which Porter was paid the extra compensation of $2.00 per week, less social security deductions. The evidence also shows that the respondent publishing company knew that Porter did employ several assistants in the performance of his duties.

There was nothing in the evidence that indicated that Porter was directed to deliver such a bundle to the Orange agent in any particular manner or by any particular person or conveyance. There is evidence, however, that the respondent publishing company, when Porter took his two weeks' vacation, paid one of its employees to take Porter's place in the office in Anaheim. Porter's compensation check of $2.00 per week plus such profits as became due under his contract, was still paid to Porter during such vacation period. This is about the substance of the oral testimony presented to sustain appellants' contention. However, there was an attempt to produce some further evidence which was disallowed.

[3] While Porter was on the witness stand he was shown what counsel for appellants claimed to be a copy of a certain contract between the Los Angeles Newspaper Guild and "The News," of Los Angeles. He was asked if he knew where the original contract was. He answered that it was "in Los Angeles office." This answer was subsequently stricken when it was shown that the witness had never seen it. Counsel for appellants then, addressing the court, said: "I would like to have it produced as soon as possible." Counsel for respondent remarked: "There is no order to produce. I am here in court, and I have no such contract, if there is one in existence." The court replied that "I assume you would have to have had issued a notice to produce or a subpoena duces tecum on the company." Counsel for appellants then stated to the court: "I am making that notice now, if the court please." The court replied: "It is too late now." No other demand or offer of proof was made and no foundation laid for the admission of the copy into evidence. Appellants' counsel now claims that the original of the instrument offered contains certain statements which are "very illuminating and interesting reading" and "shows very strongly the true relationship" of employer and employee existing between the publishing company and Porter, and that the trial court erred in refusing to compel the production of the original contract. The witness under examination had no custody of nor control over the named agreement. It becomes immediately apparent that the necessary foundation was not laid for the production of the original or the admission of a copy in evidence. § 1000, Code Civ.Proc.; 10 Cal.Jur. §§ 156 and 157, pp. 879, 880 and 881. Appellants admit that they were unsuccessful in finding a case supporting their contention.

[4] The case of Burke v. Table Mountain Water Co. et al., 12 Cal. 403, holds that the sufficiency of notice to produce a paper shown to be in the possession of a party is a question of discretion. No abuse of discretion appears.

[5, 6] Of course it is a recognized rule of law that strangers to a contract are at liberty to show that the written instrument does not disclose the full or true character of the relationship between the contracting parties and that in an action of this character, while prima facie, the relation of the parties to a written contract of employment is that which is expressed by the terms of the writing, nevertheless, in order to determine their true relation, such con-

tract should be considered in view not only of the circumstances under which it was made but of the conduct of the parties while the work is being performed. Luckie v. Diamond Coal Company, supra.

[7, 8] It was also declared in Robinson v. George, 16 Cal.2d 238, 105 P.2d 914, in passing upon a judgment of nonsuit, that the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. It was there also held that after the plaintiff established a prima facie case the burden shifted to the defendant corporation to prove that the other defendant was an independent contractor.

[9] The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises. Luckie v. Diamond Coal Company, supra.

[10-13] Where a plaintiff seeks to recover against a defendant upon the theory of respondeat superior the burden of proving the relation of master and servant or employer and employee is upon the plaintiff. Preo v. Roed, 99 Cal.App. 372, 278 P. 928. In arriving at a determination as to whether one person is an employee of another or whether the status of the former is that of an independent contractor, one of the best tests to be applied to the factual situation which is presented is the right of control, and when the essential object of the parties is the performance of certain work, the relation of master and servant does not exist unless the employer reserves the right to direct the mode and manner in which the work shall be done. Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342. Under this rule, it becomes apparent that without evidence of the existence of some other intermediate agency the relationship of employer and employee between Gray and respondent publishing company would not be established from the evidence produced. It would be lacking in the essential elements above mentioned. The only theory upon which the respondent publishing company could be made liable in the instant action would be upon the theory that Porter was the publishing company's agent or employee authorized to employ a sub-agent under sections 2349, 2350 and 2351 of the Civil Code. To establish such a relationship as between them it would be necessary to establish first that the defendant Porter was such an employee of his master, the publishing company, and that as such servant he had an assistant or assistants who were engaged in the rendition of services which he or they had been accustomed to perform at the servant's request for considerable periods of time, which would give rise to the view that the servant enjoyed an implied authority from the master to engage him or them in such service. The authorities are not in strict harmony as to the master's liability to third persons for the negligent acts of an unauthorized stranger procured by an employee to assist him in the scope of his employment, and the master is not liable when the services of a stranger are performed out of the presence and independent of the employee or when the services are not within the scope of the servant's employment or when the assistance is secured contrary to the direct instructions of the master. Some cases hold that the master is liable for such negligence *only* when there is *either express or implied authority for the agent to procure assistance* and the liability of the master has sometimes been denied upon the specific ground that the servant was not present at the time of the performance of the tortious acts complained of. Cragun v. Krossoff, 45 Cal.App.2d 480, 114 P.2d 431; Gates v. Daley, 54 Cal.App. 654, 202 P. 467; Gibbons v. Naritoka, 102 Cal.App. 669, 283 P. 845.

It therefore becomes important to determine from all the evidence whether at the very time of the accident Porter was a servant or employee of the publishing company insofar as the delivery of the bundle of papers was concerned. If in this respect he was an independent contractor, the judgment in favor of the publishing company must be sustained as the acts of Gray, as his employee, would not be imputed to respondent publishing company. On the other hand, if Porter, at the particular time in question, was an employee or servant of the publishing company in reference to the delivery of the bundle of papers, we must then inquire whether he might be brought under the rule that a master is responsible to third persons for the damage caused by the wrongful acts or omission of his servants in the course of their employment, and

this liability extended to the acts of an assistant of a regularly employed servant when the acts were done in the presence of the servant and by his direction or with his acquiescence, although the person doing the act was not a servant of the master and although the master had not authorized the servant to employ an assistant. 16 Cal.Jur., § 61, p. 1098.

[14] The term "employee," as here applied, has been held to be synonymous with the word "servant." Press Publishing Co. v. Industrial Acc. Comm., 190 Cal. 114, 122, 210 P. 820. Section 3000 of the Labor Code, St.1937, p. 261, formerly section 2009 of the Civil Code, defines a servant as "one who is employed to render personal service to his employer, other than in the pursuit of an independent calling, and who in such service remains *entirely* under the control and direction of the employer, who is called his master." The carrying of the extra bundle of papers by Gray was only incidental to his main or primary employment in performing his duties for his employer, Porter, who was an independent contractor. No authority was conferred by respondent publishing company upon Porter to employ a sub-agent. In fact the written agreement between them negatives any such authorization. Under these circumstances, it cannot be said that Gray was an employee or servant of the publishing company for the incidental service thus performed in carrying the extra bundle of papers. Press Publishing Co. v. Industrial Acc. Comm., supra.

[15-17] Generally speaking, it is the province of the jury to pass upon the facts on the strength of which the relationship of master and servant is claimed to exist. However, if the evidence shows without conflict that the relationship did not exist, a contrary determination on this question is not conclusive upon an appellate court. Hedge v. Williams, 131 Cal. 455, 63 P. 721, 64 P. 106, 82 Am.St.Rep. 366. Notwithstanding the fact that one person performing work and labor for another may be prima facie evidence of employment and supports the presumption that such person is the servant of the other in the absence of evidence to the contrary, yet if the facts are admitted or are susceptible of only one meaning, it becomes the duty of the court to declare the law upon those facts. Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295; Adams v. Wiesendanger, 27 Cal.App. 590, 150 P. 1016. A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. Perumean v. Wills, 8 Cal.2d 578, 67 P.2d 96. Where no other reasonable conclusion is deducible from the evidence, and if a verdict based thereon in favor of the plaintiff would of necessity have to be set aside by a reviewing court because of the absence of substantial evidence to support the same, the court is authorized to direct a verdict in favor of the defendant. Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 57 P.2d 1010.

[18, 19] In reviewing the propriety of the trial court's action in directing the verdict, the doctrine of scintilla of evidence has been rejected in this state. Walters v. Bank of America, etc., Ass'n, 9 Cal.2d 46, 69 P.2d 839, 110 A.L.R. 1259. With these rules in mind, we will review the evidence on this question. The oral agreement, as shown by the testimony, and there is no conflict in that testimony, was that Porter agreed to see that a bundle of papers was delivered from Anaheim to Orange every morning. For the performance of this service he was to be paid $2 per week. He could send it by express train, truck or airplane. He could deliver it personally or he could employ someone else to deliver it for him. Porter was not required to render personal service in this respect. He had the power and right to employ someone else to do the actual work and to do it in any manner that he saw fit. It cannot therefore be said, under the evidence, that he falls within the relationship of master and servant.

In the case of Preo v. Roed, supra, the court commented upon a similar arrangement in the following words [99 Cal.App. 372, 278 P. 930]:

"Here, as in that case, the manager of the corporation directed the person employed in the matter of the material to be hauled; there was no arrangement whereby the person employed was to personally drive his truck or vehicle; he could place any competent man in charge, and here defendant Roed did in fact employ his brother, who was driving the truck at the time of the accident. Each month Roed received a check from the corporation representing the aggregate amount the various dairymen should pay to him for delivering the milk to the corporation. * * *"

In that case the court found that Roed was not an employee but was an independent contractor, and said:

"Defendant Roed did not take orders from anyone as to the manner of doing the work, or how he was to haul the milk, whether by team or automobile truck, or who was to operate or drive the truck or vehicle. He was responsible only for gathering up the milk, transporting it safely and delivering it at the depot of the corporation within the hours agreed upon by the dairymen and the corporation, and was therefore not the servant of the corporation."

[20] It has been held that mere payment of wages or salary, of itself, is insufficient to establish that the recipient thereof is the servant of the one paying the same. Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757. It was similarly held that the procuring of the issuance of a blanket policy of life insurance for the benefit of employees who contributed to the payment of premiums even where the carrier was included therein and described as an "employee" did not necessarily establish the relationship of employer and employee. Rathbun v. Payne, 21 Cal.App.2d 49, 68 P.2d 291; Bohanon v. James McClatchy Publishing Co., supra. The relationship must be determined from the whole situation and not from isolated facts considered as constituting the whole. Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann.Cas. 1916E, 437. When the facts which make up the relation between the parties here are considered, although it may be argued that the respondent publishing company may have exercised some limited control over Porter as an employee—in respect to the extra bundle of papers handled by him, nevertheless, as was said in Bohanon v. James McClatchy Publishing Co., supra, it is manifest that the right of control which the publishing company reserved related *"not to the means to be used* but to the result to be accomplished." It would therefore appear that a material element of the relationship of master and servant was wanting. Winther v. Industrial Acc. Comm., supra; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Mountain Meadow Creameries v. Industrial Acc. Comm., 25 Cal.App.2d 123, 76 P.2d 724; Fidelity & Casualty Co. v. Industrial Acc. Comm., 191 Cal. 404, 216 P. 578, 43 A.L.R. 1304.

Under the evidence the question of the relationship of master and servant as between Gray and respondent publishing company was one of law, and as it would not support a judgment in favor of appellants and against the defendant publishing company the court did not err in directing a verdict in its favor.

The judgment is affirmed. The attempted appeals by other defendants are dismissed.

BARNARD, P. J., and MARKS, J., concurred.



HOGE v. LAVA CAP GOLD MIN. CORPORATION.

Civ. 12096.

District Court of Appeal, First District, Division 1, California.

Sept. 29, 1942.

Rehearing Granted Oct. 27, 1942.

See 130 P.2d 470.

1. Corporations ⇐452

A resolution of corporation directors that its vice president be authorized to negotiate with its president and others for adjustment of any differences between corporation and them, that president's indebtedness to corporation for purchase price of shares of stock therein be canceled in view of services rendered to corporation by him, and that such shares be delivered to him as payment for his services, amounted to an "offer", acceptance of which would constitute basis of binding contract for president's acceptance of such shares as compensation for services rendered and cancellation of his claims against corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

2. Corporations ⇐452

Where time for acceptance of offer by corporation directors' resolution to give its president certain number of shares of stock as compensation for services rendered was not specified, offer remained open for reasonable time.

3. Corporations ⇐452

A corporation did not rescind or revoke its directors' resolution, offering to give its president certain number of shares of stock as compensation for services rendered, by subsequent resolution that gen-

eral releases of "certain claims" of corporation against president and his asserted claims, not enumerated, against corporation should be exchanged on payment of corporation's claims.

4. Limitation of actions ⇐46(1)

Where corporation's president, to whom it offered in directors' resolution to deliver certain number of shares of stock as payment for services rendered, accepted offer by letter dated January 29, 1937, and complaint in his action against corporation for dividends declared on such shares was filed in following July, cause of action was not barred by statute of limitations. Code Civ.Proc. § 337, subd. 1.

5. Costs ⇐146, 169

Under the code section relating to costs, the term "costs" means those fees and charges which are required by law to be paid to the courts or some of their officers, the amount of which is expressly fixed by law, and the inclusion of the term "necessary disbursements" in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowed as an item of costs. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs" and "Necessary Disbursements".

6. Costs ⇐154

It may be assumed, in absence of contrary showing, that it was necessary for plaintiff, his attorney, or some one specially designated, to appear and interrogate witness whose deposition was taken at defendant's request. Code Civ.Proc. § 2025½.

7. Appeal and error ⇐1008(1)

Whether presence of plaintiff's attorney of record during examination of witness, whose deposition was taken at defendant's request, was necessary to protect plaintiff's rights properly, was fact question to be decided by trial court.

8. Costs ⇐154

The cost incurred in taking of deposition is proper disbursement.

9. Depositions ⇐19

The mode of taking witness' deposition by either written or oral interrogation is subject to trial court's direction.

10. Costs ⇐154

Necessary traveling expenses may be allowed as item of "costs" incurred in taking of witness' deposition. Code Civ.Proc. §§ 1032, 2025½.

11. Appeal and error ⇐936(1)

Where disbursement by plaintiff's attorney of record in traveling to another state to appear for plaintiff in taking of witness' deposition at defendant's request was imposed on plaintiff by defendant so far as record showed, District Court of Appeal must assume, on appeal from judgment for plaintiff, that trial court correctly decided that such attorney's presence at taking of deposition was necessary to protect plaintiff's rights, so as to authorize allowance of such disbursement as item of "costs". Code Civ.Proc. §§ 1032, 2025½.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Arthur W. Hoge against the Lava Cap Gold Mining Corporation to recover dividends declared on certain stock. From a judgment for plaintiff and an order denying defendant's motion to strike an item from plaintiff's cost bill, defendant appeals.

Affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

James Snell, of Grass Valley, for respondent.

WARD, Justice.

The defendant appeals from a judgment in favor of plaintiff declaring the latter to be the owner of 6,000 shares of the capital stock of defendant, Lava Cap Gold Mining Corporation, and that he recover the sum of $1,860, dividends declared on said stock. Defendant also appeals from an order denying its motion to strike from plaintiff's cost bill an item of $360, being traveling expenses of plaintiff's attorney from Grass Valley, California, to New York and return incurred in taking a deposition in the latter place. Both appeals are presented on one transcript.

As appears from the evidence introduced, the facts out of which the suit arose may be stated as follows: Arthur W. Hoge, the plaintiff, a mining engineer residing in the Grass Valley mining district, H. B.

Walmsley, a member of the bar of New York state, and R. F. D. LeMon, a promoter, had become interested in a group of gold-mining claims or properties located in said district, and conceived the idea of forming a corporation for the purpose of exploiting them. There were conflicting claims to these properties, debts and defects of title, and Hoge was to assist in clearing these matters up, being more or less familiar with the properties and qualified by experience in such work. Title to them was to be preliminarily vested in LeMon. The entire capital stock of the corporation, consisting of 2,500,000 shares, was to be issued to LeMon in return for a conveyance through him to the corporation of clear title to a portion of the properties, he in turn to put back into the treasury of the corporation 1,000,000 shares, and with the remainder satisfy the claims of various stockholders in prior organizations, pay off various creditors having claims upon them, and divide the balance between Walmsley and himself as compensation for their services prior to organization and thereafter until the corporation should be on a self-sustaining basis. Out of the stock so issued to LeMon it was agreed among the promoters and Hoge that the latter would be given 100,000 shares to take the presidency of the proposed corporation and "straighten out the mess." One of the witnesses testified that Hoge was to accept the presidency and that the stock was to cover his compensation until the mine was on a self-sustaining basis.

The plan was carried out, the defendant corporation was organized, coming into existence on January 14, 1932, its stock was issued as agreed, LeMon was elected to the office of executive vice-president, and active mining operations were begun and have since continued. Hoge, as president, was active in the corporation's affairs, particularly in getting the mining operations under way, in this regard acting as general manager and superintendent. Work was commenced around January 1, 1933, consisting of unwatering a mine, going down and opening up sample ore bodiers, retimbering and putting the mine in condition for operation.

In March, 1933, LeMon, charged with selling the stock of the company to the public, was preparing to apply to the commissioner of corporations of this state for a permit to sell. In that connection he addressed a letter to Hoge, in which he stated that he was endeavoring to clean up all ragged ends, and wanted the statement of the company to show no indebtedness whatever if possible. He refers to an item of "bills payable" and says: "This is made up of two $2,000 notes to yourself and Jockmus. Mr. Jockmus has consented to exchange his demand note for Lava Cap stock at 30c or 6,000 shares and I am today sending him Certificate No. 751 for 6,000 shares in payment of his note. Knowing your willingness to keep pace with others in this respect insofar as you can, I am enclosing herewith Certificate No. 752, registered in your name, for 6,000 shares, and I would ask you to mark your note paid and return to me by air mail immediately so that it can be eliminated from the statement. This, with the cancellation of the $25,000 mortgage, gives us a clean slate. I hope to have the mortgage out of the way by April 10th, at which time we can issue our statement and make application for a permit in California."

There were enclosed in this letter two promissory notes payable to Hoge, one executed by the corporation and the other by LeMon himself. Hoge had previously been requested by LeMon to subscribe for stock with the idea—counsel for appellant suggests—that Hoge being recognized in his community as a competent mining engineer, and being president of the company, prospective investors could be more readily induced to subscribe. Hoge had replied that he was unable to do so. As to the letter transmitting to him the stock certificate and notes he testified at the trial that he had no recollection of ever having subscribed for the stock, and regarded the matter as an offer made to him to take and pay for the stock by discounting the company's note and using the proceeds for that purpose—in effect, accepting the stock as an unauthorized gift. He declined to have anything to do with the transaction; and in the following month, LeMon being on a visit to the company's office at Grass Valley, handed back to LeMon the stock certificate, with his name endorsed thereon, and the two notes. A witness, O'Keefe, who at the time of the trial was secretary of the company, testified that at some time during the year 1933 this certificate was returned to the corporation by LeMon and canceled.

In addition to his activities as president of the defendant, Hoge was interested in a concern known as Hoge Development

Company. Some time in the year 1933 prior to July this company was in immediate need of funds. To meet this need Hoge, who as president and manager of defendant was authorized to draw upon the corporation's local bank account, turned over to the development company $6,500 of the defendant's funds. He testified that he regarded the transaction as a loan—although no security was given for it—and that he apprised LeMon of what he contemplated doing. However, after it was done LeMon took strong exception to it, visited Hoge (who was at the time sick in a hospital) and demanded that he replace the funds; also that he and his son (who was assistant treasurer and assistant secretary of appellant) resign their offices, and that Hoge return to LeMon the 100,000 shares given him on the organization of the company. Hoge refused to resign or return the stock.

On LeMon's return to New York toward the end of July a report of the matter was made to the directors of the company, which, with respect to Hoge, at a meeting on August 1, 1933, wherein it appears that Hoge's indebtedness to the company was repaid on July 26th, passed the following resolution:

"Resolved, that the Vice President be authorized to negotiate with Arthur W. Hoge and Arthur M. Hoge and the Hoge Development Company for the purpose of amicably adjusting any differences that may exist between this Company and them, or any of them, but that no legal action shall be taken in connection therewith, and that such steps as may be necessary to take to protect the interests of this company shall be taken in a careful and diplomatic manner, including the procuring of the resignations, if possible of Arthur W. Hoge as Director and President and Arthur M. Hoge as Assistant Treasurer and Assistant Secretary of the corporation, such resignations to be accepted at such time as this Board of Directors may deem proper.

"Further Resolved, that in view of the services rendered to this company by Arthur W. Hoge, his indebtedness to this company for $2,000 for the purchase of 6,000 shares of stock, be and the same hereby is cancelled, and that the said 6,000 shares of stock be delivered to said Arthur W. Hoge as payment for his services."

It is apparent from the tenor of this resolution that the directors of the company other than LeMon were unaware of the nature of the transaction between LeMon and Hoge above mentioned, or of the situation regarding the stock.

LeMon then returned to California. Hoge at this time was confined to his home —still sick. LeMon got in contact with Hoge junior; informed him that he, LeMon, had been appointed to handle the difficulty between his father and the company as best he could, and handed to him two written resignations, one for his signature and one for his father's. The son signed and undertook to take the other paper to his father. At this interview LeMon, though authorized by the board of directors to do so, made no disclosure of the terms of the resolution under which he was acting, nor did he come in direct contact with Hoge. Hoge later signed the prepared resignation. LeMon went back to New York and made a report to the board of directors, in which however he made no mention of any disposition of the 6,000 shares of stock, confining himself to the matters subsequently, on September 5th, included in the following resolution passed by the board: "Resolved, that whereas this Company has had, and now has, certain claims against Arthur W. Hoge and Arthur M. Hoge and the Hoge Development Company, and whereas, the said Hoges or the Hoge Development Company has asserted a claim, or claims, against this Company, and whereas, all matters in dispute between all of said parties have been settled or disposed, except the payment to this company of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39) by the Hoges or the Hoge Development Company, it is hereby resolved, that upon receipt of said sum of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39), this Company exchange general releases with the said Arthur W. Hoge, Arthur M. Hoge and the Hoge Development Company, but that said general releases executed by this Company be not delivered until payment of said sum of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39) and then only upon delivery of general releases from the Hoges and the Hoge Development Company to this Company."

In accordance with the above resolution releases were prepared, executed by the corporation and forwarded to the local attorney for the company at Nevada City, with instructions to exchange re-

leases with Hoge. The releases, however, were never exchanged.

Later Hoge and Walmsley entered into some correspondence, and on October 2, 1933, the latter sent him excerpts from the minutes of the board of directors' meeting of August 1st. This was the first intimation to Hoge that LeMon had been authorized to cancel a purported indebtedness from him to the company of $2,000, and to permit him to retain "as payment for his services" the 6,000 shares of stock assumed by the resolution to be in his possession. It was from this correspondence also that Hoge learned that LeMon had received from the company approximately $10,000 during a two-year period for expenses and drawing account. In a letter to Walmsley dated October 9, 1933, Hoge informed him that he was thinking of putting in a bill to the defendant for nineteen months' salary as president and general manager of the company, and wished to have Walmsley's opinion on the matter before doing so; and in another letter to him dated October 17th, referring to the same subject, he states that the matter of salary was never discussed until the time Jockmus, subsequently president of the company, visited Grass Valley in April, 1933, when both LeMon and Jockmus stated to him that it was their idea that no officer or director of the company was to receive any salary until after the properties went into production, adding: "In view of the above facts, I feel that I am certainly just as entitled to compensation as LeMon was."

On November 27, 1933, Hoge wrote to Jockmus, then president of the company, about the same matter, in which letter he also referred to the stock incident, as to which he said: "I want also to add that when Mr. LeMon was here with you last April, I gave him 6,000 shares of stock properly endorsed and also gave him back his note for $2,000.00 and also gave him back the company note of $2,000.00, whereas I could have paid in my $2,000.00 through my bank and paid for this stock and could in turn cash the company note."

It appears that nothing further was done either about the stock or Hoge's claim for salary until some three years later when, on November 12, 1936, Hoge wrote Jockmus, who was still president of the company, as follows: "I have succeeded, after a period of a little over three years, in getting certified copies of the famous directors' meetings of August 1, 1933, and September 5, 1933." He further stated that from their reading it was clear to him that none of the directors except LeMon knew the facts, as was apparent from that part of the minutes of the first mentioned date reading: "* * * that in view of the services rendered to this company by Arthur W. Hoge, his indebtedness to this company for $2,000 for the purchase of 6,000 shares of stock, be and the same is hereby canceled, and that the said 6,000 shares of stock be delivered to said Arthur W. Hoge as payment for his services." Hoge further stated that "it was understood that I was to receive a salary as President of the Corporation from the time the Corporation was started * * *. As to what steps I shall take in regard to these matters, I have as yet not decided and I might likewise state that this will depend largely upon what I hear from you within the next ten days." After further personal correspondence between Hoge and Jockmus, the facts were referred to the secretary of the corporation, O'Keefe, who wrote Hoge in part as follows: "The 6,000 shares, of which you speak, is of a different classification in that it was completely a corporate matter and, as such, directly related to your activities as President of Lava Cap Gold Mining Corporation. The delivery of these shares to you was contingent upon your fulfillment of certain obligations and was in direct reference to the finances and other activities. They were not delivered to you." Hoge, in reply to that part of O'Keefe's letter requesting "a general release," replied: "A general release on my part will be given when the company's actions are complied with, but not before. * * * This stock was voted to me in payment for services rendered over three months after it had been given by me to LeMon as referred to in paragraph 4 in my letter to Mr. Jockmus of November 12, 1936. In view of the above facts, which LeMon, of course, knew all about, he acted as Chairman of the Board of Directors on August 1, 1933, and voted along with Messrs. Jockmus, Pendlebury, Walmsley and Mrs. Miller, that the said 6,000 shares of stock should be delivered to me as payment for services rendered. It has not been delivered and, consequently, as above stated, there will not be any release on my part until it is." Upon discussion of the situation by the board of directors, the matter of Hoge's claim was finally referred by the company to its counsel, who there-

upon, on April 8, 1937, informed Hoge that they had advised the company the claim should be rejected. After further correspondence, the complaint herein was filed in July of 1937.

It is not necessary to decide whether respondent obtained title to the certificate for the 6,000 shares of stock at the time and by reason of its issuance in March, 1933. The factual background, however, becomes important in determining whether he became vested with ownership by reason of the above resolution of August 1, 1933, and occurrences thereafter.

Appellant in great measure places the blame for the issuance of the certificate originally upon LeMon, in this regard stating in its opening brief: "* * * in order to accomplish his purpose, LeMon, in violation of every duty he owed the appellant corporation, caused to be issued, without any consideration, this disputed certificate for 6,000 shares of stock, and in addition to that infamy caused to be executed, likewise without any consideration whatever, the promissory note of the appellant corporation, payable to respondent upon demand. These two documents he forwarded to respondent. Respondent, however, at that time recognizing his obligation to be honest in the discharge of his duties to appellant, refused to have anything to do with the malodorous transaction."

There is evidence that the stock upon its delivery by Hoge remained in the possession of LeMon, although it stood on the books of the appellant in the name of respondent, until subsequent to the resolution of August 1, 1933. There is also evidentiary support in the findings of the court that LeMon delivered the stock certificate to appellant for cancellation without the knowledge or consent of respondent, and that the writing of the word "Cancelled" across the face of the certificate was without the knowledge or authority of either respondent or appellant. The evidence of witness O'Keefe, who was working in harmony with LeMon, shows that LeMon delivered the certificate to him and that it was marked cancelled. Whether this was with the approval of respondent is a factual matter determined from all of the surrounding circumstances, but there is evidence that at the time of cancellation the matter was handled by LeMon without the knowledge of either interested party.

Whatever occurred prior to August 1, 1933, appellant at that time directed by resolution that the 6,000 shares of stock "be delivered to said Arthur W. Hoge as payment for his services." The court found that respondent had performed certain services of the value alleged, which had not been paid, and that the resolution of August 1, 1933, had been passed and never revoked or rescinded; that delivery of the stock had been demanded by respondent but was refused.

[1] Appellant contends that the resolution of August 1, 1933, vested no title of ownership to the stock in respondent. This resolution, read in its entirety, may be construed to be an offer which, if accepted, constituted the basis of a binding contract. That cancellation of claims should be negotiated through LeMon was simply a matter of convenience. Had the offer been immediately communicated to Hoge, and the cancellation of claims accomplished with the corporation direct, the contract would have been completed. LeMon as an agent of communication was a mere incident. He was neither fair to his fellow directors nor to respondent. Whatever part he played in the negotiations, they did not result in the ultimate purpose of the offer, namely, the cancellation of claims.

Upon the theory that it merely offered or proposed that respondent accept the 6,000 shares of stock as compensation for services rendered, appellant also contends that there was no acceptance of the offer in writing, and that the statute of limitations (Code Civ.Proc., § 337, subd. 1) is applicable.

Specifically, it is appellant's contention that the board of directors intended a complete severance of all connections with respondent, and that cancellation of claims should be effected through the negotiations of LeMon.

[2-4] The time for the acceptance of the offer was not specified, and therefore remained open for a reasonable time. Acceptance could not be expected until notification of the offer. Appellant's position is that any information given by Walmsley to Hoge relative to the resolution was unauthorized and "in furtherance of his own ends in connection with his war with LeMon." The incident need not be considered further. The offer was still open; the corporation did not rescind nor revoke its resolution of August 1st.

Appellant argues that the resolution of August 1st was rescinded and revoked by

that of September 5th. The latter resolution is a declaration that the Corporation still held "certain claims" against Hoge and that Hoge "has asserted a claim or claims" against the corporation; that upon the payment by Hoge, his son or the Hoge Development Company of the claim of the corporation, general releases should be exchanged. What claims Hoge still asserted against the company are not enumerated. The claims referred to in the evidence are the salary claim and that for the stock in dispute. Instead of attempting to end the matter, under the provisions of the September resolution, by positive statements further negotiations toward a settlement of the recognized controversy were inferentially approved. That Hoge accepted the company's offer, and demanded delivery of the stock when he finally obtained "certified" or verified copies of the resolutions, is demonstrated by his letter of January 29, 1937, stating: "* * * that the said 6,000 shares of stock should be delivered to me as payment for services rendered. It has not been delivered and, consequently, as above stated, there will not be any release on my part until it is." That a written acceptance was referred to, considered and acted upon by the corporation, is shown by its action in referring the matter to its attorneys for investigation. The acceptance of the offer occurred in 1937. The complaint was filed in July of that year. This also disposes of appellant's claim that the cause of action was barred by the statute of limitations.

A separate appeal has been taken from an order denying a motion to tax costs, and specifically from an order denying defendant's motion to strike from the cost bill an item covering railroad fare and other expenses of the attorney for plaintiff in traveling from Grass Valley to New York City and return for the purpose, at the request of defendant, of taking Walmsley's deposition. The correctness of the amount is not challenged.

[5] Appellant relies upon section 1032 of the Code of Civil Procedure and the decision in Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503, 507. In the Moss case, in holding that a party was not entitled to recover as costs the amount expended for a bond premium, it was said: "The term 'costs', it has been said, means 'those fees and charges which are required by law to be paid to the courts, or some of their officers, or the amount of which is expressly fixed by law'. Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022. The words 'necessary disbursements' should be similarly construed. Certainly the statute does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation. The code authorizes the allowance of costs only, and the inclusion of 'necessary disbursements' in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowable as an item of 'costs'. Bond v. United Railroads, 20 Cal.App. 124, 128 P. 786." The court therein held that the filing by the appellant of a surety bond in connection with which a premium was required was a privilege and not a duty—that a personal bond could have been filed for which no premium would have been required.

[6-11] In the case before us, the interrogatories of the deposition were propounded orally. In the absence of a showing to the contrary, it may be assumed that it was necessary for respondent, his attorney or someone specially designated to appear and interrogate the witness. Code Civ.Proc., § 2025½; Walker Min. Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 95 P.2d 188. In San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, at page 38, 99 P. 359, at page 362, 17 Ann. Cas. 933, the court said: "In the cases to which the law applies each party must take some risk. The party desiring the testimony must take the deposition or run the risk of losing it. The opposing party, if the depositions are taken, must incur the expense of employing counsel to cross-examine, or take the risk of ignoring the proceeding." Appellant imposed a necessary disbursement upon respondent. Whether the presence of the attorney of record was necessary to properly protect the rights of respondent, was a question of fact to be decided by the trial court. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L.R.A.,N.S., 1106; Welch v. Alcott, 178 Cal. 530, 174 P. 34; Hughes v. Hughes, 49 Cal.App. 217, 193 P. 148. We are not in accord with appellant's contention that as a matter of law the statute does not authorize the allowance of traveling expenses as costs. The cost incurred in the taking of a deposition is a proper disbursement. Eades v. Los Angeles Ry.

Corporation, 43 Cal.App. 259, 184 P. 884. The mode of its taking, either by written or oral interrogation, is subject to the direction of the trial court. Hopkins v. Superior Court, 105 Cal.App. 133, 286 P. 1053. If the deposition is taken by oral interrogatories it is generally necessary that someone appear. The statute specifically provides for traveling expenses, after proper notice given, upon a failure to take a deposition, except for certain designated reasons. Code Civ.Proc., § 2025½. If traveling expenses may be allowed when the deposition is not taken, we conclude that such an expense may be a necessary disbursement when the deposition is taken. The Legislature could not have reasonably approved the provision found in section 2025½ except upon the assumption that a deposition actually taken in compliance with the code provisions was subject to the discretion of the court in fixing the amount, chargeable as a necessary disbursement. In Ott v. Hentall, 70 N.H. 231, 47 A. 80, 51 L.R.A. 226, in construing a statute similar to section 2025½ relative to traveling expenses of an attorney, the court said (47 A. at page 82): "Under the previous statutes on the subject, the remedy of a party aggrieved by a failure to take a deposition was an action on the case. Rev.St. c. 188, § 22; Gen.Laws c. 229, § 10; Powers v. Hale, 25 N.H. 145. Now he is not required to bring a separate action, but may be allowed as costs an equitable sum for actual travel, and have judgment therefor in the action in which the deposition was to be taken." In Moss v. Underwriters' Report, Inc., supra, the filing of a "surety" bond was a privilege. It was there held in effect that the trial court abused its discretion in approving as "costs" the amount of a premium voluntarily paid a surety company. In the present case, so far as the record shows, the disbursement by the attorney of record in traveling to the state of New York to appear for respondent in the taking of a deposition, was imposed upon the latter by appellant. San Francisco Gas & Electric Co. v. Superior Court, supra. We must assume in the face of the record that the trial court correctly decided that the presence of the attorney of record was necessary to protect the rights of respondent.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

54 Cal.App.2d 614

DRIVER, Sheriff, v. INTERNATIONAL AIR RACE ASS'N OF AMERICA et al.

Civ. 12018.

District Court of Appeal, First District. Division 1, California.

Sept. 30, 1942.

1. Judgment ⇐581

Judgment in interpleader action was not "res judicata" in so far as it included an award in favor of the labor commissioner as assignee of a number of labor claims allowed in another action by order made under statute, where the order was not final when the judgment was rendered in the interpleader action and was subsequently reversed. Code Civ.Proc. § 1206.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Evidence ⇐43(3)

The District Court of Appeal, division one, could take judicial notice of reversal of order by division two.

3. Interpleader ⇐28

Prayer of defendant's answer to complaint in interpleader that he recover fund, less labor claims allowed by order in another action, coupled with defendant's admission of allegations of complaint with regard to the order, was in the nature of an "admission", that the order was an effective order, and that all formalities had been complied with and dispensed with affirmative proof that the order had been entered. Code Civ.Proc. § 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

4. Motions ⇐64

Order allowing labor claims was a "final order", by lapse of time when interpleader action against the holders of the claims came on for trial about fourteen months later.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

5. Judgment ⇐518

Appeal from order allowing claims under statute providing that on levy of at-

tachment, garnishment, or execution, not founded on claim for labor, any person who has performed work for defendant within 90 days prior to levy may file claim, not exceeding $200, constituted a "direct attack", on the order. Code Civ.Proc. §§ 1206–1208.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

6. Judgment ⇐518

Any attack in interpleader action on an order made in a prior action, was a "collateral attack", on the order and was governed by the rules pertaining to such attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

7. Trial ⇐36

Where defendant admitted in answer in interpleader action the existence and validity of an attachment and an order allowing labor claims, holders of those claims, in order to rely on the order as a conclusive determination of their rights were not required to establish the order and attachment by proof.

8. Pleading ⇐36(1)

Generally, a party cannot disprove admissions of his pleading, since evidence contrary thereto should not be considered.

9. Judgment ⇐486(1)

A party at whose instance a judgment was rendered is not entitled in a collateral proceeding to contend that it was void.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Interpleader action by M. B. Driver, as Sheriff of Alameda County, against the International Air Race Association of America and others, and J. A. Steele, H. C. Carrasco, as Labor Commissioner, etc., and others, to determine conflicting claims to a fund in the plaintiff's custody. From an adverse judgment, J. A. Steele appeals.

Judgment reversed in part and affirmed in part.

L. L. Steele and John Jewett Earle, both of Oakland, for appellant.

Fred G. Goldsworthy, Olney L. Huff, Dinkelspiel & Dinkelspiel, and Fred S. Herrington, all of San Francisco, for respondents.

WARD, Justice.

This is an appeal from the judgment in an interpleader action brought by the sheriff of Alameda County to determine conflicting claims upon a fund of $2,003.15 in his custody.

Appellant Steele recovered judgment against International Air Race Association for $1,421.12. On February 6, 1939, he caused a writ of execution to be levied on the fund of $2,003.15 in possession of the sheriff. The sheriff had originally taken this fund under a writ of attachment issued in an action by one Buttner against the association, which was released on February 28, 1939. The fund consists of box office receipts of the association from an air show. One of the questions argued on this appeal, as will appear hereafter, is whether prior to the levy of execution appellant Steele had procured a valid attachment on the fund, junior to that of Buttner.

The respondents had filed labor claims in the action brought by Steele against the association, as provided by sections 1206–1208, Code of Civil Procedure. In the present action in interpleader the court held that respondent Rogers was entitled to recover $450 from the fund, and respondent Carrasco, labor commissioner, $1,375.39. The balance of $115.26 remaining after paying $62.50 court reporters' fees, was awarded Steele. He appeals from the judgment insofar as it denies him recovery of the full amount owing to him under his unpaid judgment for $1,421.12.

Sections 1206 and 1207, Code of Civil Procedure, provide that upon the levy of an attachment, garnishment or execution, not founded upon a claim for labor, any person who has performed work for the defendant within ninety days prior to the levy may file a verified statement of his claim with the officer executing the writ and a copy with the court which issued the writ and give copies to the plaintiff and defendant. Within five days either plaintiff or defendant may file a dispute of claim. The claim, not exceeding $200, must be paid by the officer, if not disputed, upon the expiration of the time for filing a dispute from the proceeds of levy remaining in his hands or collectible. Rogers and the labor commissioner are assignees of a number of labor claims, each for less than $200.

If a claim is disputed by either plaintiff or defendant the claimant must within ten days petition for a hearing in the court

having jurisdiction of the action on which the writ is based. If the judgment entered upon such hearing allows the claim it is a preferred claim to be paid immediately after the order allowing the claim becomes final. An appeal may be taken from the judgment on the claim.

In the action brought by Steele against the association, Steele disputed labor claims filed under section 1206 by Rogers and by the labor commissioner, in the respective amounts of $1,025.70 and $413.25. In the hearing held on these claims the court made its order on February 28, 1939, that Rogers' claim be allowed priority for $450, that of the labor commissioner for $218. The order recites that it was made pursuant to stipulation.

Claims filed by one Adams for $4.50 and by Holmes for $125.20 were not disputed, and hence no hearing was held on them.

The present action in interpleader was filed by the sheriff on March 15, 1939, by reason of other claims than those of Steele and the labor claimants. These other claims were subsequently abandoned. The judgment in the interpleader action found that Rogers was entitled to receive $450 from the fund, the amount provided by the order of February 28, 1939. Judgment was given for the labor commissioner for $1,375.39. This includes the sum of $218, for which the commissioner was allowed priority by the order of February 28, 1939, an unpaid balance of $25.50 on the Holmes' and Adams' claims, which were not disputed, and an additional amount of $1,131.89. During the pendency of the interpleader action additional labor claims for $1,746.86 were filed by the labor commissioner, as assignee, in the action in which Steele was plaintiff, and an order was subsequently made allowing these claims for $1,131.89.

[1, 2] The judgment in the interpleader action cannot be sustained insofar as it includes the award of $1,131.89. That portion of the judgment was based on an order made in a claims hearing under section 1206, Code of Civil Procedure, in the action in which Steele was plaintiff. The order would not be res judicata until it had become final. 15 Cal.Jur., 121 and 286, citing authority. It was not final when judgment was rendered in the interpleader action and has since been reversed by Division Two of this court. Steele v. International Air Race Association of America, 50 Cal.App.2d 176, 122 P.2d 593. This court may take judicial notice of the reversal. Sewell v. Johnson, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645.

Whether the labor commissioner or appellant Steele will ultimately receive this sum depends on what further proceedings have been taken in the claims proceeding pursuant to the reversal by the appellate court. The order was reversed for failure of proof on a vital issue.

The judgment in the interpleader action insofar as it awards Rogers $450 and the labor commissioner $218 is based on the order of February 28, 1939, heretofore referred to as made in the action in which Steele was plaintiff. For the first time on this appeal Steele contends that this order is not final because it does not appear that it was entered. Neither does it appear that it was not entered.

[3, 4] A judgment is not effectual for any purpose until entered. § 664, Code Civ. Proc. The time for taking an appeal does not commence to run until entry of judgment. § 939, Code Civ.Proc., 14 Cal.Jur. 938; 2 Cal.Jur. 397, citing cases. The prayer of Steele's answer to the complaint in interpleader, filed March 28, 1939, was that he recover the fund of $2,003.15, less the labor claims allowed by the February order, and the undisputed claims of Holmes and Adams. This prayer coupled with Steele's admission of allegations of the complaint with regard to the order, is in the nature of an admission that the order of February 28, 1939, was an effective order, that all formalities had been complied with. Such a concession dispenses with affirmative proof that the judgment was entered. When the interpleader action came on for trial in April, 1940, the order of February 28, 1939, had become final by lapse of time.

Appellant Steele also contends for the first time on appeal that the order of February 28, 1939, although based on his stipulation, is void for the reason that the claims of Rogers and the labor commissioner were not for work done within ninety days of levy of attachment, execution or garnishment. Under section 1206, Code of Civil Procedure, labor claims to be allowed priority must be for work performed within ninety days prior to levy of attachment, execution or garnishment. The claims of Rogers and the labor commissioner were for work done in May and

June, 1938. Execution was levied in the Steele action on February 6, 1939. The work was not performed within ninety days of that levy.

[5, 6] The ground of reversal of the order allowing claims for $1,131.89, made in the later claims proceeding, was that it did not appear from the record on appeal that an attachment had ever been levied on the fund which would authorize the filing of labor claims. Steele v. International Air Race Association, supra. The labor claims which were the basis for that order were also for work done in May, 1938. The appeal from the later order constituted a direct attack on that order. No appeal was taken from the consent order of February 28, 1939. Any attack on that order made in the present interpleader action is, therefore, a collateral attack and governed by the rules of such attack.

The complaint in interpleader alleged the levy of an attachment on June 6, 1938. The answers of appellant Steele and of respondent Rogers and the labor commissioner admitted these allegations. In addition, Steele's answer contains particular allegations with reference to a June attachment. He alleged that a writ of attachment issued on June 2, 1938, which was delivered to the sheriff on June 6, with instructions to levy on the fund in possession of the sheriff, and that an attachment was levied on that date. Steele's admission in his answer of the validity of the February order based on this attachment, has heretofore been noted.

Although no question was raised in the trial court as to there being a valid attachment of the fund in June, 1938, which fact was conceded by all parties in their pleadings, the record on appeal shows evidence, doubtless introduced in the general development of the case, which appellant contends disproves the allegations of his own answer and of the other pleadings. Appellant contends that it appears that a writ of attachment issued on June 2, which was served on a bank in an effort to reach funds of the defendant there. The sheriff's return was made on June 2. Nothing was realized from that levy. Appellant contends that a further writ of attachment which could serve as the basis for a levy on the fund in the sheriff's possession was never issued. The evidence as contained in the bill of exceptions is not clear and unequivocal. It is not identical with that on the other appeal.

[7, 8] In view of the admissions in Steele's answer as to the existence and validity of the June attachment and the order of February 28, 1939, it was not required that respondent Rogers and the labor commissioner, in order to rely on the order as a conclusive determination of their rights, should establish the order and attachment by proof. As to Steele disproving the allegations, it is the general rule that a party cannot disprove admissions of his pleading. Evidence contrary thereto should not be considered. Bloss v. Rahilly, 16 Cal.2d 70, 77, 104 P.2d 1049; United Air Services, Lt'd v. Sampson, 30 Cal.App. 2d 135, 144, 86 P.2d 366; Chase v. Van Camp Sea Food Co., Inc., 109 Cal.App. 38, 44, 292 P. 179; Burroughs Adding Machine Co. v. Harris, 99 Cal.App. 604, 606, 279 P. 216.

[9] It may be questioned whether the above rule applies with full force where the proof, contrary to admissions of the pleading, shows a prior judgment to be void. In the instant case, however, not only did the appellant admit in his answer that the attachment and order of February 28, 1939, were valid, but there is the circumstance that the order was entered on a stipulation in which appellant participated. It has been held that a party at whose instance a judgment was rendered is not entitled in a collateral proceeding to contend that it is void. 1 Freeman on Judgments, 5th Ed. 640; 31 Am.Jur. 92, 180; note 3 A.L.R. 535, citing numerous authorities; In re Di Carlo's Estate and Guardianship, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990. The order of February 28, 1939, was based on stipulation. It allowed the claim of Rogers for $450, that of the labor commissioner for $218. The claims as filed were for $1,025.70 and $413.25, respectively. The order for the lesser amount was procured at the instance of the parties who joined in the stipulation, including appellant Steele.

While other claims were being asserted on the fund in addition to those of the labor claimants, and while it was to appellant's interest to establish his priority as of an early date, he took the position that he had an attachment lien as of June 6, 1938. In this case he contends for the first time on appeal that he had no attachment lien. But for his position that there was

a valid attachment, which would serve as the basis for labor claims under section 1206, the labor claimants may well have sought to reach other property of the debtor, which by lapse of time is lost to them.

The judgment should be affirmed insofar as it awards respondent Rogers $450 and the labor commissioner $218.

The judgment of $1,375.39 in favor of the labor commissioner also includes the sum of $25.50, which represents the unpaid balance on the Holmes' and Adams' claims, which had not been disputed. Copies of these claims were attached to the complaint in interpleader. They show that the claims were filed by Adams and Holmes personally, rather than by the labor commissioner as assignee. There is no showing of any subsequent assignment. Holmes and Adams were not made parties defendant to the interpleader action. The judgment for $25.50 in favor of the labor commissioner, not shown to be an assignee of Holmes and Adams, should be reversed.

The judgment is reversed insofar as it awards the labor commissioner $1,131.89 and the additional sum of $25.50. Other portions of the judgment appealed from are affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

54 Cal.App.2d 779

CONSOLIDATED ROCK PRODUCTS CO. v. HIGGINS.

Civ. 11984.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1942.

Hearing Denied Dec. 7, 1942.

1. Judgment ⇐515

Unless judgment is absolutely void, a stranger to the record may impeach a judgment rendered in action to which he was neither a party nor in privity with a party only upon showing that he has rights, claims or interests accruing prior to rendition of judgment which would be prejudiced by enforcement thereof.

2. Judgment ⇐494, 507, 515

A stranger to the record, if entitled to impeach judgment because rights accruing to him prior to rendition thereof would be prejudiced by its enforcement, may attack judgment on the ground of want of jurisdiction, or for fraud or collusion, but cannot object to it on account of mere errors or irregularities, or for any matters which might have been set up in defense to the original action.

3. Divorce ⇐165(6)

In employer's action to enjoin claimant from claiming workmen's compensation as surviving widow of deceased employee, trial court's findings that after entry of interlocutory decree of divorce claimant and decedent were reconciled and were living together as man and wife when final decree was entered, negatived a want of jurisdiction to enter order setting aside such final decree, and negatived commission of any fraud or collusion in obtaining such order, as grounds for "collateral attack" on the order. St.1937, p. 268, § 3501(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

4. Divorce ⇐165(6)

An employer seeking to enjoin claimant from claiming workmen's compensation as surviving widow of deceased employee could not attack order setting aside final decree divorcing claimant and decedent on the ground of alleged irregularities that might have been set up in defense of divorce action, where order setting aside final decree was not shown to be void. St. 1937, p. 268, § 3501(a).

5. Divorce ⇐168

Irregularities in the proceedings in a divorce action can be attacked only in the divorce action.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Consolidated Rock Products Company against Margaret Higgins to enjoin defendant from making a claim against plaintiff for workmen's compensation as the surviving widow of Charles E. Higgins who died as result of an injury suffered while in plaintiff's employ. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

F. Britton McConnell, of Los Angeles, for appellants.

Joseph Shane, of Los Angeles, for respondent.

STURTEVANT, Justice.

On November 26, 1937, Charles E. Higgins, while employed by and in the course of his employment by one of plaintiffs, the Consolidated Rock Products Co., a corporation, was injured. At that time the other plaintiff, Pacific Employers Insurance Company, was the employer's insurance carrier. As a result of said injury said Charles E. Higgins died on the date of the injury. Later the defendant, claiming to be the surviving widow of said decedent, filed an application with the Industrial Accident Commission asking said commission to establish her claim against the plaintiffs. The plaintiffs appeared before said commission and, among others, they presented the contention that the defendant, Margaret Higgins, had been married to the decedent but that long prior to the date of his death said marriage had been dissolved by a valid decree of divorce and that at the time of the injury no relation existed between the defendant and the decedent. The defendant controverted that contention. The Industrial Accident Commission held the issue was one in equity which should be so heard and determined. It suspended the proceedings before said commission, and this action was commenced to obtain a decree that the said defendant should be

enjoined from making a claim or contending that she was the surviving widow of said decedent within the meaning of subdivision (a), section 3501 of the Labor Code, St.1937, p. 268. The issues were many but each was fully examined. The findings of the trial court were against the plaintiffs and in favor of the defendant. From the judgment entered thereon the plaintiffs have appealed.

[1-3] The pleadings are very long. The reporter's transcript contains about 800 pages. The findings are long and dispose of every issue made by the pleadings. However, the story is short. The material issue is equally short. It was the contention of the plaintiffs that the defendant Margaret Higgins had been divorced from the decedent and that a final decree had been entered prior to the death of the latter. The defendant on the other hand contended that she and the decedent intermarried, that later the decedent commenced an action against her for divorce, that he obtained an interlocutory decree, that later a final decree was entered, and thereafter said final decree was set aside; and therefore, she was the surviving wife of the decedent. In reply the plaintiffs contended that the order setting aside the final decree was obtained through the fraudulent practices of the defendant. The contention last stated presents the one material question involved in the controversy. It involves the right of these plaintiffs to attack the orders and judgment in the divorce case hereinabove mentioned. The rule applicable is stated in 34 C.J. 526: "Judgments", section 832, as follows: "A stranger to the record, who was not a party to the action in which the judgment was rendered nor in privity with a party, is not prohibited from impeaching the validity of the judgment in a collateral proceeding; but in order to do so he must show that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which accrued prior to its rendition, unless the judgment is absolutely void. Thus situated he may attack the judgment on the ground of want of jurisdiction, or for fraud or collusion; but he cannot object to it on account of mere errors or irregularities, or for any matters which might have been set up in defense to the original action." See, also, 15 Cal.Jur. 56; 31 Am.Jur. 192; 15 R.C.L. 841. The plaintiffs' contention was fully presented by the pleadings. It was fully tried out in the trial court and thereafter the trial court made findings against the plaintiffs and in favor of the defendant on said issue. In this connection the trial court heard much evidence and afterwards made findings to the effect that after the aforesaid interlocutory decree was entered Mr. and Mrs. Higgins became reconciled, lived together as man and wife, and at the time the final decree was entered that they were living together as man and wife. In this connection the findings negative a want of jurisdiction and negative the commission of any act of fraud or collusion.

[4, 5] Continuing the plaintiffs specify certain alleged errors and irregularities and matters which might have been set up in defense in the divorce action and claim to rely thereon. However, they have no right to do so. Hall v. Brittain, 171 Cal. 424, 153 P. 906; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Agoure v. Peck, 17 Cal. App. 759, 121 P. 706. As noted above the trial court in the instant case made a finding that the trial court in the divorce case had jurisdiction thereof and of all of the parties. The record in the divorce case does not show that the judgment or the order setting aside the final decree was void. It follows that any mere irregularities in the proceedings in the divorce case could be attacked only in the divorce action.

The plaintiffs cite Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, and then they say: "However, the supreme court, recognizing its duty in protecting parties litigant in just such a situation as was there presented, examined the evidence very carefully 'in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action,' and using its own judgment, decided that the evidence upon which the judgment was based was so inherently improbable that it constituted no evidence at all sufficient to support the judgment. That is exactly what we contend here. * * *" We have carefully read the statement. We find nothing in the record before us which warrants its application to the instant case.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

54 Cal.App.2d 730

ROMAN CATHOLIC BISHOP OF SAN DIEGO v. LAWRENCE et al.

Civ. 2980.

District Court of Appeal, Fourth District, California.

Oct. 5, 1942.

Hearing Denied Dec. 3, 1942.

1. Wills ⇐93

In action to quiet title to realty, evidence sustained finding that deed was executed and delivered to bishop by deceased with intent to make an immediate conveyance, and that deed was not understood merely as a testamentary disposition.

2. Deeds ⇐56(7)

The fact that, after execution and complete delivery of deed, grantee allowed deed to be returned to grantor and to remain in her custody, did not invalidate the deed, and did not necessarily negative the fact of intended execution and delivery.

3. Appeal and error ⇐1012(1)

In action by bishop to quiet title to realty which had been deeded to bishop by deceased to whom deed was returned, who was permitted to retain possession of realty after execution of deed, and who subsequently devised the realty to another, after apparently destroying the deed, presumption, if any, of undue influence because chaplain at hospital who called attorney who executed the deed was the deceased's spiritual adviser, was merely a matter to be weighed by the trial court.

4. Deeds ⇐211

Evidence *held* not to show that deed executed by deceased to bishop of church at time when she thought that she would soon die was invalid because of unfair dealing on ground that deed was executed to circumvent the provisions of the Probate Code restricting charitable bequests made within a certain time prior to death.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action to quiet title to realty by the Roman Catholic Bishop of San Diego (a corporation sole) against Norris B. Lawrence, as executor, and others. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Hert & Withington and Fred A. Wilson, all of San Francisco, for appellants.

Charleville & Weddell and Martin J. Coughlin, all of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This in an action to quiet title to certain real property which had been deeded to the plaintiff by May Adeline Driscoll, but which in a later will Mrs. Driscoll left to the defendant, Mrs. Dewey Smart. The property in question is a duplex house in Colton, one part of which Mrs. Driscoll occupied as a home and the other part of which she rented. The court found in all respects in favor of the plaintiff and the defendants have appealed.

On August 5, 1938, Mrs. Driscoll, who was then 61 years of age, came to St. Bernardine's Hospital in San Bernardino suffering from a heart attack, to which malady she had been subject for some years. It appears, without conflict, that while she was physically very ill she was mentally alert and that for several years she had intended to leave her home, the duplex, to the Catholic Church. On a number of occasions, over a period of two years, she had told two of her neighbors of this intention. Father Mathews, chaplain for the hospital, who had not previously known her, made a routine call upon her on the day she entered the hospital. During their conversation Mrs. Driscoll told him that she realized her days were numbered, that she wished to make a will, that she wished to leave the property she lived in for the benefit of the Colton parish, and that she wanted to remember certain of her friends with some cash. He told her that he would call an attorney to make out a will for her, which he did. This attorney first visited Mrs. Driscoll alone. She gave him instructions for drawing her will, telling him that she owned this duplex and had about $2,000 in the bank, that she had a brother in Ireland whom she had not heard from for many years, that she did not want him to have any of her property, that she wanted to leave $100 each to four of her neighbors who had been kind to her, that she wanted the parish in Colton to have her real estate,

the duplex property, and that she wanted any balance of her money to go to Father Mathews. At that time the attorney explained to her the probate provisions relative to charitable bequests and told her these restrictions might prevent the carrying out of her wishes with respect to her real property if she died within thirty days and partially prevent this if she died within six months. Mrs. Driscoll then said: "Well, I want the Church to have this property," and asked the attorney if there was any positive or sure way this could be accomplished. He told her it could be done by executing a deed to the property and explained to her that the effect of a deed would be an immediate conveyance of the property, passing title to the property at once, while a will would only take effect upon her death. She replied that she wanted the Church to have the property and instructed him to prepare such a deed and to prepare a will with reference to her personal property, her final instruction being: "Go ahead and make up the deed and the will."

The attorney called Father Mathews and explained to him the reason for making the deed and inquired as to the proper designation of the grantee in a deed to the Church. Thereupon, Father Mathews made a second call on Mrs. Driscoll and assured her that the bishop would not interfere with her staying in the home while she lived, and that she would be allowed to continue in possession of the property as long as she lived. Mrs. Driscoll then informed him that she wanted the Church to pay her funeral expenses so that this expense would not come out of her personal property, and Father Mathews agreed that this would be done. Father Mathews also testified that he assured her that the deed would not be recorded, although he was not certain whether that assurance was given at that time or on a later occasion.

On the next day, August 6, 1938, the deed to the duplex property which had been prepared by the attorney, and which named the plaintiff as grantee, was executed by Mrs. Driscoll in the presence of the attorney, a notary and two nurses. After the notary had placed the acknowledgment certificate thereon Mrs. Driscoll delivered the deed to the attorney and asked him to deliver it to Father Mathews. This he did, and Father Mathews, on the same day, mailed the deed to the bishop at San Diego. Immediately after the deed was executed the will disposing of her personal property was signed by Mrs. Driscoll and two witnesses thereto. Mrs. Driscoll retained the original will and the attorney kept a copy. Two days later, Mrs. Driscoll was sufficiently recovered to return to her home. Shortly thereafter, Father Mathews delivered to her a letter from the bishop thanking her for the property. At the request of the bishop, Father Mathews then asked her whether or not she desired the Church to take care of the taxes and insurance on the property. Mrs. Driscoll replied that these were paid up to date and that she would take the rent from the other part of the duplex and take care of these things in the future. Shortly after her return from the hospital, on separate occasions, Mrs. Driscoll informed two of her neighbors that she had deeded her property to the Catholic Church and that she had also made a will in which she had remembered them. One of these witnesses testified that Mrs. Driscoll also told her that she did not want anyone to know she had deeded the property to the Church and that she further stated that "she had deeded the place to the Catholic Church, but she was going to ask for the deed, but she was going to let it stand as it was, but she only wanted the deed of her property."

On October 17, 1938, the attorney who had prepared the deed and the will called at Mrs. Driscoll's home and she paid him for his services and expressed no dissatisfaction with what had been done. Some time in November, 1938, Mrs. Driscoll called Father Mathews, who came to her home. She then told him that some of her neighbors had said that the bishop had recorded the deed and was going to throw her out on the street. He testified that she was quite disturbed, not about the deed but about "the fact she was going to be thrown out on the street," that he assured her that this was not so, and she replied: "I will take your word for it." He then testified that to make doubly sure he told her that he would ask the bishop to send him the deed so he could show it to her "to put her mind at rest about being thrown out of her property"; that shortly thereafter he got the deed from the bishop; that he took the deed to her home and asked her to observe that it had not been recorded; that he then said: "I will leave it with you now and keep it safe because it is a very important document"; that

she replied: "You know, Father, I want the Church to have the property"; and that he left the deed with her and had never seen it since.

On November 30, 1939, Mrs. Driscoll suffered a stroke of paralysis and was taken to the Loma Linda Hospital. The next day, her doctor asked Mrs. Smart, who had been a friend of Mrs. Driscoll's, whether Mrs. Driscoll had sufficient money to pay her hospital expenses. At that time Mrs. Driscoll was paralyzed and was unable to talk, and Mrs. Smart knew nothing of her business affairs. Mrs. Smart took a man with her and went to Mrs. Driscoll's home to look for a will and any papers which might indicate whether she had any money. She found nothing in Mrs. Driscoll's desk, but in a dresser drawer she found two bank books, a receptacle containing documents, and the will which Mrs. Driscoll had executed on August 6, 1938, which had been torn in a number of pieces. She testified that she put the will together on the bed but that she did not examine the receptacle containing documents because the bank books gave her the information she wanted, that she took the receptacle containing the documents to a bank and left it there, that she then showed the mutilated will to the doctor, that she then called another attorney and asked him to come to the hospital, that she then gave him this mutilated will, and that after Mrs. Driscoll's death she got the documents from the bank and gave them to the executor, without examining them. Mrs. Driscoll died on December 6, 1939. At some time after November 30, 1939, she executed a will leaving this real property to Mrs. Smart, but it does not appear just when this will was executed or how much her condition had improved after December 1, when she was unable to talk.

It appears from the mutilated will, as pieced together, that on October 12, 1938, Mrs. Driscoll made some alterations and changes thereon with a pencil. In this manner she changed the provision referring to her brother by giving him $500. She struck out the provision giving $100 to one of her friends and she crossed out the provisions giving the residue of her estate to Father Mathews and appointing him as executor. It is significant, however, that she made no change in the provision which stated that she had made arrangements for the payment of funeral expenses "from other sources than from the properties herein bequeathed" and she made no change in the provision "I declare that the only property I have and own is personal property consisting principally of cash," and no provision was added disposing of her home place.

[1] The appellants contend that the finding that this deed was executed and delivered to the respondent is not supported by and is contrary to the evidence. It is first argued that Mrs. Driscoll was, or thought she was, on her deathbed, that she had already formed a testamentary plan and fixed the method of its accomplishment and that the change in this method was proposed by the attorney, and that the evidence conclusively establishes that she did not understand she was making or intend to make an immediate conveyance to the respondent, but rather understood and intended the deed as a part of the testamentary disposition of her property. If we assume that a part of the evidence and certain inferences which might be drawn would have supported such a conclusion the question was one of fact for the court and the evidence sufficiently supports the findings made in this regard. The evidence of several witnesses discloses that before the execution of the deed the reasons for the use of such a form of conveyance was carefully and fully explained to her; that she chose to adopt that procedure rather than to follow her original intention of disposing of all of her property through a will; that the difference in the effect of a deed and a will with respect to one taking effect and passing title immediately and the other taking effect only upon her death was fully explained to her; that she understood this difference and chose to convey the real property by deed because she wanted to make certain that the Church would have the property; that she spoke of both a deed and a will in a manner indicating that she knew the difference between them; and that while she retained the will she directed that the deed be delivered to Father Mathews.

[2] It also appears that she later disclosed a full understanding of what she had done by telling two of her friends that she had deeded the real property to the Church and had also made a will disposing of her personal property, that in the sixteen months which followed she did not express dissatisfaction with what she had done, that during that time she did nothing

and said nothing which was inconsistent with the fact that she had deeded the real property to the respondent, and that she did nothing to indicate any lack of understanding as to what she had done, at least until she executed a new will upon her deathbed. In that connection, while it appears that the will then executed was admitted to probate the record now before us discloses nothing further as to her mental condition at that time than the fact that on the morning of December 1, 1939, she was paralyzed and unable to speak and unable to convey any information to Mrs. Smart, and that Mrs. Smart called another attorney when she first returned to the hospital after finding the mutilated will and other papers. The evidence discloses a rather complete case of an execution and delivery of the deed with a full understanding on the part of Mrs. Driscoll as to what she was doing and the effect of the instrument, and there is nothing in connection with the incident, as a result of which the deed was later left in her custody which would compel a conclusion contrary to that reached by the trial court. The fact that after execution and delivery the grantee allowed the deed to be returned to her and to remain in her custody would not invalidate the deed and does not necessarily negative the fact of an intended execution and delivery. Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507.

The appellants further argue that there was no delivery of this deed because both parties believed that it would not be effective until it was recorded, citing Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A.L.R. 734, and Kenney v. Parks, 137 Cal. 527, 70 P. 556. No such situation here appears. We can find no evidence that Mrs. Driscoll asked that this deed be not recorded or that she believed that it would be ineffective until it was recorded. She had been told that it would take effect and pass title immediately and she had changed her testamentary plan and adopted the procedure of a deed with that end in view. Father Mathews had told her that it would not be recorded and that she did not wish it to be recorded may be inferred from the fact that she asked one of her neighbors, after telling her of the execution of the deed, to keep the matter a secret. When she called Father Mathews in November, 1938, she was disturbed and expressed concern over the rumor that she was to be put out on the street rather than with whether or not the deed had been recorded. There is nothing in this evidence which necessarily indicates belief or intention, even on the part of Mrs. Driscoll, that the deed was to remain ineffective until it was recorded. Knudson v. Adams, 137 Cal.App. 261, 30 P.2d 608; Stewart v. Silva, 192 Cal. 405, 221 P. 191; McCully v. McArthur, 187 Cal. 194, 201 P. 323.

[3] It is further argued that there is a presumption that this deed was obtained through undue influence because of the asserted fact that Father Mathews was at the time acting as Mrs. Driscoll's spiritual adviser, and because she had no independent advice. In the latter connection, it is argued that the attorney who drew the deed was merely a scrivener and not acting as her attorney. It does appear that this attorney acted as something more than a scrivener. He first explained to her the possibility that her wishes would not be carried out by the will, which she contemplated, and when she asked him if there was any sure and certain way to accomplish the purpose she had in mind he suggested the deed with respect to the real property and explained the difference between the effect and operation of a deed and a will. It would serve no useful purpose to consider in detail this matter of undue influence and the exact position occupied by Father Mathews in connection with the making of this deed. He had never met Mrs. Driscoll before and while he called an attorney at her request he took no part in the actual execution of the deed and but a small part in the events leading up to it. Mrs. Driscoll had some independent advice, and if any presumption of undue influence was present the effect thereof was a matter to be weighed by the trial court as a part of the questions of fact presented.

[4] It is further argued, in connection with the question of undue influence, that the respondent failed to meet the burden resting upon it of affirmatively establishing by clear and convincing evidence that Mrs. Driscoll fully understood and comprehended the effect and result of the instrument. This is sufficiently covered by what we have already said in connection with the first point raised. It is further argued that where such a presumption of undue influence appears the grantee must also establish fairness in dealing and that no such fairness appears because Mrs. Driscoll was

induced to evade the law by thus attempting to circumvent and escape the effect of the provisions of the Probate Code, sec. 40 et seq., restricting charitable bequests made within a certain time prior to death. So far as we are advised, there is no law against conveying property by deed under the circumstances which here appear and nothing in the evidence compels a conclusion that there was such an evasion of law as would constitute any unfair dealing.

In our opinion, the entire question was one of fact for the trial court and the evidence is sufficient to sustain the findings made.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



54 Cal.App.2d 795

DEARY v. SHIELDS, Judge of Superior Court.

Civ. 6898.

District Court of Appeal, Third District, California.

Oct. 13, 1942.

1. Appeal and error ⇐933(5)

Where trial court assumed that affidavits filed in connection with motion for new trial were formally presented for consideration on the motion, the reviewing court would assume that all material portions of the affidavits were read and considered by the trial court.

2. Affidavits ⇐18

The mere filing of an affidavit with the clerk is not the presentation to the court of any of the matters contained therein.

3. Trial ⇐377(1)

Where document is received in evidence before judge sitting without jury, it is not necessary that it shall be read in open court in its entirety, and, if adverse counsel desires any omitted portion to be read to the judge, it is his duty to read it or to call the judge's attention to the omitted portion.

4. Appeal and error ⇐933(5)

A presumption exists that trial court will read and consider all material evidence which is introduced as or assumed to be a part of the record.

5. Appeal and error ⇐528(4), 612(1)

Where motion for new trial was heard on affidavits which were assumed by trial court to have been formally presented in evidence and no oral evidence was introduced, the affidavits were properly a part of the "record" on the motion, and trial judge had duty to certify to correctness of the proceedings on the motion, including the affidavits, as against contention that a settled bill of exceptions of the proceedings was necessary. Code Civ.Proc. § 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

6. Appeal and error ⇐612(1), 706(4).

Where no oral evidence was presented at hearing on motion for new trial and motion was heard on affidavits only, that trial court in passing on motion commented on evidence adduced at trial on merits or referred to documents included therein did not require settlement of bill of exceptions of entire trial to be presented on motion for new trial, and did not relieve trial court of duty to certify to the proceedings on motion for new trial. Code Civ.Proc. § 953a.

7. New trial ⇐157

In absence of presentation of evidence to court on motion for new trial, the evidence was not before the court, and, in considering motion, the court was confined to record actually presented at the hearing.

Original mandamus proceeding by Roy G. Deary, as the real party in interest representing the Hires Bottling Company, against the Honorable Peter J. Shields, as Judge of the Superior Court of Sacramento County, to require the judge to certify to the clerk's transcript of judgment roll and proceedings in a certain suit, at the trial of which the judge presided, including proceedings which occurred on motion for new trial.

Demurrer to writ overruled and writ granted and trial judge directed to cer-

tify as correct and to authenticate certain affidavits and proceedings on motion for new trial.

Downey, Brand & Seymour and Frederic R. Pierce, all of Sacramento, for petitioner.

W. H. Metson, P. H. McCarthy, Jr., and F. Nason O'Hara, all of San Francisco, for respondent.

THOMPSON, Justice.

Roy G. Deary, as the real party in interest representing the Hires Bottling Company, by means of a writ of mandamus seeks to require the trial judge of the Superior Court of Sacramento County, who presided at the trial of a suit therein entitled "Montaldo, et al. v. Hires Bottling Company" to certify to the clerk's transcript of the judgment roll and proceedings in said cause, including those which occurred on motion for a new trial, as provided by section 953a of the Code of Civil Procedure, pursuant to which an appeal was sought to be perfected.

The respondent, as judge of the Superior Court of Sacramento County, tried the cause previously referred to without a jury. Findings were adopted favorable to the plaintiff, and a judgment was accordingly rendered against the Hires Bottling Company. The defendant moved for a new trial on the grounds of alleged errors of law and newly-discovered evidence. The motion was presented solely on the record of the judgment roll and upon two affidavits in behalf of the defendant, and one counter affidavit for the plaintiff, together with the minutes of that proceeding. No oral evidence was adduced upon that hearing. The motion for new trial was denied. Notice of appeal was duly served and filed. Notice for the preparation and presenting of a clerk's transcript on appeal, as provided by section 953a of the Code of Civil Procedure, was duly served. That notice requested the clerk to include in his transcript the judgment roll as defined by section 670 of the same code and, "In addition thereto, a copy of all pleadings, papers, records, files, orders and all proceedings taken on motion for a new trial and on motion to vacate judgment and all matters to which same relate, for use on appeal from said judgment."

The clerk's transcript was so prepared as directed and duly certified by the clerk. It contains the affidavits on motion for new trial. Notice was served upon "the attorneys appearing in the cause" of the filing and time set for presenting said transcript to the trial judge for approval, as required by the statute. At that hearing the plaintiffs made no application to include in the clerk's transcript any other "papers, files, documents, records and proceedings", as they were permitted to do, under the provisions of the second paragraph from the end of section 953a. The trial judge thereupon certified to the correctness of the judgment roll, but refused to certify to the proceedings on the motion for new trial, on the apparent assumption that it was necessary to present the proceedings on motion for new trial by means of a settled bill of exceptions.

This petition for a writ of mandamus was then filed in this court to require the trial judge to certify to the proceedings on motion for new trial. The petition alleges the foregoing facts and recites that the motion for new trial was presented and heard upon affidavits only; that no stenographic reporter was present at that hearing, but that there was no occasion for the presence of a reporter since the motion was heard without additional oral evidence. To the petition for a writ of mandamus the respondent filed a demurrer and an answer. The demurrer merely asserts that the petition fails to state facts sufficient to warrant the issuance of the writ. The answer admits substantially all of the alleged material allegations of the petition. The answer concedes that "No additional oral evidence was taken upon said proceedings on the motion for a new trial". The answer also refers to the clerk's proposed transcript, which includes the affidavits and proceedings on motion for the new trial. By stipulation that transcript is before us for consideration on this petition for a writ of mandamus.

The real issue which is involved in this petition is whether a trial judge is required by section 953a of the Code of Civil Procedure to certify to the proceedings on motion for new trial, which are included in a clerk's transcript on appeal, when the motion for new trial is heard on affidavits only and no oral evidence is adduced, in the absence of a settled bill of exceptions of the proceedings on that motion.

The respondent admits that no oral evidence was adduced on the motion for new trial, but insists that a settled bill of exceptions of that proceeding is necessary

for the reason that the affidavits were not actually received or entirely read in evidence and because, in commenting upon the motion, the trial judge referred to oral testimony and to some documents which he had received in evidence upon the trial of the merits of that cause.

We must assume that the affidavits were fully considered by the court on the motion for new trial. They were actually filed in that proceeding and adverse counsel were notified they would be used on that hearing. In denying the motion for new trial, the trial judge said regarding those affidavits:

"No oral testimony was offered on the hearing of the motion and the three affidavits filed in the matter were not read in their entirety nor formally offered in evidence. In the circumstances of the case however they were before the court and assumed to have been received in evidence and herein they will be regarded as having been so."

[1, 2] From the foregoing it is apparent that the court assumed that the affidavits were formally presented for consideration of the court on the motion for new trial. We assume that all material portions of the affidavits were read and considered by the court. As the court says in People v. Thompson, 5 Cal.App.2d 655, at page 658, 43 P.2d 600, at page 601: "The mere filing of an affidavit, with the clerk, is not the presentation to the court of any of the matters contained therein."

[3-5] In Hurley v. Lake County, 113 Cal.App. 291, 298 P. 123, it was said that the mere filing of an affidavit in an action without the introduction of the document as testimony, or calling the attention of the court thereto, is insufficient. But in the case to which we have last referred it is clear, as the court specifically states, that the affidavit was neither presented to the court nor read in evidence. In the present case, however, both the trial judge and the attorneys assumed that the affidavits were presented to the court at the hearing for the consideration of the judge. The judge so states. In fact, those affidavits were read in the presence of the court, although not "in their entirety". That very fact shows that they were intended to be, and actually were, considered to have been received in evidence. When a document is received in evidence before a judge sitting without a jury it is not necessary that it shall be read in open court in its entirety. If adverse counsel desires any omitted portion to be read to the judge, it is his duty to either read it or to call the court's attention to the omitted portion. It will be presumed the trial judge will read and consider all material evidence which is introduced as or assumed to be a part of the record. We must presume the judge did so in the present case. There is no real merit in the contention that the affidavits are not a proper part of the record on the motion for new trial.

[6, 7] The fact that the court in passing upon the motion for new trial may have commented on the evidence adduced at the trial of the merits of the cause, or that he referred to documents included therein, does not require the settlement of a bill of exceptions of the entire trial to be presented upon the motion for new trial. Such comments were harmless. The evidence adduced at the trial on its merits was not offered or received in evidence upon hearing of the motion for new trial. In the absence of a presentation of that evidence to the court on the motion for new trial, it was not before the court on the motion. In considering the motion for new trial, the judge is confined to the record actually presented at that hearing. That rule prevailed under the old system. In Cole v. Wilcox, 99 Cal. 549, at page 552, 34 P. 114, at page 115, the court said in that regard: "When the motion for a new trial came on to be heard, the court, in its action thereon, was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement for the purpose of determining whether the new trial should be granted or refused."

We are of the opinion it was the duty of the trial judge to certify to the correctness of the three affidavits which were included in the clerk's transcript and which were considered on the motion for new trial, together with the minutes of that proceeding. It is conceded no oral evidence was adduced at that hearing and there appears to have been no occasion for the presence of a stenographic reporter. No bill of exceptions was required.

Section 953a of the Code of Civil Procedure provides for a method of preparing

an authorized record on appeal "in lieu of * * * a bill of exceptions", including "all proceedings taken on motion for a new trial". The clerk's transcript appears to conform to the requirements of that section in every necessary particular. It is not contended that any proposed amendments or additions thereto were offered by the plaintiffs at the hearing, or otherwise. The plaintiffs had an opportunity to offer any further competent court minutes or records to be included in the transcript. None were offered. The next to the last paragraph of section 953a provides in that regard: "The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause, including the proceedings on motion for a new trial, as they then desire to have incorporated therein, and the said papers, files, documents, records and proceedings shall when so incorporated be deemed fully authentic for use on said appeal."

Section 953a requires the trial judge, before whom such a record is presented, to "certify to the truth and correctness of said transcript."

Almost the exact question which is involved on this proceeding was determined adversely to the contention of the respondent here in Pierce v. Works, 171 Cal. 684, 154 P. 852, 853. That was also a petition for mandate to compel the trial judge to certify to the clerk's transcript prepared under section 953a, supra, on appeal from an order granting a motion for change of venue. The judge refused to so certify upon his assertion that "it is not such a statement or transcript as is contemplated by section 953a, Code of Civil Procedure". The answer alleged and the respondent contended that the proposed transcript did not contain "the statements of the court [made] at the hearing of the motion". The Supreme Court granted the writ of mandamus and directed the trial judge to certify to the clerk's transcript, saying in part:

"The remaining question * * * is whether the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure, providing a record on appeal in lieu of the ordinary bill of exceptions, authorize such a record in a matter like the one here involved, *when the proceedings at the hearing have not been taken down by a stenographic reporter,* and the evidence submitted to the court consisted entirely of the files and records of the action.

"The order appealed from is, of course, one not included in a judgment roll. * * * Section 953a purports to provide a method of preparation of record to which a party appealing 'from any judgment, order or decree of the superior court' may resort 'in lieu of preparing and settling a bill of exceptions,' and under which, of course, he may bring to the appellate court anything he might properly include in a bill of exceptions. It is true, of course, that as to parol evidence, and as to writings merely offered or received in evidence at a trial, as distinguished from papers, records, and files in the cause, the section contemplates that there shall have been a phonographic report of the proceedings. * * * But, if there was no such evidence to report, and consequently no office for a stenographic reporter to perform, if the only matters considered on the hearing of the motion were the pleadings, papers, records, and files in the cause, *as is always the case on a motion heard and determined solely on affidavits and the records and files of the action,* we can see no reason why it should not be held that section 953a fully covers the matter. * * *

"We can conceive of no possible reason why such a transcript may not consist exclusively of such papers, authenticated by the judge, in a case where the same constitute all the matters material to a proper determination of the appeal. The mere fact that there was no office for a stenographer to perform at the hearing of the motion, and that consequently there was no stenographic reporter present, certainly should not be held to preclude the bringing to an appellate court in this way of all papers, records, and files essential to a proper determination of the appeal, where the statute authorizes, as we must hold it does, the inclusion of the same in such a transcript." (Italics ours.)

The rule announced in the foregoing case, from which we have quoted, is approved in Lake v. Harris, 198 Cal. 85, 243 P. 417.

We are satisfied the petitioner is entitled to have the trial court certify to the correctness of the affidavits and court records of the proceedings on motion for new trial which are contained in the clerk's transcript of that proceeding for use on an appeal. That transcript appears to contain all of the affidavits and proceedings

necessary for a presentation to a reviewing court of such appeal.

The demurrer is overruled.

The writ is granted and the trial judge is directed to certify as correct and to authenticate the three affidavits and the proceedings on motion for a new trial, which are contained in the clerk's transcript, to be used on appeal.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.



54 Cal.App.2d 764

PEOPLE v. KEILLY.

Cr. 2234.

District Court of Appeal, First District, Division 2, California.

Oct. 8, 1942.

Hearing Denied Nov. 5, 1942.

1. Criminal law ⇐824(4)

Trial court's failure of its own motion to specially instruct on claimed defense of alibi, in absence of any request by defendant for such instructions, did not constitute prejudicial error.

2. Robbery ⇐24(3)

Evidence as to defendant's identification was sufficient to support conviction on two counts of robbery in the first degree, where victims of alleged robbery each testified clearly to facts identifying defendant.

3. Criminal law ⇐1202(1)

The word "term", as used in section of Penal Code defining an habitual criminal as one who has been twice previously convicted and served separate terms, would not be construed as applying to only such prior convictions the terms of which had been wholly served, and hence fact that defendant committed crime for which he was to be sentenced as an habitual criminal while on parole from one of prior convictions and before his term for such conviction had been completed would not prevent defendant from being adjudged an habitual criminal Pen.Code, § 644(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Term".

4. Constitutional law ⇐42

Before anyone may be heard to claim that a purported statute is invalid, he must first show that statute purports to interfere with at least some one of his rights.

5. Constitutional law ⇐42

Where defendant who was adjudged an habitual criminal failed to apply for relief as authorized under habitual criminal statute, defendant could not claim that habitual criminal statute was void on its face. Pen.Code, § 644(a–c).

6. Constitutional law ⇐47

Where defendant who was adjudged an habitual criminal claimed habitual criminal statute was unconstitutional because it permitted unjust discriminations in its administration, defendant could not bring into court certain judgments for purpose of showing how statute was administered, but District Court of Appeal, in passing on constitutionality of statute, was required to confine itself to an examination of statute as enrolled. Pen.Code, § 644(a–c).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

John F. Keilly was convicted on two counts of robbery in the first degree, and he appeals.

Affirmed.

John F. Keilly in pro per., for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

Appellant, John F. Keilly, was tried by a jury and convicted on two counts of robbery in the first degree committed on the 12th day of April, 1941, as alleged in an information filed by the District Attorney of Alameda County; the first count charged him with robbing Mary Correia of the sum of $190, more or less, a number of fountain pens and a quantity of drugs, consisting of morphine and codeine, by the use of a deadly weapon, to wit, a pistol; the second count charged appellant with robbing Herman Correia, the husband of Mary Correia, at the same time and place, of a pocket watch, a wrist watch, a dia-

mond ring and an Elk's tooth, by the use of said deadly weapon.

The information further charged appellant with two prior felony convictions alleging the service of sentences on both, the first, a burglary on the 29th day of September, 1924, and the second, robbery on the 11th day of August, 1930. The jury also found the two prior convictions were true, as alleged in the information.

Upon denial of a motion for a new trial, appellant was sentenced to San Quentin Penitentiary for life, the term prescribed by law, as an habitual criminal. Notice of appeal was thereupon given by appellant from the judgment and the order denying his motion for a new trial.

Herman and Mary Correia, husband and wife, owned a drug store on Foothill Boulevard in Alameda County. On the night of April 12, 1941, at about the hour of 11 o'clock p. m., while they were closing their business for the night, Mary Correia was accosted at the front door of said drug store by an accomplice of appellant. She had opened the front door with the day's receipts in her purse; her husband had put out the lights in the rear room and was coming out of said room, when said accomplice thrust a gun against her ribs and said, "Where are you going, sister, you are not going home. You are going in the back room with me." He pushed her along towards the rear room with the gun at her back. Meanwhile, appellant had forced her husband, at the point of a gun, to return to said back room where, under cover of the gun of the accomplice, Herman and Mary Correia were bound, hand and foot, by appellant. She was pushed or thrown into a chair, her husband was forced to turn his face to the wall. Appellant's accomplice took the day's receipts, about $175, from her bag, and the fountain pens; the appellant took all the morphine and codeine the Correias had in stock, and the pocket and wrist watches of Herman Correia, his diamond ring and $45 or $50 from his wallet; the appellant was a drug addict.

[1] As recited above the appellant entered a plea of not guilty to the charge of robbery and denied both of the prior convictions. No other issue was presented by the pleadings. During the trial the appellant took the stand as a witness in his own behalf. Among other things he testified that at the time of the robbery he was, and for some time prior thereto had been, at Reno, Nevada. At the close of the trial the prosecution and the defense stipulated that the trial court might give oral instructions. It did so, but it did not specially instruct on the claimed defense of an alibi. The appellant does not claim that he requested and the trial court refused to give such an instruction, but he claims the trial court committed prejudicial error in failing of its own motion to give such instructions. We find no merit in that claim. In re Durand, 6 Cal.App.2d 69, 44 P.2d 367; People v. Black, 45 Cal.App.2d 87, 96, 113 P.2d 746; People v. Scofield, 203 Cal. 703, 709, 265 P. 914.

[2] In his next point the defendant asserts that the verdict is contrary to law and the evidence. In support of that assertion he claims that the evidence as to his identification was insufficient. That claim also is not sustained by the record. The prosecution called both Mr. and Mrs. Correia, the owners and proprietors of the drug store. Each testified clearly to facts identifying the defendant. If the jury believed them, and from its verdict we must assume it did, there was sufficient evidence on the point in question to support the implied finding of the jury.

[3] The appellant contends that the trial court was without jurisdiction to adjudge the defendant an habitual criminal. That contention is based on these facts. The basic charge, robbery, was committed April 12, 1941. The first prior alleged against the appellant was a judgment rendered in Los Angeles County in 1924. The second was a judgment rendered in Alameda County in 1930. On the latter judgment the defendant was imprisoned in the prison at Folsom. He served part of his time, was paroled before the end of his term, and, while on parole, he committed the robbery of the drug store as hereinabove recited. Under these facts the appellant contends that it may not be said that he had, as to the judgments entered respectively in 1924 and 1930 "served separate terms" as provided in Penal Code, section 644. In other words, he contends said section should be so construed as to apply to only such prior convictions the terms of which have been fully and completely served. The first answer is the statute is not so worded. The second answer is that by its provisions the statute was enacted as a deterrent to the commission of crime and not as an inducement that an ex-con-

vict should commit his transgressions prior to the full expiration of his term, but not afterwards. The word "term" as used in said section, therefore, was not intended to have the broad meaning used and applicable to the "term" as fixed by the State Board of Prison Directors. People v. Carkeek, 35 Cal.App.2d 499, 502, 96 P.2d 132; Spivey v. McGilvray, 29 Cal.App.2d 357, 360, 84 P.2d 256. It will hardly be contended that the word "term" has exactly the same meaning in every section in the Penal Code wherein said word is used. Section 644 is almost wholly a new law specially applicable to habitual criminals. As such it should be construed.

[4, 5] Continuing the appellant claims that section 644 of the Penal Code is void on its face. We think the record does not present the point. The section is divided into several subdivisions. Subdivision (a) defines the law as to a defendant who has suffered two prior convictions. Subdivision (b) defines the law as to a defendant who has suffered three prior convictions. Then subdivision (c) provides: "Provided, however, that in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section or of Sections 3047 and 3048 of this code." The record does not show that the defendant ever applied for relief under subdivision (c) nor that any order was made denying him relief thereunder. But it is settled law that before any one may be heard to claim that a purported statute is invalid he must first show that it purports to interfere with at least some one of his rights. 5 Cal.Jur. 622, Constitutional Law, § 52; People v. Perry, 212 Cal. 186, 193, 298 P. 19, 76 A.L.R. 1331. That showing this appellant has not attempted to make.

[6] Finally it is claimed section 644 of the Penal Code is unconstitutional and void because it permits unjust and illegal discriminations in its administration material to their rights between persons in similar circumstances and conditions and standing in the same relation to the statute. Manifestly that does not appear on the face of the statute. It designates one rule as applicable to all who come within the same class. But, the appellant claims it is not so administered and he offers to prove the fact by bringing into court certain judgments. They may not be received by this court. We must confine our consideration to an examination of the statute as enrolled. County of Yolo v. Colgan, 132 Cal. 265, 64 P. 403, 84 Am.St.Rep. 41. Appellant cites and relies on Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. It is not in point. It was a proceeding in habeas corpus and specially pleaded the respective issues there ruled upon. See, also, In re Mooney, 10 Cal.2d 1, 16, 73 P.2d 554.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



54 Cal.App.2d 756

GILLIES et al. v. LA MESA LEMON GROVE AND SPRING VALLEY IRR. DIST. et al.

Civ. 2873.

District Court of Appeal, Fourth District, California.

Oct. 6, 1942.

Hearing Denied Dec. 3, 1942.

1. Waters and water courses ⇐257(1)

Where riparian owners seeking a mandatory injunction requiring defendant irrigation district to furnish water to owners' lands in accordance with rates fixed by contract, which had been assumed by a flume company and later by district's predecessor, alleged that predecessor was a public utility under rate fixing jurisdiction of Railroad Commission, which assumed jurisdiction and fixed rates in excess of those specified in contract against protests of owners and their predecessors, and district had succeeded to company's interest under commission's jurisdiction, owners could not rely on provisions of contract as against higher rates established by commission. St.1897, p. 254, as amended.

2. Waters and water courses ⇐257(1)

Where rates for furnishing water to riparian land as established in a contract could not be enforced between the parties because provisions of contract dealing with

rates had been superseded by rates established by Railroad Commission, violation of terms of contract concerning rates furnished no ground for an action for damages for breach of contract.

3. Action ⇐6

An "action for declaratory relief" lies when there is an actual bona fide dispute between the parties as to a legal obligation arising under circumstances specified in statute, and there must not only be a dispute between the parties but that controversy must be judicable and plaintiffs must show that the dispute presents a question to which there is more than one answer. Code Civ.Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Action for Declaratory Relief".

4. Action ⇐6

When the complaint in an action for declaratory relief with respect to a contract alleges no facts showing an enforceable contractual right in plaintiffs and only a judgment for defendants can be entered, there is no "judicable dispute" and the action will not lie. Code Civ.Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicable Dispute".

5. Action ⇐6

In action for declaratory relief with respect to a contract to furnish water to riparian land, allegations of complaint showing that plaintiffs based their claim to relief on a contract that had been superseded by orders of the Railroad Commission did not state a cause of action for declaratory relief. Code Civ.Proc. § 1060.

Appeal from Superior Court, San Diego County; Franklin G. West, Judge.

Suit by F. A. Graham Gillies and others against La Mesa, Lemon Grove and Spring Valley Irrigation District and others, for an injunction, declaratory relief, and damages for breach of contract. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Ward & Ward and Jesse George, all of San Diego, for appellants.

W. H. Jennings, of La Mesa, for respondents.

MARKS, Justice.

This is an action for an injunction, declaratory relief and damages for breach of contract. A demurrer to the complaint was sustained without leave to amend. This is an appeal taken from the judgment.

Plaintiffs are owners of land riparian to the San Diego River. The La Mesa, Lemon Grove and Spring Valley Irrigation District (hereinafter called the district) is an irrigation district organized under the California Irrigation District Act, approved March 31, 1897, St.1897, p. 254, as amended. The individual defendants are the directors of the district.

The complaint contains three counts. The first count seeks a mandatory injunction requiring the district to furnish and deliver to plaintiffs, on their lands, three miner's inches of water at an annual price and charge of $60 for each miner's inch. The second cause of action seeks damages for violation of contract to furnish and deliver the water at that price. The third cause of action is for declaratory relief. The allegations of the first cause of action are incorporated in the other causes of action by reference. We will therefore examine the allegations of the first cause of action in some detail.

It is alleged that F. A. Graham Gillies and J. T. Gillies (hereinafter referred to as Gillies Brothers) owned described land in El Cajon Valley in San Diego County; that Fred N. Patterson also owned described land in the same valley; that both tracts of land are outside of the boundaries of the district.

That there is attached and is appurtenant to the lands of Gillies Brothers two inches continuous flow of the waters of the San Diego River, and to the lands of Patterson one inch of that flow; that the district is obligated by contract to transport that water to the lands of plaintiffs for the consideration already mentioned.

That the San Diego River is an unnavigable stream about fifty-five miles long from its source to its mouth at the Pacific Ocean; that the city by reason of succession has the prior right to the flow of the river necessary for its municipal purposes; that if the waters of the river are properly developed, impounded and conserved the average annual flow of the river is "far in excess of the amount of water necessary to meet the present and reasonably future demands and needs of the said city of San Diego."

It is alleged that plaintiffs' water rights found their source in W. E. Robinson and his associates who, in 1885, filed on and appropriated approximately 21,000 miner's inches of the flow of the San Diego River, to be used on approximately 25,000 acres of the El Cajon Rancho in the El Cajon Valley; that in the same year Robinson and his associates entered into a contract with Henry B. Lockwood and his associates (the parties being the owners of the greater part of the 25,000 acres already mentioned and also the lands of the Ex Mission Rancho) whereby Robinson and his associates bound themselves to the other land owners to build, construct and operate in perpetuity the necessary dams, aqueducts and pipe lines to impound the waters and bring them on the lands in El Cajon Valley, including the lands of plaintiffs; that this contract was duly recorded; that the parties to that contract organized the San Diego Flume Company (hereafter called the Flume Company); that in 1886, Robinson and his associates assigned their rights to the Flume Company which assumed their obligations under the contract; that in 1889, the Flume Company completed and put into operation a system capable of delivering to the lands in El Cajon Valley, including the lands of plaintiffs, 5,000 miner's inches of water; that the Flume Company sold and conveyed to the owners of land in the El Cajon Valley and Ex Mission Rancho, including the predecessors in ownership of plaintiffs, various specified quantities of water which were attached to and made appurtenant to the various described parcels of land and which were to be delivered on those lands for the price of $60 per inch per year, payable in semi-annual instalments of $30 each; that this contract was duly recorded; that plaintiffs' water rights passed to them by mesne conveyance under this contract; that in 1910 the Flume Company sold all of its rights to James A. Murray and his associates, co-partners doing business under the name of Cuyamaca Water Company, who assumed the obligations of the Flume Company under its contract; that in June, 1925, the Railroad Commission of the state authorized the Cuyamaca Water Company to sell the water system and plant and the major portion of its utility properties to the district upon the condition that the district would continue to serve an adequate supply of water in quantities to which they were entitled at the date of sale, to consumers of the Cuyamaca Water Company, whose properties were outside of the boundaries of the district; that conveyances were made upon the conditions imposed by the Railroad Commission; that the district has recognized its obligation to furnish water to plaintiffs but has refused to furnish water in the amounts and at the rates provided in the contract of the Flume Company to the irreparable damage of the plaintiffs.

It is also alleged that the Cuyamaca Water Company, shortly after its purchase from the Flume Company, became a public utility subject to the jurisdiction of the Railroad Commission, which assumed jurisdiction over it and fixed rates and charges higher than those established in the contract of the property owners with the Flume Company "against the protest and objection of the said Fred N. Patterson and the predecessors in ownership of Gillies Brothers, plaintiffs herein."

In addition to the foregoing allegations, damages to Gillies Brothers in the sum of $52,000 and to Fred N. Patterson in the sum of $14,000 are alleged in the second cause of action, the damages being predicated on the breach of the Flume Company contract.

The third cause of action seeks declaratory relief in the controversy over the alleged obligations contained in the Flume Company contract.

A more complete statement of the facts, and reference to various proceedings before the Railroad Commission, may be found in the case of Brewer v. Railroad Commission, 190 Cal. 60, 210 P. 511, involving the same contract that is now before us.

It is clear that the principal question for decision is this: The plaintiffs having alleged in their complaint that the Cuyamaca Water Company was a public utility under the rate fixing jurisdiction of the Railroad Commission, which assumed jurisdiction and fixed rates in excess of those specified in the Flume Company contract against the protest and objection of Patterson and the predecessors in interest of Gillies Brothers, and the district having succeeded to the interest of the Flume Company under the jurisdiction of the Railroad Commission, can the plaintiffs rely on the provisions of the Flume Company contract as against the higher rates established by the Railroad Commission?

[1] This very question was answered in the negative in Brewer v. Railroad Com-

mission, 190 Cal. 60, 210 P. 511, and Id., 190 Cal. 85, 210 P. 521. The plaintiffs or their predecessors in interest may not have been parties to the Brewer case, still they have alleged that the Cuyamaca Water Company, the predecessor of the district, was a public utility under the jurisdiction of the Railroad Commission which fixed rates in derogation of those fixed in the Flume Company contract over their protest and objection or the protest and objection of their predecessors in interest. These allegations bring the case within the principle upon which the decision in Brewer v. Railroad Commission, supra, is based, and plaintiffs may not now rely upon the Flume Company contract as against the higher rates fixed and established by the order of the Railroad Commission. They cannot attack the formal order of the commission in this manner in the superior court.

A case factually similar to the instant case is Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 53 P.2d 929, 938. There the plaintiff had a contract for conveyance of its waters through the system owned and operated by the defendant, a public utility, at a price much less than the rates subsequently fixed by the commission. In holding that the plaintiff could not attempt, in an action in the superior court, to enforce the provisions of its contract as against the rates established by the commission, the Supreme Court said: "Assuming that the plaintiff is correct and that this court cannot take judicial notice of the 1929 order above referred to, it still affirmatively appears from the record that the commission, with full knowledge of the claimed rights of plaintiff, has made at least two orders fixing rates for the service rendered plaintiff by defendant. It does not appear that these orders are void on the face thereof. Under such circumstances, the trial court had no jurisdiction directly or indirectly to overrule an order of the Railroad Commission. The power to reverse, review, correct, or annul orders of that commission rests solely in the Supreme Court (section 67 of the Public Utilities Act, supra) and the superior court is without jurisdiction in the premises. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann. Cas.1915C, 822; Truck Owners, etc., Inc., v. Superior Court, 194 Cal. 146, 228 P. 19; Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249; People v. Hadley, 66 Cal.App. 370, 226 P. 836."

It follows that the first cause of action, which attempts, in an action in the superior court, to enforce the provisions of the Flume Company contract as against the subsequent orders of the Railroad Commission and thereby to nullify its orders, fails to state a cause of action.

[2] The action for damages was based on a violation of the terms of the Flume Company contract which had been superseded by the rates established by the commission. As the rates established in the contract cannot be enforced between the parties it follows that violation of the terms of that contract can furnish no ground for an action for damages.

The question presented under the third cause of action seeking declaratory relief is somewhat different but we believe its answer is equally simple.

[3, 4] An action for declaratory relief lies when there is an actual bona fide dispute between the parties as to a legal obligation arising under the circumstances specified in section 1060 of the Code of Civil Procedure. There must not only be a dispute between the parties but that controversy must be judicable. The plaintiffs must show that the dispute presents a question to which there is more than one answer. When the complaint alleges no facts showing an enforceable contractual right in the plaintiffs, and only a judgment for defendants can be entered, there is no judicable dispute and the action will not lie. Merkley v. Merkley, 12 Cal.2d 543, 86 P.2d 89.

[5] We have such a situation here. Plaintiffs base their claim to this relief on a contract that has been superseded by orders of the Railroad Commission. They have brought their action in a court that can grant them no relief. The third cause of action in seeking a determination of rights under a contract that has been superseded by orders of the Railroad Commission, fails to allege facts sufficient to state a cause of action for declaratory relief.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

CONTRERAS et al. v. GUMMIG.

Civ. 13077.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1942.

Hearing Denied Nov. 12, 1942.

1. Appeal and error ⇐927(7)

On review of directed verdict for defendant in malpractice action against physician, inconsistent testimony was required to be viewed most favorably to plaintiff.

2. Physicians and surgeons ⇐16

In malpractice action against physician for death of patient from myocarditis after nasal hemorrhage for which physician treated patient, where cause of death was definitely fixed as being excessive bleeding, negligence of physician which did not result in bleeding could not be regarded as "proximate cause" of patient's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Physicians and surgeons ⇐18(9)

In malpractice action against physician for death of patient from myocarditis after nasal hemorrhage for which physician treated patient, where jury might have resolved conflicting evidence as to continuance of bleeding after last packing in favor of plaintiff's contention, directed verdict for physician was error.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 129 P.2d 18.

Walter Powers and Stephen Monteleone, both of Los Angeles, for plaintiffs-appellants.

W. I. Gilbert, Jr., of Los Angeles, for defendant-respondent.

PER CURIAM.

[1-3] The respondent, in his petition for rehearing, asserts that "the evidence is, however, precisely to the effect that no such additional bleeding occurred" after the last packing of Contreras' nostrils, and contends that, in the absence of such evidence, any negligence of which respondent may have been guilty in making that packing is not shown to have been the proximate cause of Contreras' death. In this case, however, there was sufficient evidence of negligence resulting in bleeding, irrespective of the last packing, to require a submission of the case to the jury. In support of his statement that "no such additional bleeding occurred," respondent refers to testimony of Contreras' cellmate as follows:

"Q. Did you see any blood on him or around him at that time [referring to the time after the last packing when the cellmate awoke and Contreras was dead]? A. No." (Tr. p. 35.)

It is true that he did so testify, but it is also true that prior thereto he testified as follows:

"A. I know that they took him to the hospital down below, and I went to sleep. I don't remember when they returned him.

"Q. Did you wake up and see Contreras afterward? A. Yes." (Tr. p. 28.)

"Q. By Mr. Monteleone: Now, did you observe his appearance at that time [referring to the time after he was taken to the hospital] when you woke up? A. Yes.

"Q. Describe what his appearance was as you observed it? A. He was standing up like this (indicating), and he had very much blood on his face, along here (indicating).

"Q. You say his hand was this way (indicating), did he have anything—were his hands tied? A. Yes.

"Q. Did you see what it was tied with? A. With manacles." (Tr. pp. 29, 30.)

Contreras was taken to the hospital from jail only one time and that was when the last packing was made. The manacles were on Contreras only after he returned to jail after the last packing. A jailer testified that the handcuffs were put on Contreras after he was "brought back up" from the hospital. (Tr. p. 90.) It therefore appears that after the last packing there was testimony that Contreras "had very much blood on his face." The reference by respondent to testimony that the cellmate did not see any blood on Contreras after the last packing, and the reference herein to the further testimony that he did see blood on Contreras' face after the last packing are, obviously, inconsistent. The court is required, however,

to adopt the view most favorable to plaintiffs, which is that blood was on Contreras' face after the last packing. Of course, in a case like this, where the cause of death is definitely fixed as being excessive bleeding, negligence of the attending physician which does not result in bleeding cannot be regarded as a proximate cause of death and proof that it did so result is part of the burden cast on plaintiff. The jury might, however, have resolved the conflict in the evidence above quoted favorably to plaintiff and found that there was bleeding after the last packing.

The petition for rehearing is denied.

SCHAUER, P. J., PARKER WOOD, J., and SHAW, Justice pro tem., concur.



54 Cal.App.2d 743

TALCOTT v. TALCOTT.

Civ. 12033.

District Court of Appeal, First District, Division 1, California.

Oct. 6, 1942.

1. Powers ⇐30

Codal provision that where "power" is vested in several persons all must unite in its execution, but in case any one or more of them is dead, the power may be executed by the survivor or survivors unless otherwise prescribed by the terms of the power, means any power including the power to consent as well as the power to alienate or transfer. Civ.Code, § 860.

See Words and Phrases, Permanent Edition, for all other definitions of "Power".

2. Powers ⇐30

The common-law rule that where a power of sale is to be executed with the consent of third persons, the death of one of the consentors before consent is given completely nullifies the power of sale is not absolute, but where from the terms of will and the circumstances of the parties it may be gathered that it was the intent of the testator to continue the power, rendering possible the performance of the terms and conditions of the will, the death of one or more of those whose consent was required does not terminate the power of sale.

3. Powers ⇐30

The codal provision that where a power is vested in several persons all must unite in its execution, but in case any one or more of them is dead the power may be executed by the survivor or survivors unless otherwise prescribed by the terms of the power, supersedes the common-law rule. Civ.Code, § 860.

4. Action ⇐6

Where parties had disagreed about power of plaintiff to sell property without consent of others, an "actual controversy" existed within codal provision providing for suit for declaratory relief, notwithstanding there was no ambiguity in the decree of distribution which plaintiff sought to have construed. Civ.Code, § 860; Code Civ. Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

5. Powers ⇐30

Where agreement between beneficiaries of trust provided that corpus of trust should be distributed to mother of the two other beneficiaries with power to sell on consent of such other beneficiaries and the property was so distributed, and one of the beneficiaries thereafter died and was survived by widow, the mother had power to sell the real property involved, with consent of surviving son. Civ.Code, § 860.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Minnie D. Talcott against Veronica Talcott and others for the purpose of having it judicially determined that plaintiff was vested with power to make sale of certain real estate without the consent of a surviving son, or if he should predecease her without the consent of any one. From a judgment for plaintiff, the named defendant appeals.

Judgment affirmed.

Leon U. Everhart, of Pasadena, for appellant.

McEachern & Ritchie, of Pasadena, for respondent.

KNIGHT, Justice.

This appeal involves the question of the power of the plaintiff and respondent, derived from the terms of a written agreement and a final decree of distribution, to sell the property distributed to her by said decree.

The decedent, Charles M. Talcott, died testate on March 7, 1935. He was survived by a widow, Minnie D. Talcott, the plaintiff and respondent, and two married sons, Vaughan and Thaddeus Talcott. After making several specific bequests, the testator bequeathed his estate to the First Trust and Savings Bank of Pasadena in trust with directions to pay the net income therefrom to his widow during her lifetime, and upon her death to divide and pay over the estate in equal shares, to the two sons; and the bank as such trustee was given full power and authority to hold, use, manage, sell, invest and reinvest the property of the estate. The bank declined to serve as trustee, whereupon the widow and her two sons entered into a written agreement authorizing and requesting the court to distribute the estate as provided therein. The agreement was dated December 1, 1935. It was signed by the widow as party of the first part, and by the two sons "as second party"; and the agreement provided in part as follows: "First: That the whole of the said estate be distributed to first party as the surviving widow of the said decedent for the period of her lifetime. First party shall be vested with the same power over and control of said estate as is given to the trustee named in said will and shall have the right to all of the benefits from said estate, both as to principal and income, including the One Thousand ($1,000.00) Dollar bequest, payment of which prior to distribution was waived by first party as she would have received or been entitled to as beneficiary of the trust set forth in said will. First party shall have the right to sell, assign, exchange, transfer, encumber or hypothecate said estate or any portion thereof in her own name with the consent of the second party, and in connection therewith the signature of first party shall convey full and complete title and ownership thereto to any purchaser, grantee, transferee or assignee. * * *" The agreement then provided that upon the death of the widow the estate should be divided between the two sons in the manner therein specified. The decree of final distribution was entered on January 22, 1936, and admittedly it was based upon the agreement of the parties. It distributed the estate as follows: "To Minnie D. Talcott for the period of her lifetime with power to receive and use the entire income therefrom, together with a sum not to exceed Two Thousand ($2,000.00) Dollars per annum from the principal of the said estate, and further with the power to sell, assign, exchange, transfer, encumber or hypothecate said estate or any portion thereof with the consent of Vaughan H. Talcott and Thaddeus M. Talcott." The decree then went on to provide that upon the death of the widow the remainder of the estate should be divided between the sons in the manner there stated.

On March 25, 1940, Thaddeus M. Talcott, one of the sons, died testate, leaving his wife, Veronica Talcott, the appellant herein, as his sole legatee and devisee. After the death of Thaddeus the mother, Minnie D. Talcott, had an opportunity to sell two lots belonging to the estate. Vaughan, the surviving son, consented to the sale, but Thaddeus died without having given consent to the sale of any portion of the estate. Thereupon the mother brought the present suit for the purpose of having it judicially determined that she was vested with power to make the sale with the consent of the surviving son, or if he should predecease her, without the consent of either son. She joined as parties defendant Vaughan and his wife, and Veronica Talcott, the widow of Thaddeus. Vaughan and his wife defaulted, but Veronica Talcott opposed the relief sought. The trial court entered judgment that "Notwithstanding the death of Thaddeus M. Talcott, the said power to sell, convey and/or transfer is still vested in Minnie D. Talcott provided Vaughan H. Talcott consents to such sale. That said Minnie D. Talcott, with the consent of Vaughan H. Talcott, is now empowered to sell, convey, and/or transfer said real property." From said judgment Veronica Talcott has appealed. It is our conclusion that the trial court was correct in so holding.

[1, 2] Section 860 of the Civil Code provides: "Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power." Here a power of consent was vested in the two sons by the agreement and the decree. One of the sons died, and admit-

tedly there is nothing in the terms of the agreement or the decree from which the power of consent was derived indicating that upon the death of one of the consentors the power thus given could not be executed by the survivor. Appellant argues that said section does not include a power of consent; that it applies only to the power to alienate or transfer. But the section is not so limited, expressly or by implication. In broad terms it reads "Where *a* power * * *" (italics ours), which doubtless means any power, including the power to consent as well as the power to alienate or transfer. Appellant further contends that in any event said code section is not here controlling; that the rule of the common law must govern; and that the common-law rule is that where a power of sale is to be executed with the consent of third persons, the death of one of the consentors before consent is given completely nullifies the power of sale, citing Barber v. Cary, 11 N.Y. 397. But the common-law rule to which reference is made in that case is not deemed to be absolute, for many cases are to be found which hold that where from the terms of the will and the circumstances of the parties it may be gathered that it was the intent of the testator to continue the power, rendering possible of performance the terms and conditions of the will, the death of one or more of those whose consent was required did not terminate the power of sale. See Sohier v. Williams, 22 Fed.Cas. page 772, No. 13,159; Leeds v. Wakefield, 10 Gray 514, 76 Mass. 514; Phillips v. Davies, 92 N.Y. 199; Odell v. Youngs, 64 How.Prac., N.Y., 56; Wells v. Brooklyn U. El. R. Co., 121 App.Div. 910, 106 N.Y.S. 79; Hackett v. Milnor, 156 Pa. 1, 26 A. 738. The case of Barber v. Cary, supra, holds that its statute comparable to section 860 did not include the power to grant consent, because there were a series of statutes in that state drawing a distinction between the power to execute and the power to consent. No such distinction exists in this state. For that reason section 860 must be held to be all-inclusive, and specifically to include the power to consent as well as the power to execute. Moreover, from an analysis of the decision in Barber v. Cary, supra, it would appear that it was not based upon the common-law rule therein referred to, but upon a statute in force in that state which required the consent of the persons whose consent was required to be "expressed in the instrument by which the power is executed, or * * * certified in writing thereon"; and in that case there was no compliance with the terms of the statute by either of the two consentors. One had died, and the consent of the other was oral and not expressed in or endorsed on the instrument as required by the statute.

[3] Irrespective, however, of whatever may be the common-law rule, it has been superseded in this state by section 860 of the Civil Code.

[4, 5] Appellant also contends that there was no ambiguity or uncertainty in the decree of distribution and therefore the court had no jurisdiction to determine the present proceeding or to construe said decree. However, this action is in the nature of a suit for declaratory relief, and section 1060 of the Code of Civil Procedure provides: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. * * *" Here there was obviously an actual controversy between plaintiff and her son's widow as to whether plaintiff could sell certain property without the consent of both sons; and therefore it would seem that under the declaratory relief provisions of the code above quoted plaintiff was entitled to have the court hear the matter and determine her rights under the decree of distribution.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

54 Cal.App.2d 666

In re GOLDSWORTHY'S ESTATE.

BROZ et al. v. HODGE.

Civ. 12164.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1942.

1. Wills ⇐130

A document, holographic in form, to be valid as a testamentary disposition must comply strictly with statute permitting a holographic will. Probate Code, § 53.

2. Wills ⇐386

The question of due execution of a will is a "question of fact" and the trial court's determination on that question cannot be overruled unless the determination is without support in the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Wills ⇐302(6)

Evidence sustained finding that decedent intended to incorporate printed matter on Page 1 of will form and make it part of his will, although fact that decedent did not fill in blanks in the introductory clause gave rise to an inference to the contrary, and therefore the document was not a valid "holographic will" under statute requiring such a will to be entirely written by hand of testator. Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

4. Wills ⇐302(6)

Where deceased placed letters intended as an abbreviation of the word signed, in front of his signature affixed at bottom of first page of alleged testamentary document, evidence sustained finding of trial court that such signature was for purpose of authenticating the document as a will, so that the date on back of instrument could not be considered a part of the instrument which was not a valid "holographic will" under statute requiring such a will to be entirely written, "dated" and signed by hand of testator. Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Dated".

5. Appeal and error ⇐1008(3)

The appellate court should not supplant a trial court's construction of an alleged testamentary instrument which is supported by reasonable inferences by a strained construction merely to satisfy the policy of the law favoring testacy rather than intestacy.

6. Wills ⇐131

The legislature by amending statute regarding holographic will by adding sentence providing that no address, date or other matter written, printed or stamped upon the document which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will, did not intend in anywise to change the law but added the sentence for purpose of codifying the then existing law. Probate Code, § 53.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of William G. Goldsworthy, deceased wherein James J. Broz, as executor, etc., and others sought the probate of an instrument which was opposed by Albert Hodge. From an order denying probate of instrument as a will, James J. Broz as executor, etc., and others appeal.

Affirmed.

James J. Broz, of San Francisco, in pro. per., for appellants.

Byron Coleman, of San Francisco, for respondent.

WAGLER, Justice pro tem.

This is an appeal from an order denying probate to a certain document offered as the holographic will of William G. Goldsworthy. The document in question is written on a printed stationer's form marked "Crocker's Blank No. 2508-Will." This form consists of a double sheet of paper, each sheet being 8½ by 14 inches in size; the two sheets constitute four pages. On the first page the following printed and written matter appears. For the purpose of clarity all portions in the handwriting of deceased are italicized:

"I, ..., of, County of, State of, of the age of years, being of sound and dis-

posing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person or any sort whatever, do make and declare this to be my last WILL AND TESTAMENT.

FIRST, *20 Per cent of my estate to Mrs. Iren Orr*

926 - 1/2 Diamond st
San Francisco

20 Per cent of my estate to Mrs. Hortence Dean

Harry Lemintyrs
Daughtr

~~SECONDLY,~~ *20 Per cent of my estate to Mrs Larain Hoot*

Harry Lemintyrs
Daughts

20 Per Cent of my estate to Mrs & Mr Frans Bellisle

247 - 15 av
San Francisco

Money in Bank of Amecia
Branch Masion & Market st

and my personal things
My Friend
Mr. James Broze

my attornay

Will act has my administraer with out Bounds and to receve the usel fee
Then the Balance of

my estate to be divey equally betwn my 5 frunes. This Will I make in my Soud Mine.

SG W Goldsworthy."

Page two is blank. Page three contains the following printed matter:

"LASTLY. I hereby nominate and appoint the executor of this my last will and testament, and hereby revoke all former wills by me made.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of, in the year of our Lord one thousand nine hundred and THE FOREGOING INSTRUMENT, consisting of page, beside this, was, at the date thereof, by the said Signed and Sealed and Published as, and declared to be last Will and Testament, in the presence of us, who, at request, and in.....presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

..... residing at
..... residing at"

The fourth page, which is the back of the document, is divided into sections for folding. One of these sections contains the following written and printed matter:

"THE
LAST WILL AND TESTAMENT
of
W. Goldsworthy

Dated *June 22* , 1940

Filed , 19
Clerk
By Deputy Clerk"

It is conceded by all parties that the letters "SG" preceding the name of "W. Goldsworthy" at the end of page 1 are in the handwriting of the decedent, and that they were intended by the decedent as an abbreviation for the word "signed."

The lower court found that decedent intended the printed matter contained on page 1 of the stationer's blank to be a part of his will; that there was no date on the face of the purported will, and that the inscription on the fourth page ("THE LAST WILL AND TESTAMENT of *W. Goldsworthy* Dated *June 22* , 1940") was merely descriptive of the contents of said document and not a part of said purported will.

If these findings of the trial court are correct, obviously the document does not comply with the provisions of section 53 of the Probate Code, which reads as follows:

"A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."

[1] The rule is well established in this state that a document, holographic in form, to be valid as a testamentary disposition must comply strictly with this section. In re Rand's Estate, 61 Cal. 468, 44 Am.Rep. 555; Estate of Billings, 64 Cal. 427, 1 P. 701; In re Plumel's Estate, 151 Cal. 77, 90 P. 192, 121 Am.St.Rep. 100; In re Dreyfus' Estate, 175 Cal. 417, 165 P. 941, L.R.A. 1917F, 391; In re Thorn's Estate, 183 Cal. 512, 192 P. 19; In re Bernard's Estate, 197 Cal. 36, 239 P. 404; In re Bower's Estate, 11 Cal.2d 180, 78 P.2d 1012; In re Towle's Es-

tate, 14 Cal.2d 261, 93 P.2d 555, 124 A.L.R. 624.

Appellants presented evidence to the effect that the document was found among decedent's papers in his hotel room after his death; that he was a man over sixty years of age, without formal education, and "was unaware of the legal necessities of making an holographic will." No evidence was offered regarding the circumstances under which the alleged will was executed.

Appellants contend that under the facts here presented the trial court was called upon to do nothing more than to construe and interpret the written document; that the question whether the document does or does not comply with the requirements of section 53 of the Probate Code is, under such circumstances, a question of law and not one of fact, and that this court is free to disregard the findings of the lower court. With these contentions we cannot agree.

[2] It is well settled that the question of the due execution of a will is one of fact, and that the trial court's determination on this issue cannot be overturned unless that determination is without support in the evidence. In re Cullberg's Estate, 169 Cal. 365, 146 P. 888.

In Re Streeton's Estate, 183 Cal. 284, 191 P. 16, no evidence was offered on the issue of execution except the document itself. The Supreme Court stated (183 Cal. at page 289, 191 P. at page 18): "the finding of the trial court to the effect that the testator signed his name at the top of the will with the intention of authenticating the instrument was sustained by a 'positive and satisfactory inference' *arising from the face of the document itself.*" (Italics added.)

In Re Maguire's Estate, 14 Cal.App.2d 388, 58 P.2d 209, one of the questions presented was whether the date contained on an envelope in which the will was found was to be considered a part of the will. Although no direct evidence was offered on the point, the court held that the determination of the trial court to the contrary was a question of fact which could not be overthrown on appeal, even though the question might have been determined either way by the fact finder.

[3] In the case at bar the trial court found that the decedent intended to incorporate the printed matter on page one of the form and make it a part of his will. The fact that decedent did not fill in the blanks in the introductory clause gives rise to an inference to the contrary. In re Bower's Estate, supra. However, we believe that the circumstances and all other legitimate inferences to be drawn from an examination of the document itself support the finding of the trial court. Appellant's own testimony that decedent was "unaware of the legal necessities of making an holographic will" weakens, rather than strengthens, his position; had decedent been aware of the requirements of section 53 we may legitimately infer that a printed form would not have been used. The fact that the decedent did use a printed form is some evidence that it was procured by him for the purpose of using the printed words to manifest his intention in a formal manner. Certainly, he hoped to accomplish something by the use of the form. In order to obtain such a form he had to go to a stationery store and purchase it. Even then he was under no compulsion to use it directly as a means of expressing his intentions; he could have used a blank sheet of paper and copied from the form those portions which he thought essential to his purpose. This he did not do. He deliberately and intentionally wrote his will on the form which he obtained for that very purpose. The manner in which the decedent expressed himself in his first written words is some evidence of the fact that he intended to make use of the introductory clause preceding his first written words. It is true that it can be argued that the words in the hand of the testator on page one, standing alone, constitute a complete testamentary disposition, and that a testamentary intent can be inferred from the words which are in the hand of the testator. It must be conceded, however, that testamentary intent is much more evident and that the document is much more complete and intelligible when the printed portions are read with the portions in decedent's own handwriting. Furthermore, from the fact that the decedent struck out the printed word "Secondly" on page one, we may infer that he intended to make use of the printed words on the same page not so stricken out.

The only case which has come to our attention wherein the use of a printed form was not held fatal to a valid holographic disposition is the case of Gooch v. Gooch, 134 Va. 21, 113 S.E. 873, 875. In the Gooch case the testator, during the process of initiation into a secret society, was supplied with a printed form very sim-

ilar to the form used in the case at bar, and was instructed that it was his present duty to make his will, but that if a will had previously been made he could so state the fact. Thereupon, the testator wrote the following between the introductory clause and the attestation clause: "My will is made in favor of my wife, Loulie M. Gooch, duly signed and filed. Witnessed by: E. W. Poindexter and A. C. Hopwood, Attorneys in Roanoke, Va." The court held that the printed portions were surplusage, and that the statement written by the candidate constituted a valid holographic republication of his former will. We agree with this conclusion. The very language used by the testator demonstrates an intention *NOT* to make use of the printed portions of the form. The testator had previously drawn his will and he was apparently satisfied with its provisions; it could not be said that he intended to incorporate the printed provisions expressing testamentary intent, when in fact his very language shows that no testamentary intent was in his mind at the time. The mere fact this act constituted a valid republication so as to validate his will drawn prior to the birth of a child, does not support the contention of appellants in the case at bar.

In those cases wherein the decedent has used a printed form on which to express a testamentary disposition, the documents have consistently been rejected as valid holographic dispositions. See In re Bower's Estate, supra; In re Rand's Estate, supra; In re Wolcott's Estate, 54 Utah 165, 180 P. 169, 4 A.L.R. 727; Maris v. Adams, Tex.Civ.App., 166 S.W. 475.

[4, 5] The finding of the trial court that the alleged will was not dated is also supported by legitimate inferences to be drawn from an examination of the instrument itself. On the back of the form, after the printed words "Last Will and Testament of," the decedent wrote his name; after the printed word "Dated," he wrote *"June 22,"* and after the figure "19," he added the figure *"40."* If the contents of this page can be considered a part of the will, the date is sufficient. In other words, the fact that the figure "19" was printed, would not invalidate the date. In re Durlewanger's Estate, 41 Cal.App.2d 750, 107 P.2d 477. On the other hand, if the back of the instrument cannot be considered a part of the will, the instrument is without date. This, of course, would be a fatal defect. An examination of the document shows that when the deceased affixed his signature to the first page he placed the letters "SG" in front of his name. It is agreed that these letters were intended by the deceased as an abbreviation of the word "Signed." Under such circumstances, the trial court was justified in concluding that decedent affixed his signature at the bottom of page one for the purpose of authenticating the document as a will, and that, when he placed his name on the back of the instrument, he did so not for the purpose of authentication but for the purpose of identifying the document. In re Maguire's Estate, supra; In re Manchester's Estate, 174 Cal. 417, 163 P. 358, L.R.A.1917D, 629, Ann.Cas.1918B, 227. To hold that the name was placed on the back of the document for the sole purpose of identifying the document, and that the date was placed thereon as a part of the act of execution, would be a strained and unreasonable construction. This court should not supplant a trial court's construction of the instrument which is supported by reasonable inferences by a strained construction merely to satisfy the policy of the law favoring testacy rather than intestacy.

In re Maguire's Estate, supra, an undated holographic will was enclosed and sealed in an envelope which bore on its face, "Will of H. F. Maguire Mch. 8th, 1930" in the handwriting of the testator. The trial court held that the inscription on the envelope was merely descriptive of the contents and therefore not a part of the will. It was held that this finding could not be disturbed on appeal.

The last page of the document here in question falls in the same category as the back of any legal document or the writing on the face of an envelope enclosing a document. It is not a part of the document itself; it is merely a description of the contents. As stated by the Supreme Court in In re Manchester's Estate, supra, 174 Cal. at page 419, 163 P. at page 359: "The defect is not cured by the words 'My will' indorsed on the envelope and signed by the decedent. The manifest purpose of that indorsement was to state that the paper within the sealed envelope was the will of Ida Matilda Manchester. It shows that the decedent believed that the inclosed document was her will, and indicates that she believed that it was lawfully executed and valid. But her belief that it was a valid will, properly executed, does not make it so. The power to dispose of one's property by will and the mode by which it may be

exercised are matters under legislative control, and the mode prescribed by the statute must be followed, or there is no will."

[6] The appellants also urge that the Legislature, by the addition of the concluding sentence of section 53 of the Probate Code, intended to establish a more liberal rule in the construction of holographic wills (In re Durlewanger's Estate, supra), and that, since the portion of the document in the handwriting of the decedent constitutes a complete disposition of his property, the printed portion should be treated as surplusage.

We do not believe that the Legislature intended in anywise to change the law by its amendment of section 53 in 1931. The history of the amendment shows that said sentence was added in 1931, like many other provisions of the Probate Code, for the purpose of codifying the then existing law. This is the view expressed by Mr. Justice Curtis in Re Towle's Estate, 14 Cal.2d 261, 93 P.2d 555, 124 A.L.R. 624. In re Bower's Estate, supra, expressly holds that this sentence was added to codify a rule announced in Re De Caccia's Estate, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393. To sustain the will in this case would require us to read into the statute, language which is not to be found therein.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.



54 Cal.App.2d 230

SMITH v. ADDIEGO et al.

Civ. 11887.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1942.

Hearing Denied Oct. 29, 1942.

1. Taxation ⇐782, 784, 785

The effect of deed from the state executed February 4, 1938, conveying land deeded to the state in 1935 pursuant to sale for delinquent general taxes for 1929–1930, was to convey title to the purchaser from the state free of all liens, taxes, assessments or encumbrances levied or assessed or liened on the property. Pol. Code, §§ 3897, subd. 7, 3898.

2. Taxation ⇐509, 510

The legislature may make taxes a paramount lien on property of the taxpayer taking precedence over every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of taxes, but such preference does not belong to a tax lien unless it is expressly so declared by statute.

3. Taxation ⇐785

Section 3897 of the Political Code as it read in 1935, when land was deeded to state pursuant to sale for delinquent general taxes for 1929–1930, and on February 4, 1938, when land was conveyed from state to purchaser, providing that such deed from state conveyed title to purchaser free of all liens, taxes, assessments, or encumbrances of any kind levied, assessed or liened on the property operated to "extinguish" the lien of street improvement bonds attaching in 1928, which was foreclosed in 1935, a commissioner's deed thereunder being issued a month prior to conveyance from state to purchaser. St.1911, p. 730; Pol.Code, §§ 3787, 3897, 3898.

See Words and Phrases, Permanent Edition, for all other definitions of "Extinguish".

4. Taxation ⇐697(1)

Holder of street improvement bonds or holder of commissioner's deed issued under sale in foreclosure of the lien of such bonds, could have redeemed from sale to state for delinquent general taxes just as effectively as the former record owner at any time prior to sale of the realty by the state to third person.

5. Evidence ⇐358, 379

If it can be shown that there is only one map of a tract including lot described in tax assessment without reference to any map upon which map such lot is delineated or designated, and that such map is well known and generally accepted as authentic, it is admissible in action to quiet title to the lot as tending to identify the land before the court.

6. Taxation ⇐810(3)

Evidence sustained finding that assessment of general taxes was made in

accordance with description furnished assessor by owner with request that separate assessments be made against the lots as then subdivided and consequently neither owner nor his successor in title could question the adequacy of description in assessment and subsequent proceedings for enforcement of the tax for the failure therein to refer to any map on file or of record.

7. Taxation ⇐435

A map need not be recorded before it can be used in tax proceedings.

8. Taxation ⇐335, 442

A taxpayer may not complain of a description taken from a statement of property furnished by him or by someone on his behalf and by his authority, and it is presumed in support of an assessment that a description is identical with that contained in the statement furnished by the owner.

9. Taxation ⇐420

The object of requiring any description of the property is in order that taxpayer may know for what property he is assessed and whatever is sufficient to identify that property with reasonable certainty is a sufficient description.

10. Taxation ⇐420

In determining the sufficiency of description of property in tax assessment, the surroundings connected with the assessment may be examined.

11. Taxation ⇐335

One who acquired title to realty through foreclosure of street improvement bonds, stood in the shoes of the former owner and could not complain of the inadequacy of description of the realty in tax assessment where such description was supplied by the owner.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Laura Smith against Bennie Addiego and others to quiet title to realty. From a judgment and decree in favor of plaintiff, defendants appeal.

Judgment and decree reversed with directions.

Hearing denied; Carter and Traynor, JJ., dissenting.

Piccirillo & Wolf, of San Francisco, for appellants.

Eugene K. Sturgis, of Oakland, for respondent.

GOODELL, Justice pro tem.

This appeal was taken from a judgment and decree quieting respondent's title to four lots in El Cerrito.

On November 9, 1928, the lots were owned by Realty Syndicate Company and, under the act of 1911 (Stats.1911, p. 730), the street improvement bonds here in question were a lien upon those lots. After several transfers, the bonds found their way into the hands of Guy E. Smith, the husband of respondent, who, on or about February 23, 1934, filed suit to foreclose them, and by a decree of foreclosure entered on November 2, 1935, the sale of the lots was ordered. On November 30, 1935, a certificate of sale was issued showing that the lots had been sold to Laura Smith, executrix of the will of Guy E. Smith; on January 2, 1938, a commissioner's deed issued to her as such executrix and she later succeeded to her deceased husband's rights in the lots, and now claims title under such deed.

The appellants assert title under tax deeds. General taxes for 1929-1930 went delinquent and the lots in question were sold to the state on June 26, 1930. There having been no redemption, a deed to the state was made on June 29, 1935. On January 27, 1938, a sale was had at which the appellants or their predecessors purchased the lots, and on February 4, 1938, deeds were made to them by the tax collector, as agent for the state. Under these deeds the appellants claim absolute title to the lots, free and clear of any claim, lien or title based upon the street improvement bonds.

It is admitted by the appellants that the lien of the bonds attached as of November 9, 1928, several months before the lien for 1929-1930 taxes attached (on the first Monday of March, 1929). It is a fact, also, that the commissioner's deed was made a month before the tax deeds issued to appellants. Notwithstanding these priorities in point of time the appellants contend that their tax title is paramount because of the provisions of sections 3897 and 3898, Political Code, as those sections read when they purchased the tax title and got their deeds on February 4, 1938. They also in-

voke the rule laid down in Woodill & Hulse Electric Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296.

The respondent relies upon a group of cases (presently to be discussed) which held that liens for taxes, on the one hand, and certain other liens and special assessments, on the other, are of equal rank, such reliance being based upon the fact that section 3787, Political Code (see §§ 3518-3520, Revenue and Taxation Code, St.1939, p. 1328), so declared at the time when the lots were sold to the state in 1935, from which premise it is argued that the title having thus become vested in the state, this equivalence of rank remained constant and undisturbed until and including the time when the commissioner's deed issued. Consistently with this position the respondent concedes that if she prevails herein her title should be quieted "subject to all county and city taxes * * * outstanding" when judgment is entered.

At the time when the lien of the street improvement bonds attached in 1928, and at the time when the deed to the state was made in 1935 (at which time the lien of the bonds had not been foreclosed), section 3787, Political Code, declared the effect of such deed in the following language: "* * * Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation, reclamation, protection, flood control, public utility or other district purposes, * * *." In Neary v. Peterson, 1 Cal.2d 703, 37 P. 2d 82, the plaintiff sued to foreclose the lien of a street improvement bond issued under the same act of 1911. The defendant Brown set up the claim of ownership in himself by virtue of a tax deed from the state based upon a lien for 1923 general taxes. The trial court adjudged that Brown's tax title was paramount, which judgment was reversed. The Supreme Court in its opinion states the question to be decided as follows (1 Cal.2d at page 705, 37 P.2d at page 83): "Did the lien for taxes due the state destroy the lien of the improvement bond?" and then says: "This question, for all practical purposes, was answered by the recent case of La Mesa, etc., Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143, where it was held that by section 3787 of the Political Code the former priority of liens for general taxes was subordinated and they were placed on a parity with certain enumerated liens for special assessments." The court concluded (1 Cal.2d at page 706, 37 P.2d at page 84): "The liens are therefore on a parity, made so by statute, and the lien for the subsequent street improvement remained intact, notwithstanding the sale" for taxes.

The La Mesa case, supra, reviews the history and evolution of section 3787 in the following interesting discussion (216 Cal. at page 736, 17 P.2d at page 146):

"In the light of these propositions, we pause to ascertain whether or not the Legislature of California has spoken upon the question of the relative priority of general taxes and special assessment liens. We note that under section 3788 of the Political Code as originally enacted in 1872 there was no mention made of liens or special assessments, and a deed to the state at that time would no doubt have been construed as extinguishing liens for special assessments. Later, however, section 3788 became section 3787, and in the year 1913 (Stats.1913, p. 559, § 5) this section was redrafted so as to except from its operation a lien of taxes levied for municipal purposes. Later, and in 1917, (St.1917, p. 241), this section was again amended so as to except not only a lien for municipal purposes, but for irrigation district purposes as well. Later, and in 1927 (Stats. 1927, p. 1666), the section was again amended so as to specially except a lien for reclamation, protection, flood control, public utility, and other district purposes. This section has been construed by our own appellate court and by the Supreme Court of at least one other state which has enacted it into their law, from which it is concluded that the legislative intent is to place all taxes, both for county, municipal, and other governmental agency purposes and taxes in the form of assessments in favor of special agencies of the state upon an equal footing before the law. Bolton v. Terra Bella Irr. Dist., 106 Cal. App. 313, 289 P. 678; State v. Board of [County] Com'rs, 89 Mont. 37, 296 P. 1, supra.

"From the above authority and upon our construction of the section we may now safely conclude that under our system of taxation liens in favor of county and municipal corporations and special assessments, under the authority of state agencies for public purposes are all on an equality. By this is meant that in case of delinquency a deed to any one of these

agencies for such taxes will not obliterate the existing liens on the property in favor of any or all of the others unless, indeed, said section 3804a compels a different conclusion."

The Bolton case, supra, was the first of this group of "parity" cases. The La Mesa case, supra, as we have seen, was followed in the Neary case, supra. Other somewhat similar cases relied upon by the respondent are Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408, and Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, 59 P.2d 559. The transactions out of which the Bolton, La Mesa, Neary and Conley cases arose occurred in the ten or twelve years just before 1931 and the decisions were, of course, controlled by the statutes then in effect. At all times after the 1927 amendment and down to 1939 (when it was transferred to the Revenue and Taxation Code), section 3787, Political Code, read as heretofore quoted—as construed in the "parity" cases. That section declared the effect of deeds to the state after the five-year redemption period had elapsed. But there was, during the same time, another section declaring the effect of deeds from the state to purchasers at tax sales. That section 3898, Political Code, during the period when the "parity" cases arose—from 1920 (or theretofore) to 1931—read as follows: "Said deed shall * * * operate to convey all of the interest of the state in and to said property." This was virtually a "quitclaim," and nothing more. From what has just been said it will be seen that the only section which defined or declared "the interest of the state" in and to the property conveyed by a tax deed from the state was section 3787, Political Code, which declared the effect of a deed to the state. In 1931 the statute was amended by the addition of a new section, numbered 3897b, which dealt with deeds from the state, and read as follows: "Except as hereinbefore provided, such deed shall convey to the grantee therein named the absolute title to the property described therein, free and clear of all encumbrances." At the next session the Legislature (Stats.1933, p. 2585) rewrote the section (numbering it 3897) as follows: "A deed given by the tax collector upon a sale made as in this section provided shall convey title to the purchaser free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due at the time of such sale so conveyed prior to the date of such sale * * *." In 1935, St.1935 p. 1437 this identical language was put into subdivision 7 of section 3897 and it continued to so read until it was transferred, in 1939, to the new Revenue and Taxation Code (see §§ 3691–3730 thereof, St.1939, p. 1334 et seq.), so when the tax deeds involved herein were made by the state on February 4, 1938, the statute read as last quoted above.

A drastic change, then, had been made in the statute after the first "parity" cases had laid down the rule already discussed. If this change in legislation had not been made, we of course would be bound to follow the Neary case, supra, the facts of which are quite similar to the facts of the case at bar. In 1931, 1933 and 1935 the Legislature made material changes in, and additions to, section 3897, Political Code, and kindred sections following. That the 1933 changes were made for the purpose of changing the rule of the "parity" cases there can be no doubt. In the case of Brewer v. Feigenbaum et al., 47 Cal.App.2d 171, 173, 117 P.2d 737, 739, this is said with respect to these statutory changes:

"It appears unnecessary to set forth in this opinion the lengthy provisions of said section 3897 of the Political Code as they existed on September 1, 1938. See Deering's 1937 Pol.Code, § 3897. That section had been amended following the decision in La Mesa, etc., Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143, and other related sections had been amended or added to the Political Code, including section 3897d. The last mentioned section was before the court in South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, on page 490, 42 P.2d 64, on page 66, and the court said: 'The legislation was doubtless deemed expedient following our decision in La Mesa, etc., Irrigation District v. Hornbeck, 216 Cal. 730, 17 P.2d 143, wherein it was held that the liens for county taxes and for irrigation district assessments were of equal rank and the Legislature found it necessary to provide some expeditious way to return to private ownership, and consequently to local tax rolls, lands covered by overlapping tax deeds. That the necessity existed is apparent for the reason that sales of tax titles would be complicated when purchasers could not be assured of a title free from liens possessed by other governmental agencies.'

"Nor is a detailed discussion of the provisions of said section 3897 required as there is no dispute concerning the construction to be placed upon any of said provisions and, as above indicated, it is conceded that the tax sale in question was conducted in all respects in accordance with said provisions. Suffice it to state that said section provides the procedure for the sale of real property which has been deeded to the state for delinquent taxes; provides for notice of the sale to other political subdivisions and taxing agencies having the right to levy taxes and assessments on the property; provides for certain rights which are granted to such political subdivisions and taxing agencies with respect to such sale, including the right to file claims for the amount of delinquent taxes and assessments and to share proportionately in the proceeds of such sale; and provides that the title conveyed to the purchaser is a title '* * * free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due at the time of such sale * * *'. Sub. 7."

[1] The holdings in the "parity" cases showed that an impassé existed, to remove which new legislation was needed. The Neumiller case, cited in Brewer v. Feigenbaum, supra, elaborates upon the effect of this legislation and shows what it was designed to accomplish. For the purposes of the instant case it is sufficient to point out, by way of repetition, that because of these amendments, culminating in subdivision 7 of section 3897, Political Code, the effect of the deed from the state on February 4, 1938, was to "convey title to the purchaser free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property * *." In the early case of Dougherty v. Henarie, 47 Cal. 9, 10 (where the controversy was between a street assessment lienor and the holder of a tax deed), the court, with respect to similar language in a similar statute, said (47 Cal. at page 15): "More explicit and comprehensive language could not well have been employed to define the nature of the title which passes by the tax deed. * * * This language is so explicit as to require no interpretation and to leave no room for construction. The tax deed conveyed the title, discharged of the plaintiff's lien." In that case the court also said (47 Cal. at page 14): "The necessity of collecting revenue for the support of the Government imperatively requires that the lien for taxes shall take precedence over all other liens; and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected."

[2] The respondent does not question the power of the Legislature to declare that tax liens shall be paramount, for in her brief she quotes the following from 37 Cyc. 1143: "It is competent for the legislature to make taxes a paramount lien on the property of the taxpayer, and this has been done in many states, the consequence being that a lien for taxes takes precedence of every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of taxes. But this preference does not belong to the tax lien unless it is so declared by statute, and a law, for example, which merely enacts that taxes shall be a lien on real property does not make them a first lien." There are a number of California cases so holding, notably California Loan & Trust Co. v. Weis, 118 Cal. 489, 492, 50 P. 697. The cases of Guinn v. McReynolds, 177 Cal. 230, 170 P. 421, and Home Owners' Loan Corporation v. Hansen, 38 Cal.App. 2d 748, 102 P.2d 417, 420, emphasize the point "that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority."

[3] Our conclusion is that the provisions of section 3897, Political Code, as they read when the appellants' tax deeds were issued, and as they read in 1935 when the deed was made to the state, operated to extinguish the lien of the street improvement bonds. The Neumiller and Brewer cases make it clear that the legislative intent was to do away with the "parity" rule, and the language of section 3897 is clear and definite.

The Brewer case, supra, is authority for this holding, for there the court held that the tax deed, because of the language of section 3897, extinguished the lien of the city of Albany's taxes. It cannot be claimed, we believe, that the lien of the

respondent's street improvement bonds are of any greater dignity than the lien for city taxes in that case.

In view of our holding that the statutory language is controlling it is unnecessary for us to discuss the case of Woodill & Hulse Electric Co. v. Young, supra, also relied upon by appellants, which lays down the rule that the lien last in time is prior in right.

[4] At the time the general taxes became delinquent Realty Syndicate Company was the owner of the four lots. It failed to pay the taxes and the usual procedure was followed. Respondent's predecessors in interest, being street assessment bond lienors, could have made redemption just as effectively as the record owner. This right could have been exercised at any time prior to the sale by the state on January 27, 1938. Respondent's concession that if judgment is entered herein in her favor it should be subject to taxes, is a concession that such redemption should have been made by her or her predecessors. This holding works no injustice upon respondent, because there existed from 1929 to January 27, 1938, a period of almost nine years, a right to redeem, which was not exercised. When respondent acquired "title" through the commissioner's deed on January 2, 1938, she knew, or should have known, that her "title" was subject to being defeated by a deed from the state unless she redeemed.

There is a second point which requires discussion. The respondent contended in the trial court that the assessment was void because of "The complete inadequacy of the descriptions in the assessments" which followed throughout all subsequent proceedings for the enforcement of the tax. This position was seriously contested below, and evidence, both oral and documentary, was addressed to this issue. The trial court held in favor of the appellants, having denied respondent's motion for a nonsuit on appellants' cross-complaint on this ground (while granting it on the other ground, first discussed). The respondent now seriously urges that the nonsuit should have been granted, and the judgment should now be affirmed, on this ground.

The assessment on the 1929-1930 rolls was against Berkeley Country Club Terrace No. 1, Lots 48a, 48b, 52a, 52b—nothing more. In other words there was no reference to any map on file or of record in any office.

In her complaint in this suit the respondent alleges that she is the owner in fee, and entitled to the possession, of Lots 48, 52, 53-A and 53-B as delineated and designated upon a map of Berkeley Country Club Terrace, Unit No. 1, filed September 18, 1922, in Map Book 18, pages 402-406, in the office of the recorder of Contra Costa County. The allegation continues: "Being also described as Lots 48-A, 48-B, 52-A, 52-B, 53-B, 53-C, and 53-D," as delineated and designated upon an amended official map of Units 1 and 2 of the same Terrace filed March 3, 1930, in volume 1 of Official Maps, pages 25-31, in the same office.

When the 1929-1930 assessment was levied the 1922 map was on record, but the assessment not only made no reference to it but it described the lots otherwise than they were described therein. On the other hand, the 1930 recorded map describes the lots as they were assessed but it was not filed for some months after the assessment in question. Thus the assessment on its face finds no support in either map.

[5] For the purpose of this discussion it may be assumed that the cases cited by respondent hold that an assessment such as this is prima facie invalid. But other cases cited by respondent hold that, despite this prima facie invalidity, "if it can be shown that there is only one map of a tract which includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court." Best v. Wohlford, 144 Cal. 733, 737, 78 P. 293, 294. Respondent frankly concedes this rule, but claims that "There was no competent proof offered that the owner of the property in 1929 furnished the description upon which the tax assessment of 1929 was made."

[6] The court found "That, in the making of said assessment, the assessor of said Contra Costa County, described each separate parcel of said real property, by reference to a certain unrecorded map, wherein each said parcel was shown, exactly as described in said assessment, thereof, and which said map was mailed to and furnished to said assessor by the owner

of said lands and was accompanied by the written request of said owner, to said assessor that the said assessment of said lands, for the tax year 1929-30, be made in accordance with said map and as the several parcels of said lands were shown thereon. That said map was not in existence at the time of the trial of this action." The written request was contained in a letter dated January 9, 1929, signed Realty Syndicate Company by H. W. Watson, reading as follows: "We are resubdividing some of the lots in Berkeley Country Club Terrace, which we still own. Maps have been drawn up for filing in the county recorder's office, but there is a probability that they will not be filed before the first Monday of March of this year. Therefore, we are enclosing maps of the resubdivision and request that you make separate assessments against the lots as they are not [now] cut up." The original letter was produced from the assessor's files and its receipt, on or about its date, was testified to by the assessor and his chief deputy, both of whom testified that it was accompanied by a map. The witness Watson, who wrote the letter and sent the map had charge, at the time, of all matters of assessment, and the supplying of data or information for affidavits for assessment purposes and that his best recollection was that he enclosed, "in the envelope enclosing said letter, a certain map of a resubdivision of said real property, the exact details and descriptions contained in which said map he did not remember, but believed identical with 'Amended Official Map of Units 1 and 2, Berkeley Country Club Terrace,' except that this map of 1930, Plaintiff's Exhibit 6, had a designation and name, whereas he could not be positive by what, if any, name the map mailed to the Assessor was designated; that he assumed and believed the map mailed by him to said Assessor, showed the lots subdivided and numbered as shown and numbered in the assessment proceedings of said Assessor for the year 1929, and as appearing on said Assessor's 'block' or 'work' book, in said Assessor's Office, and in accordance with the request contained in his letter." The assessor testified that accompanying the letter "was a map, showing the subdivision of the lots, the subject matter of the instant action, as he had assessed them in the year 1929" which map had since been lost or mislaid. He testified, further, that in addition to the assessment roll, "there was maintained for assessment purposes, in his office, a book, commonly referred to as the office 'work book,' in which there were exact copies of all and any filed and official maps of assessable real property in the County of Contra Costa, which said maps were prepared, for his office, by the County Surveyor. That said assessment 'work book' prior to receipt of said letter from the said witness Watson, contained an exact copy of the said 'Map of Berkeley Country Club Terrace Unit No. 1,' filed in 1922 * * * that is to say, that, as shown upon said map and said assessment 'work book,' there was no subdivision whatever of Lots 48 and 52, into the smaller parcels, referred to as Lots 48a and 48b, 52a and 52b, 'Map of Berkeley Country Club Terrace, Unit No. 1,' but that, upon receipt of the said letter from the witness, Watson, he caused some one in his office to subdivide said Lots 48 and 52, as shown upon 'Map of Berkeley Country Club Terrace, Unit No. 1,' into said smaller parcels and designated them, upon said assessment 'work book,' as Lots 48a, 48b, 52a and 52b, etc., as said smaller lots or parcels were shown and designated upon the said lost or mislaid map, by him received, and as enclosed with the said letter from the said witness, Watson." The chief deputy county assessor testified that he had diligently searched for the map but without success; that he recalled the receipt by the assessor of the letter accompanied by a map showing the resubdividing of Unit No. 1 into smaller subdivisions, and that the ink lines upon the assessor's "work assessment book" subdividing the lots "and numbering and designating said smaller parcels, had been made exactly in accordance with and exactly as shown upon the said map" enclosed with the letter. There was the testimony of another witness for the appellants, a civil engineer who had surveyed these lots and made both maps in question. His testimony was not inconsistent with that of the other three witnesses. He did testify that he did not know what map was referred to by the witness Watson, and did not remember having seen such map,—that it must have been some map the employees of the corporation "got together by maps furnished the company by him." This testimony, at most, is only negative; it was not contradictory of appellants' other three witnesses. C. P. Murdock, the vice-president and general manager of the company was called as a witness by the respondent,

and his affidavit made on the first Monday of March, 1930, the year after the assessment here in question, was introduced in evidence, apparently to show that the lots then, in 1930, were not declared as subdivided, but rather in accordance with the old 1922 map. This, of course, was no contradiction of the appellants' witnesses, for it was addressed to a different assessment, a year later. Even if it had concerned the 1929 assessment, there is sufficient testimony in the record to support the finding of what actually happened. From all this testimony, which we have referred to at some length, it will be seen that the finding is amply supported by competent evidence. The finding, in brief, comes to this: that the assessor acted upon a description (however informal) furnished by the owner with the request that separate assessments be made against the lots "as they are now cut up." That, and just that, was done.

[7-10] In the first place, "The law does not require the recordation of a map before it can be used in tax proceedings." Morton v. Sloan, 96 Cal.App. 747, 751, 275 P. 223, 224; Schainman v. All Persons, 96 Cal.App. 753, 758, 275 P. 225, 276 P. 113. But over and above that, it is definitely settled in this state that "A taxpayer may not complain of a description taken from a statement of property furnished by him, or by someone on his behalf and by his authority. * * * It is presumed in support of an assessment that a description is identical with that contained in the statement furnished by the owner." 24 Cal.Jur. 192, § 178. See Lake County v. Sulphur, etc., Mining Co., 68 Cal. 14, 16, 8 P. 593 (citing City and County of San Francisco v. Flood, 64 Cal. 504, 2 P. 264). In City and County of San Francisco v. Pennie, 93 Cal. 465, 29 P. 66, 67, where the Flood case is followed, it is said: "The object of requiring any description of the property is that the tax-payer may know for what property he is assessed; and whatever is sufficient to identify that property with reasonable certainty is a sufficient compliance with the statute." And, further, 93 Cal. at page 471, 29 P. at page 67: "For the purpose of determining whether this description was sufficient to identify the property, and to give sufficient information to the tax-payer of the property for which he was assessed, the court was at liberty to examine the surroundings connected with the assessment." The Pennie case is followed in Dear v. Weineke, 94 Cal. 322, 29 P. 646. In Lummer v. Unruh, 25 Cal.App. 97, 104, 142 P. 914, the following is quoted from Cooley on Taxation: "The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him, or is not calculated to mislead him." The Flood case, the Pennie case and Best v. Wohlford, supra, are cited to the same effect. In the very recent case of Biaggi v. Phillips, 50 Cal.App.2d 92, 98, 122 P.2d 619, the same passage is repeated. And in E. E. McCalla Co. v. Sleeper, 105 Cal.App. 562, 567, 288 P. 146, 148, this is said: "While it is true that the map to which reference is made in the present case was not prepared in the manner provided by section 3658a of the Political Code, it was provided by the plaintiff himself, and contained the only description of the property which was furnished to the officer. The owner was therefore estopped from challenging the sufficiency of the description which he himself had given to the assessor. Dear v. Varnum, 80 Cal. 86, 22 P. 76; Jacoby v. Wolff, 198 Cal. 667, 674, 247 P. 195; 24 Cal.Jur. 192, § 178."

[11] The respondent who, on the foreclosure of the street assessment bonds, succeeded to whatever title the owner had, stands in the owner's shoes and cannot, under the cases cited, attack the description—so found, on uncontradicted evidence to have been supplied by the owner—any more than the owner could have attacked it. The owner would have no difficulty in identifying its own land from its own description. Moreover, the complaint shows that the lots as subdivided and as assessed were the same lots as shown by the 1922 map.

A stipulation in the record shows that Lot 53-B was removed from the case. The findings and judgment therefore affect only Lots 48, 52 and 53-A, otherwise described (and assessed) as Lots 48-A, 48-B, 52-A and 52-B.

It should be noted that the case of Brewer v. Feigenbaum, supra, was not decided until October, 1941, long after this case was tried, and after the briefs on this appeal had been filed.

The judgment and decree is reversed with directions to the trial court to enter a judgment and decree quieting the title of appellants to their respective lots.

PETERS, P. J., and WARD, J., concurred.

54 Cal.App.2d 719

ADAMS v. SCHMOKER et al.

Civ. 2962.

District Court of Appeal, Fourth District, California.

Oct. 5, 1942.

1. Automobiles ⇐245(14, 80)

In action by motorist, who was continuing across intersection, for injuries sustained when right rear fender caught left end of front bumper of automobile making right hand turn at intersection, questions of negligence, contributory negligence and credibility of witnesses were for jury.

2. New trial ⇐155

Where motion for new trial is not passed upon by trial judge within time allowed, the motion is denied by operation of law.

3. New trial ⇐99

Denial of motion for new trial for "newly discovered evidence" was not error where the showing of due diligence was not very strong, and the testimony was merely cumulative and not such that it could reasonably be expected to change the result.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action for damages sustained in automobile collision by W. W. Adams against Leora E. Schmoker and others. From an adverse judgment, plaintiff appeals.

Affirmed.

William L. Waters, of Fullerton, for appellant.

Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This action arose out of a collision between an automobile driven by the plaintiff and another car owned by the defendants and driven by Mrs. Schmoker. A jury returned a verdict in favor of the defendants and the plaintiff has appealed from the judgment.

The collision occurred at the intersection of two country roads. Mrs. Schmoker was driving north on one road with the intention of making a right-hand turn and proceeding easterly on the other road. As she reached the intersection she stopped, looked both ways and, putting her car in low gear, entered the intersection and proceeded to make a right-hand turn. As she entered the intersection and was making this turn the Adams car was approaching the intersection from the west. Adams testified that he saw the other car as it approached the intersection; that he was 100 to 150 feet away from the intersection or "some place like that" when the other car stopped; that he turned his attention to another car which was coming toward him; that he did not again see the Schmoker car until he was "alongside" it; and that he then could not see the front of that car but "could only see the body of it by looking across my car out the right-hand window." The right rear fender of the Adams car caught the left end of the front bumper of the Schmoker car, breaking off the left half of that bumper. The Adams car rolled over and landed in a ditch some sixty feet away, while the Schmoker car stopped practically where the collision occurred, the tire marks indicating that its front wheels had skidded five inches to the right. All witnesses agree that the Schmoker car was moving very slowly at the time of the accident; that it was upon the southerly half of the road upon which it was turning or had turned; that the Adams car was traveling about forty-five miles an hour through the intersection; that the Schmoker car remained practically at the point of impact; that Mrs. Schmoker did not see the Adams car; and that the Schmoker car had either completed or almost completed the right-hand turn at the time of the impact. It also appears from the testimony of all eyewitnesses except Adams that there was no other vehicle near enough to this intersection to have had any effect upon the accident, and that he had ample room to pass to his left of the Schmoker car.

[1] The appellant makes no contention that the evidence, if believed, is not sufficient to sustain the verdict, but it is argued that the testimony of Mrs. Schmoker and her son, who was riding with her, is so incredible that it must be disregarded. It is argued that it is incredible that the Adams

car could have come up behind the other car after it had completed its turn and, in passing that car, have missed its rear end but cut in and hooked its front bumper. While a part of the respondents' evidence indicated that their car had completed its turn, a large part of that evidence was to the effect that that car was being turned at the time in question and that the turn had almost but not quite been completed. Under such circumstances, it is not inherently unreasonable or incredible that the left front bumper of a turning car should be caught by the right rear fender of another car which passed too close or which cut in too soon. It is also argued that the mere hooking of this bumper by the appellant's right rear fender could not have had the effect of causing the appellant's car to swerve, bounce and roll over. This involves many factors, including the speed of the Adams car and the reactions of its driver, and common experience teaches us that there is nothing impossible or incredible in such a thing resulting from a comparatively slight collision of moving vehicles. It is further argued that it is not credible that Mrs. Schmoker's son, who was riding in the front seat of her car, could have seen the Adams car shortly before the impact and yelled a warning to his mother "unless the boy turned his head clear around and looked through the back window," and that it is not to be believed that Mrs. Schmoker looked to the west, after she stopped, without seeing the Adams car. There is nothing to even indicate that the boy could not have seen the other car, and that one driver did not see another car when it might have been seen is not entirely unknown in collision cases. Several other instances in which the testimony is said to be incredible are set forth, which need not be repeated here. Nothing appears in the evidence which can be held as a matter of law to be incredible, and the entire question was one of fact for the jury.

[2, 3] A motion for a new trial was not passed upon by the trial judge within the time allowed, with a resulting denial by operation of law. The appellant contends that a new trial should have been granted because the affidavits presented not only show due diligence but disclose newly discovered evidence which was material and which indicates that the result would be different on a new trial. It may first be observed that the showing of due diligence is not very strong. One of the witnesses now desired to be produced was a witness at the trial and no reason appears why the evidence he would now give was not then available. Two other such witnesses are traffic officers who visited the scene of the accident shortly after the collision, and no valid reason is given for failing to call them. With respect to the other witnesses now sought to be produced, it appears that the appellant discovered them through advertisements in newspapers after the trial was concluded. No reason is given for not having earlier used this method which later proved effective. Putnam v. Pickwick Stages, etc., 98 Cal. App. 268, 276 P. 1055.

With respect to its substance, the testimony which it is now sought to produce is merely cumulative and it does not appear that it could reasonably be expected to change the result. So far as material to the facts of the case, the main thing the appellant thinks he could establish by these new witnesses is that the point of impact of the two vehicles was within the intersection and not a few feet easterly therefrom. A part of the respondents' evidence was to the effect that their car had completed the turn and was proceeding easterly on the other road and had actually gotten ten or fifteen feet out of the intersection. Other portions of the respondents' evidence is to the effect that the car had almost but not quite completed the turn, and indicates that the point of impact was within the intersection although near its easterly edge. The exact point of impact is by no means controlling, and a reading of the record does not indicate that any testimony in that regard could be reasonably expected to affect the result. The offered testimony would be cumulative in connection with the conflicts which already existed and could not greatly affect either the issue of negligence or contributory negligence. The important consideration was the manner in which the two cars were being operated at the time, and not the exact point where the impact occurred. On the question of negligence, the record indicates that the preponderance of the evidence was in favor of the respondent. On the other hand, while it was a question of fact, contributory negligence on the part of the appellant quite clearly appears from his own testimony. The entire question was one of fact and it neither appears that the trial court

abused its discretion in failing to grant a new trial nor that this court is warranted in setting aside the verdict and allowing the appellant an opportunity to retry issues which seem to have been fairly and correctly decided.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



54 Cal.App.2d 762

GOODPASTOR v. SOUTHERN PAC. CO. et al. (two cases).

Civ. 11812.

District Court of Appeal, First District, Division 1, California.

Oct. 7, 1942.

1. Appeal and error ⇐768

Facts stated in appellants' brief were accepted as correct in view of respondent's failure to file briefs. Rules of Supreme Court and District Courts of Appeal, rule 5, § 1.

2. Negligence ⇐93(1)

Where automobile owner requested friend to drive automobile and owner was injured and his wife killed in collision with electric train, the negligence of the friend was imputable to the owner and precluded his recovery for his personal injuries and for death of his wife. Vehicle Code, § 402, St.1937, p. 2353.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Personal injury action by Clayton J. Goodpastor and death action by Clayton J. Goodpastor as administrator, etc., against the Southern Pacific Company and others. From orders granting plaintiff's motions for new trials the defendants appeal.

Reversed.

Elliott Johnson, of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondent.

PETERS, Presiding Justice.

As the result of an intersection collision between the automobile of plaintiff, Clayton J. Goodpastor, and the electric train of defendants, plaintiff received personal injuries and his wife was killed. Plaintiff instituted two actions for damages against defendants, one to recover for his personal injuries, and the other for the death of his wife. The trial court granted defendants' motions for nonsuits, but, thereafter, granted plaintiff's motions for new trials on the ground of insufficiency of the evidence. From these orders defendants have appealed.

Although given ample opportunity to do so, respondent has filed no brief on these appeals, nor has he or his counsel suggested any theory upon which the orders appealed from can be sustained. In fact, respondent's counsel in several letters to this court has indicated his belief that by reason of a recent decision of the Supreme Court, hereafter mentioned, the orders cannot be sustained. Nevertheless, respondent has refused to stipulate to a reversal.

[1, 2] The facts as stated in appellants' brief, which in view of respondent's failure to file a brief, we are permitted to accept as correct (rule V, § 1, of the Rules of the Supreme Court and District Courts of Appeal), are as follows: Plaintiff owned an automobile which he was unable to drive because of an arthritic condition. On the day of the accident he requested his friend, Mr. Conroy, to drive. Plaintiff occupied the seat beside the driver, while Mrs. Goodpastor and Miss Perry were sitting in the back seat. While driving northerly on Webster Street in the city of Oakland, the automobile collided with the electric train of defendants at the intersection of Webster Street with Seventh Street. The evidence shows without conflict, and it was admitted at the trial, that Conroy was guilty of negligence. He failed to stop at the arterial stop sign guarding the crossing, and failed to heed the signals of the train or of the flagman stationed at the crossing. There was a conflict of evidence as to whether the train was traveling at an excessive speed. The main issue presented to the trial court was whether the admitted negligence of Conroy should be imputed to the plaintiff as owner of the automobile. If so, the plaintiff was chargeable with contributory negligence as a matter of law. The trial court granted the nonsuits on the theory

that the negligence of the driver was imputable to the owner, but, on motion for new trial, changed its view, and held that such negligence was not imputable to the owner. At that time, the law on this question was uncertain. Subsequent to the perfecting of the present appeals, the Supreme Court has settled the issue. In Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10, it was held that under the provisions of section 402 of the Vehicle Code, St. 1935, p. 153, as amended in 1937, St.1937, p. 2353, as a matter of law "the negligence of a borrower of a car should be imputed to the owner in an action by the owner against a third party." Page 304 of 19 Cal.2d, page 13 of 121 P.2d. That case is conclusive on the sole issue here presented. The admitted negligence of Conroy must be imputed to plaintiff. That being so, such contributory negligence, as a matter of law, bars any recovery by plaintiff.

The orders appealed from are reversed.

KNIGHT and WARD, JJ., concurred.



54 Cal.App.2d 748

DOWD et al. v. GLENN et al.

Civ. 12095.

District Court of Appeal, First District, Division 1, California.

Oct. 6, 1942.

Rehearing Denied Nov. 5, 1942.

Hearing Denied Dec. 3, 1942.

1. Action ⇐6

In action by beneficiary and trustees under trust deed, for judgment declaring realty subject to sale under trust deed, allegations that realty was sold to irrigation district for delinquent assessment, that practice of district was to allow original owners of tax deeded realty or persons satisfactory to original owners to buy back realty for approximately amount of assessment, penalties and interest, and that valuable realty was sold for a nominal amount showed the existence of an "actual controversy" with a protectible interest in complainants, justifying as against a general demurrer, if true, a declaratory judgment that title to realty was subject to sale under trust deed. Code Civ.Proc. § 1060; Gen.Laws 1937, Act 3854, § 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

2. Action ⇐6

In action by beneficiary of trust deed to declare title of purchaser of property at sale for delinquent irrigation district assessments subject to sale under trust deed, evidence that it was practice of district to allow original owners of tax deeded realty or persons satisfactory to original owners to buy back realty for approximate amount of assessment, penalties and interest was admissible, if the facts indicated that purchaser was in fact acting for original owner. Gen.Laws 1937, Act 3854, §§ 43, 45, 47, 48.

3. Action ⇐6

In action by beneficiary of trust deed to declare title of purchaser of property at sale for delinquent irrigation district assessments, subject to sale under trust deed, evidence supported finding that a confidential relationship existed between purchaser and original owner, that they conspired to deprive beneficiary of trust deed of his lien, and that except for purchaser's representation to district that he was taking title on behalf of original owner, district would not have sold the realty to him for a nominal sum. Gen.Laws 1937, Act 3854, §§ 43, 45, 47, 48.

4. Action ⇐6

In action by beneficiary of trust deed to declare title of purchaser of property at sale for delinquent irrigation district assessments, subject to sale under trust deed, whether purchaser was buying for himself or on behalf of original owner was for trial court. Gen.Laws 1937, Act 3854, §§ 43, 45, 47, 48.

5. Evidence ⇐588

The testimony of a witness may not be disregarded, but the trier of facts is not bound to decide in conformity with such declaration, if an inference may reasonably be drawn from other evidence that it is untrue or if there is any reasonable ground to disbelieve the witness.

6. Appeal and error ⇐994(3)

An appellate court should accept as justified the evident and plain conclusion of the trial court on questions of credibility of a witness made evident by trial court's findings.

7. Waters and water courses ⇐231

In case of a sale under the Irrigation District Act, deed does not vest an absolute title, free of all incumbrances, such as a trust deed, if actual fraud is present. Gen.Laws 1937, Act 3854, §§ 43, 45, 47, 48; Pol.Code, § 3836.1, as added by St. 1939, p. 1921.

8. Waters and water courses ⇐231

Owner of realty may not sever rights of a beneficiary under a trust deed by allowing irrigation assessments to become delinquent and then, through connivance of a third person, re-acquire title to the detriment of the beneficiary under the trust deed. Gen.Laws 1937, Act 3854, §§ 43, 45, 47, 48; Pol.Code, § 3836.1, as added by St. 1939, p. 1921.

9. Mortgages ⇐200(1)
Waters and water courses ⇐231

Beneficiary under a trust deed and trustees had no duty to pay delinquent assessment by irrigation district on realty covered by the trust deed and failure to do so was not a "waiver" by the trustees and the beneficiary of his interest as against purchaser of property on sale for delinquent assessments.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

10. Equity ⇐67

A defense of "laches" is intended to protect the innocent, not those who seek to circumvent a statutory provision to the detriment of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Frank Dowd and others against Elsie Glenn and others and Clarence J. Dalby, to have the rights and duties of plaintiffs as beneficiary and trustees of a certain deed of trust on realty declared and determined. From a judgment in favor of the plaintiffs, Clarence J. Dalby appeals.

Judgment affirmed.

T. L. Chamberlain, Thos. F. Sargent, and Gerald Beatty Wallace, all of Auburn, for appellant.

Lowell L. Sparks and R. C. McKellips, both of Auburn, for respondents.

WARD, Justice.

This is an appeal by defendant Dalby from a judgment for plaintiffs in an action to have their rights and duties as beneficiary and trustees of a certain deed of trust upon real property declared and determined.

On August 9, 1933, defendant Elsie Glenn and her husband borrowed $1,000 from plaintiff Frank Dowd, and, to secure payment of a note in this amount and further advances, executed a deed of trust upon a dairy ranch, respondents George Mariner and Harold Brown being named as trustees. The property was subsequently deeded to Mrs. Glenn by her husband in 1935 shortly before his death. Thereafter Mrs. Glenn obtained further loans from Dowd upon her promissory notes in amounts as follows: July 6, 1935, $839.75; November 25, 1935, $200; February 1, 1936, $100; notices of these advances made upon the security of said deed of trust being recorded in the office of the recorder of Placer County.

The ranch in question is located within the boundaries of the Nevada Irrigation District. In 1935, Mrs. Glenn failed to pay the amount assessed against said land by the district, and on August 8, 1936, the property was sold by the collector thereof to the district for the delinquent assessment and was formally deeded to the district on September 12, 1939, without any right of redemption. Neither Mrs. Glenn nor Dowd paid any assessments levied by the district subsequent to 1935, although there is testimony that Dowd was advised of the delinquency.

In the meantime, on August 1, 1939, only eight days before the original note would have outlawed, respondent Dowd recorded notice of breach and election to sell under the trust deed. On October 17, 1939, Mrs. Glenn filed a petition in bankruptcy, listing among her assets the dairy ranch, and among her obligations the indebtedness secured by the trust deed to Dowd and a second deed of trust on the property. She testified that she took such action to stay the foreclosure proceedings and to give her a "breathing spell" with her creditors. Dowd attended meetings before the conciliation commissioner in bankruptcy, and in the course of the proceedings offered a year's extension on the note and deed of trust. On December 4, 1939, while the petition before the conciliation commissioner was still pending, appellant Dalby, the

brother of Mrs. Glenn, called at the offices of the irrigation district, identified himself as the brother of Mrs. Glenn and told the manager that he wanted his sister to continue to live on the property; that he hoped she would be in a position to pay all her old debts, and that allowing her to remain on the property would give her this opportunity. In response to a question by the manager of the district as to whether a proposed purchase of the property by him would meet with the approval of his sister, he testified: "I think I told him it would be satisfactory, or I thought it would be." Dalby made a bid therefor, and the property was deeded to him, unencumbered, on December 11, 1939, for the sum of $50, said deed being later recorded. He testified that he purchased the property after consultation with his attorney, and believing it to be free of the Dowd lien; that he would not otherwise have made the purchase. Several days after its purchase, Dalby leased the property to his sister for the sum of $30 a month and she has continued in undisputed possession, so far as her brother is concerned, although she has made no payments of rental.

There was testimony that it was the practice and policy of the officers of the irrigation district to allow the original owner to buy back tax deeded property for the approximate amount of delinquent assessments, penalties and interest; that the same concession was generally extended to any other person "satisfactory" to the original owner. If the property had been abandoned by the original owner and he did not seek to repurchase directly, nor to have the land sold to someone "satisfactory," the practice of the district was to have an investigation made to determine what the property could reasonably be sold for.

Appellant contends that the evidence is not sufficient to support the judgment declaring his title to the property to be subject to sale under the deed of trust, which, he claims, ceased to be a lien when the property was deeded to the irrigation district; that he purchased the property "free of all encumbrances" pursuant to section 48 of the California Irrigation District Act, including the deed of trust which antedated the assessment from which the property was not redeemed and by reason of which it had been sold to the district; that no fraud was proven in connection with his purchase of the property with his own funds, obtaining thereby an admittedly valid title though held for the benefit of the trustor under the deed of trust; that the trial court committed error in admitting evidence of an alleged custom of the district to sell property to a previous owner, or a person agreeable to such owner, for the amount of assessments and costs, when no knowledge of such custom was chargeable to him; and that, as purchasers from irrigation districts, brothers and sisters of former land owners should not be placed in any different category than strangers.

Appellant contends first that the demurrer to the complaint should have been sustained. The demurrer interposed by Dalby, the only appellant, is general. Some of the objections now urged, if presented by way of special demurrer might have merit. In the main, appellant's contention is that the complaint fails to state a cause of action in that the plaintiffs are not entitled to the relief sought; in other words, that an action for declaratory relief is not a proper method of testing whether plaintiffs have a subsisting lien.

[1] The complaint shows the existence of an actual present controversy with a protectible interest in the complainants (Pacific States Corp. v. Pan American Bank, 210 Cal. 472, 292 P. 494), which fact, if true as alleged, justified the granting of declaratory relief (Merkley v. Merkley, 12 Cal.2d 543, 86 P.2d 89) to the beneficiary under the trust deed. R. G. Hamilton Corp. v. Corum, 218 Cal. 92, 21 P.2d 413. Such allegations in an action for such relief are sufficient against a general demurrer. Code Civ.Proc. § 1060; Andrews v. W. K. Company, 35 Cal.App.2d 41, 94 P.2d 605; Frasch v. London & Lancashire F. Ins. Co., 213 Cal. 219, 2 P.2d 147.

Other points urged by appellant to the effect that an action for declaratory relief is not the proper remedy are primarily directed to the claim of insufficiency of the evidence, and that, under the provisions of the California Irrigation District Act, 1 Deering's Gen.Laws 1937, Act 3854, pp. 1824–1830, respondents no longer had a lien against the property upon its purchase by appellant. Upon delinquency in the payment of an irrigation district assessment the land is sold by the district collector to the district, which receives a certificate of sale. § 43. The district may transfer the certificate for a consideration of not less than the amount of the assess-

ment, penalties and costs. § 45. If the property is not redeemed in three years the collector executes a deed to the district. § 47.

Referring to a deed issued by the collector of an irrigation district, section 48, Stats.1931, p. 441 provides: "Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all encumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession." Deering's Gen.Laws, Act 3854, § 48, p. 1834. In 1937, Stats.1937, p. 379, section 47 was amended to include the following provision: "The district may also sell, convey, lease, give and also take options upon, and issue and take contracts of sale upon and otherwise deal with such property including sale of the same to a former owner or holder of said property, on such terms and at such price as may be approved by the board of directors." Deering's Gen. Laws, Act 3854, § 47, p. 1832. Reading the section as amended, it must be determined that the Legislature has formulated a policy of permitting a former owner to purchase land from an irrigation district upon terms approved by the board of directors, and that the deed thereupon given is conclusive evidence of the regularity of the proceeding "except as against actual fraud."

[2] In a case such as the present it becomes important to ascertain the rules, regulations and customs of the board in fixing terms and price in a sale to the former owner. The evidence was admissible if, as previously noted, the facts indicated that appellant was in fact acting for his sister. The evidence shows that the sale would not have been made to him at the price fixed had he not been "satisfactory" to the original owner.

In Garvey v. Byram, 18 Cal.2d 279, 115 P.2d 501, 136 A.L.R. 1137, a proceeding to compel a county tax collector to execute a deed to the former owner of property after a tax lien had attached and the property had been deeded to the state, the property was placed on public sale, whereupon the owner made the highest bid therefor, less, however, than the amount of the delinquency. The majority opinion there held that Political Code, section 3834.25, as added by St.1939, p. 1917, provided no specific exclusion of bids by former owners, and, 18 Cal.2d at pages 282, 283, 115 P.2d at page 503, that: "The court would thus be required not only to circumscribe the rule of the cases cited, but to run counter to express statutory provisions in order to formulate a policy, which finds no express legislative sanction, that defaulting owners may bid at tax sales. It is for the legislature and not the courts to formulate such a policy. The petition for a peremptory writ of mandate is denied." In the present situation, an express legislative sanction has been given to bidding by defaulting owners, § 47, and the property may be sold to them on such terms and at such price as may be approved by the board of directors of the irrigation district "except as against actual fraud." We turn, therefore, to the findings.

[3-6] The court found that a confidential relationship existed between appellant and his sister, and that they had fraudulently conspired and colluded to deprive plaintiffs of their lien, and that, except for the representation that appellant was taking title "for the use and on behalf of his sister," the district would not have sold property of the value of at least $3,500 to him for $50. This appeal, unlike that of the Garvey case, involves the rights of a third person. The findings are substantially supported by the facts as previously recited. The question whether appellant was buying for himself or on behalf of his sister was for the determination of the trial court based upon direct or indirect evidence or inferences drawn therefrom. The claim of appellant that he sought to obtain the ranch without the knowledge of his sister is inconsistent with statements made to the irrigation board, and with his conduct throughout the whole transaction. The testimony of a witness may not be disregarded, but the trier of the facts is not bound to decide in conformity with such declaration if an inference may reasonably be drawn from other evidence that it is untrue, or if there is any reasonable ground to disbelieve the witness. An appellate court should accept as justified the evident and plain conclusion of the trial court on the question of the credibility of a witness made evident by its findings. Minikin v. Hendrix, 15 Cal.2d 338, 101 P. 2d 473; Zibbell v. Southern Pacific Co.,

160 Cal. 237, 116 P. 513; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Iffland v. John, 128 Cal.App. 531, 17 P.2d 1028.

[7, 8] So, we are faced with the problem of a third party endeavoring fraudulently to advance his own interest or to conserve that of a defaulting owner. It was not intended, and it is not the law, that a tax collector's deed should vest title in a grantee free and clear of all encumbrances "of any kind" (Garvey v. Byram, supra) existing before the sale when "actual fraud" is proven (Stats.1939, chap. 529, § 3836.1, p. 1921), or, in the case of a sale under the California Irrigation District Act, an absolute title, free "of all encumbrances," in the presence of actual fraud. § 48. There is support in the record to sustain the finding "that defendant Elsie Glenn and Clarence J. Dalby further conspired and colluded together that although the title to said property should be taken in the name of Clarence J. Dalby that the ranch in truth and in fact should belong to Elsie Glenn and that she would at all times live upon said property, and exercise all the prerogatives of ownership thereof," and the conclusion of law based thereon that appellant held such interest in trust (Civ.Code, § 2224; Cummings v. Cummings, 55 Cal.App. 433, 203 P. 452; 25 Cal. Jur., p. 146; 42 A.L.R. 10; 54 A.L.R. 1195) for the use and benefit of respondents in accordance with the terms of the deed of trust. A property owner may not sever the rights of a beneficiary under a trust deed by allowing irrigation assessments to become delinquent and then, through the assistance and connivance of a third party, reacquire the title to the detriment of the junior lien claimant. Christy v. Fisher, 58 Cal. 256; Moss v. Shear, 25 Cal. 38, 85 Am.Dec. 94; Gates v. Lindley, 104 Cal. 451, 38 P. 311. Appellant, not being an innocent purchaser, but, on the contrary, the perpetrator of a legal fraud, whatever interests he obtained under the deed from the district could not give him a greater advantage than would have been gained by his sister, the owner, had she purchased at the sale. Cummings v. Cummings, supra; Moss v. Shear, supra.

[9, 10] Finally, appellant urges that the trial court erred in not holding that respondents were barred by laches in failing to redeem the property; in other words, that, under the deed of trust they had the right to pay assessments and to be secured therefor, but neglected to exercise it. Whatever right existed, no duty was imposed upon respondents to pay the delinquent taxes, and their failure to do so was not a waiver by them of their interest as beneficiary and trustees under the deed of trust. In addition, it may be said that the defense of laches is intended to protect the innocent, not those who seek to circumvent a statutory provision to the detriment of another. Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 P. 600; Hovey v. Bradbury, 112 Cal. 620, 44 P. 1077.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



In re HANLEY'S ESTATE.*

HANLEY v. HANLEY et al.

Civ. 13676.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1942.

Hearing Granted Dec. 3, 1942.

1. Appeal and error ⇐428(2)

The time of filing of the notice of appeal is jurisdictional, and neither stipulation nor other acts of the parties can confer the right of appeal once lost by expiration of the statutory time.

2. Executors and administrators ⇐510(6)

Where notice of appeal was filed on the sixty-first day after notice of the entry of order approving the first account current of executrix, and date of the entry of such order was December 12, 1941, instead of December 17, 1941, as stated in notice of entry of order, but misstatement of date was not willfully made for the purpose of deceiving appellant, the appeal would be dismissed.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

* Subsequent opinion 142 P.2d 423.

Proceeding in the matter of the estate of Kate Hanley, deceased, relating to the first account current of Katharine G. Hanley, as executrix, etc., wherein Katharine G. Hanley and others were parties. From an order approving first account current, Katharine G. Hanley appeals. On motion of respondents to dismiss appeal.

Appeal dismissed.

Laurence B. Martin, of Los Angeles, for appellant.

F. C. Stevens, of Los Angeles, for respondent.

PER CURIAM.

[1, 2] The above entitled matter having come on for hearing upon respondents' motion to dismiss the appeal and it appearing that the notice of appeal was filed on the sixty-first day after notice of entry of the order approving the First Account Current of the executrix and that the date of entry of such order to wit, December 17, 1941, (instead of December 12, 1941), contained in the notice served by respondent was not wilfully made for the purpose of deceiving appellant (see Moyle v. Landers, 78 Cal. 99, 20 P. 241, 12 Am.St.Rep. 22) and that the time of filing of the notice of appeal is jurisdictional and that neither stipulation nor other acts of the parties can confer the right of appeal once lost by expiration of the statutory time (Estate of Brewer, 156 Cal. 89, 103 P. 486; Irving v. Sheetz, 26 Cal. App.2d 751, 80 P.2d 502; Estate of Pearsons, 119 Cal. 27, 50 P. 929; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459); now, therefore,

It is ordered and adjudged that the motion to dismiss the appeal be and it is hereby granted and the appeal is dismissed.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion the actions of respondent in serving written notice containing the false statement that the order appealed from had been entered on December 17, 1941, constituted fraud (Civ.Code, § 1710, subd. 2) and made applicable the rule enunciated in Moyle v. Landers, 78 Cal. 99, 20 P. 241, 245, 12 Am.St.Rep. 22, where it was held that one who fraudulently concealed the death of a party for the purpose of defeating an appeal was "estopped to attack the notice given, or to question the jurisdiction of the court." The rule of Moyle v. Landers has been referred to impliedly with approval, in Churchill v. Flournoy, 127 Cal. 355, at page 359, 59 P. 791, and in Deiter v. Kiser, 158 Cal. 259, at page 263, 110 P. 921.



55 Cal.App.2d 85

In re CLARK'S ESTATE.

CLARK et al. v. WALLMARK et al.

District Court of Appeal, Second District, Division 3, California.

Oct. 19, 1942.

1. Wills ⇐130

The requirement of a "date" in statute providing that a will, to be holographic, must be entirely written, dated and signed by the hand of the testator includes the day, month, and year and if any one of them is omitted or not written by the testator, the document cannot be admitted to probate as a "holographic will". Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Date" and "Holographic Will".

2. Wills ⇐130

The "date" required by statute providing that a will, to be holographic, must be entirely written, dated and signed by the hand of the testator, need not be the actual date of execution of the will. Probate Code, § 53.

3. Wills ⇐130

Where alleged holographic will was dated as required by statute except for the interposition, between the name of the month and the number of the day, of a character which was sort of a vertical curlicue about half the height of the number and then nearly a vertical straight line of about the same height as the number, drawn through the curlicue, trial court properly found in will contest that the character resulted from testatrix' effort to correct a previous error of penmanship by

striking out a meaningless form accidentally or otherwise wrongly put on the paper, and that such character was to be disregarded in passing on the alleged holographic will. Probate Code, § 53.

4. Wills ⇐132

The statutory definition of a "holographic will" does not require that the testator's handwriting be perfect or forbid the correction by the testator of any mistakes he may make in the course of writing his testamentary disposition. Probate Code, § 53.

5. Wills ⇐130

The fact that testatrix' signature may have been placed on will four days after the date stated in the will and as long after the body of the will was written would not prevent the will from being given effect as a "holographic will". Probate Code, 53.

6. Wills ⇐302(6)

In contest of alleged holographic will, evidence sustained trial court's finding that the will was written by testatrix' own hand as required by statute. Probate Code, § 53.

7. Wills ⇐130

The presence on will of the names of two persons designated as witnesses, and statement of notary public over his signature that the will was signed before him with date and venue, did not detract from the will's character as a "holographic will". Probate Code, § 53.

8. Wills ⇐55(1)

Evidence sustained finding that testatrix was not of unsound mind at time of execution of will.

9. Wills ⇐386

The fact that contestants produced several witnesses who testified that testatrix was of unsound mind at time of execution of holographic will and that two of contestants' witnesses, about time will was signed, filed petitions seeking appointment as testatrix' guardian on ground that she was incompetent, afforded nothing more than a basis for an argument on the weight of the evidence on which the District Court of Appeal could not review trial court's decision that testatrix was not of unsound mind.

10. Wills ⇐155(1)

In order to set aside a will on ground of "undue influence" it is necessary to show that pressure was brought to bear directly on the testamentary act, and that the influence was such as, in effect, to destroy the testator's free agency and substitute another person's will for his.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

11. Wills ⇐155(1)

Mere general influence not brought on the testamentary act is not sufficient to require the setting aside of a will on ground of "undue influence", but it must be influence used directly to procure the will and must amount to coercion destroying free agency of the testator.

12. Wills ⇐166(7)

Mere opportunity to influence the testator's mind, even coupled with an interest or a motive to do so, is not sufficient to require the setting aside of the will on ground of "undue influence."

13. Wills ⇐324(3)

In will contest, evidence was insufficient to establish "undue influence" as a matter of law.

14. Wills ⇐163(2)

The mere relation of parent and child between a testator and a beneficiary of a will does not raise a presumption of "undue influence".

15. Wills ⇐386

If the fact that testatrix was living in son's house and that he was active in connection with the execution of her will raised a presumption of undue influence on the son's part, question whether such presumption was overcome in will contest, was for the trial court's determination, and its decision was binding on the District Court of Appeal, where not without evidentiary support.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceeding in the matter of the estate of Annie Clark, deceased, wherein William Paul Clark and Edna Frances Grace opposed by Elsie Wallmark and others, filed a contest of a document offered for probate as the will of Annie Clark, deceased. From an order admitting the will to probate, the contestants appeal.

Affirmed.

LeRoy Anderson, A. J. McGuire, and Elbert E. Hensley, all of Los Angeles, for appellants.

Bartlett & Kearney and James A. Miller, all of Los Angeles, for respondents.

SHAW, Justice pro tem.

Appellants, who are two of the six children and heirs at law of Annie Clark, deceased, filed, before probate, a contest of a document offered for probate as her will. After trial by the court sitting without a jury, an order was made admitting the will to probate, from which this appeal is taken.

The will purports to be both a holographic and a witnessed will. The grounds of contest are, that the will "is not such a document that complies with the law of California relating to holographic wills," that it "was not executed and attested with the formalities required by law," that at the time of its execution the testatrix was of unsound mind, and that its execution was procured by the undue influence of the other four children of the testatrix and of the wife of one of them. All the allegations of the contest on these matters were denied and the trial court found them to be untrue.

[1, 2] On the question whether the will was properly admitted as a holographic will, the above quoted allegation is not very enlightening as to the nature of appellants' objections to it, but in argument two points are presented; first, that the will is not dated, and second, that it is not entirely written and signed by the testatrix. The Probate Code clearly provides, in section 53, that a will, to be holographic, must be "entirely written, dated and signed by the hand of the testator himself." The cases have firmly established the rule that the requirement of a date includes the day, month and year, and that if any one of them is omitted or not written by the testator the document cannot be admitted to probate as a holographic will. 26 Cal. Jur. 859, 860; In re Estate of Vance, 1916, 174 Cal. 122, 124, 162 P. 103, L.R.A.1917C, 479; In re Estate of Maguire, 1936, 14 Cal.App.2d 388, 389, 58 P.2d 209. The date stated need not, however, be the actual date of execution of the will. In re Estate of Vance, supra; In re Estate of Fay, 1904, 145 Cal. 82, 84, 78 P. 340, 104 Am. St.Rep. 17; In re Estate of Wilkinson, 1931, 113 Cal.App. 645, 649, 298 P. 1037.

[3-5] Appellants in their brief state that the date appears in the will as "April 1–1–4 1940" and argue that from these figures no date can be ascertained. The printed transcript on appeal represents the date to be "April + 14 1940," and the respondents in their brief assert that it is "April 14, 1940." In view of these conflicting statements we have caused the original will to be sent us from the trial court for our inspection. The whole document is written in an uncertain and wavering hand. At the top of it, where a date would usually be, appears "April 14, 1940," with a character interposed between "April" and "14" to which nothing short of a photographic reproduction could do exact justice. Except for this interposed character the date is complete and unquestionable. Inspection of this character indicates that a sort of vertical curlicue about half the height of the "1" in "14" was first written and then a nearly vertical straight line of about the same height as the "1" was drawn through this curlicue. The trial court might properly find, and we assume it did find, from inspection of the will, that this character resulted from an effort to correct a previous error of penmanship by striking out a meaningless form accidentally or otherwise wrongly put on the paper, and that such character was to be altogether disregarded in passing upon the will. There is nothing in the code definition of a holographic will as one "entirely written, dated and signed by the hand of the testator himself" which requires that his handwriting be perfect, or forbids the correction by him of any mistakes he may make in the course of writing his testamentary disposition. See Succession of McCay, 1928, 166 La. 681, 117 So. 772. The testimony indicates that the testatrix' signature may have been placed on the will on April 18, 1940, four days after the date stated in the will and as long after the body of the will was written; but if this be the fact, it does not prevent the will from being given effect as a holographic will, under the rule above stated.

[6] On the question whether the will was written by the testatrix' own hand, the case is simply the ordinary one of conflicting evidence. Two witnesses produced by the proponents testified that they saw the testatrix writing the will, one of them saying she saw only a part of it being written. Three witnesses, two of them daugh-

ters and one a daughter-in-law of the testatrix, testified that they were familiar with her handwriting, that all of the will above the signature was in her handwriting, and that the signature itself was genuine. One of contestants' witnesses also conceded that the signature was genuine. Two witnesses testified that the testatrix wrote the signature in their presence, the body of the will having been previously written. The proponents produced witnesses who expressed the opinion that neither the body of the will nor the signature was in the handwriting of the testatrix. The trial court's resolution of this conflict is binding here.

[7] Below the testatrix' signature to the will are the signatures of two persons, designated as "witnesses," with no further attestation clause, and the statement of a notary public over his signature that the will was "signed before me," with the date and venue. None of these matters was in the handwriting of the testatrix. However, they were obviously not intended to be a part of the will, and their presence on the same paper does not detract from its character as a holographic will. In re Soher, 1889, 78 Cal. 477, 479, 21 P. 8; In re Estate of Tanner, 1939, 33 Cal.App.2d 186, 189, 91 P.2d 170. Since the will was properly executed as a holographic will we do not consider the points made against its attestation by the witnesses.

[8, 9] Coming to the ground of contest that the testatrix was of unsound mind, we find that it also was decided against appellants on conflicting evidence. Six witnesses, of whom four were children of the testatrix, testified that she was of sound mind at or about the time the will was executed. One of these witnesses was a physician who was called in to attend the testatrix on April 14, 1940, and continued to see her once or twice a day until her death on July 14, 1940. He testified that in his opinion she was of sound mind "from the latter part of April until some time in June, 1940," and that she "in the beginning had a fairly keen mind." Appellants produced several witnesses who testified to contrary opinions, but neither that fact, nor the further fact that two of respondents' witnesses, about the same time the will was signed, filed petitions seeking appointment as testatrix' guardian on the ground that she was incompetent, affords anything more than a basis for an argument on the weight of the evidence, on which we may not review the trial court's decision.

Neither do we find any lack of evidentiary support for the trial court's finding that the will was not the result of undue influence. We do not have here the usual case where someone to whom undue influence is charged profits by the dispositions made in the will. The will simply bequeaths the property of the testatrix to her children, who appear to be her only heirs, "share and share alike." The appellants alleged and the trial court found that the testatrix had executed a previous will on January 17, 1940, and while its contents do not appear in the record, except inferentially, the appellants conceded on the argument that it made the same disposition of the property as does the will in contest and that the main difference in substance was that the former will appointed Mr. Hensley, one of appellants' counsel, who was then acting as attorney for the testatrix, as executor, while the contested will appoints two of those charged with undue influence, Richard Clark and Mable Hammacker, as executors. Appellants contend that there are circumstances from which undue influence may be inferred, and that those named as executors in the will stood in a confidential relation to the testatrix and their undue influence is presumed as a matter of law. It appears that several of the respondents, who are children of testatrix, discussed with her, after the will of January 17, 1940, the making of a new will, but nothing further is shown regarding the character or contents of these conversations. The record is quite devoid of even a suggestion of undue influence by any of the respondents other than Richard Clark. The testatrix had an eye operation for cataract on February 23, 1940, and left the hospital February 26, 1940. From that time until March 17, 1940, she lived with her daughter, Mrs. Edna Grace, one of the appellants. She then went to live with her son, Richard Clark, and remained there until her death. He testified that he saw the testatrix write the will. She said to him, "Dickie, I want to make my will." He furnished her with a copy of a will, and a law book. He got the law book from his sister, Mrs. Wallmark, another of the respondents. He also furnished the paper on which testatrix wrote the will, and drew lines on the paper for her. After the will was written he took

the testatrix to the notary's office where the will was signed and witnessed. On the way he picked up Mrs. Rea, one of the witnesses, telling her he wanted her to be a witness. At the notary's office, however, according to Mrs. Rea, the testatrix said she wanted to sign the will, produced it and proceeded to sign it. The notary gave substantially the same testimony on this point. Mr. Hensley testified that shortly after the execution of the will of January 17, 1940, in which he was named as executor, the testatrix told several of her children she wanted him to administer her estate, and one of the appellants testified that two days before the will in contest was dated the testatrix said she wanted Mr. Hensley to handle her affairs. On the other hand, one of the respondents testified that the testatrix in March, 1940, "was bitter at Mr. Hensley" and said she wanted a new will. Mrs. Rea testified that after the will in contest was signed, the testatrix said she was glad she had done it. There is testimony showing that about April 10, 1940, while the testatrix was living with Richard, she bought a used automobile, which he used to take her out riding and for other purposes, and that this purchase was made over the protest of Mr. Hensley, who was then looking after her business affairs. Richard initiated this transaction by going to the car dealer and picking out the car. Testatrix then looked it over, asked some questions about it and signed the contract. There is no showing that the testatrix did not enter into this transaction voluntarily, or indeed, that the idea of it did not originate with her.

These are, in brief, the matters relied on by appellants to show undue influence. We doubt if they would have supported a finding of undue influence if one had been made. Certainly they are not sufficient to justify us in reversing a finding adverse to appellants on that issue. Perhaps Richard Clark suggested the terms of the will, but to reach even that conclusion we must surmise, without proof, that the copy of *a* will which he gave to the testatrix was like *the* will which she executed, instead of being a mere legal form for her to use. It does not appear that he urged or insisted upon the execution of such a will as was made, or even that the suggestion of a will came from him in the first place. Indeed, according to his testimony it came from the testatrix.

[10-13] In order to set aside a will on the ground of undue influence it is necessary to show that pressure was brought to bear directly upon the testamentary act, and that the influence was such as, in effect, to destroy the testator's free agency and substitute another person's will for his. Mere general influence not brought to bear upon the testamentary act is not enough; it must be influence used directly to procure the will and must amount to coercion destroying free agency on the part of the testator. Mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. These propositions are well settled, and were recently declared in Re Estate of Arnold, 1940, 16 Cal.2d 573, 577, 107 P.2d 25. The evidence here, taking it in the aspect most favorable to the findings, does not meet these tests and is not sufficient to establish undue influence as a matter of law.

[14, 15] As to the claimed confidential relationship, the mere naming of a person as executor of a will does not place him in a confidential relation to the testator. Nor does the mere relation of parent and child raise a presumption of undue influence. Best v. Paul, 1929, 101 Cal.App. 497, 499, 281 P. 1089. Assuming, however, that the additional facts that here the testatrix was living in Richard Clark's house and that he was active in connection with the execution of the will raise a presumption of undue influence on his part, the question whether such presumption has been overcome is one of fact to be determined by the trial court and its decision is binding upon us unless without evidentiary support. Schurman v. Look, 1923, 63 Cal.App. 347, 355, 218 P. 624; In re Estate of Butts, 1927, 201 Cal. 185, 188, 256 P. 200. Upon the evidence here, which we have reviewed briefly, it was within the competence of the trial court to find, as it did, that the presumption, if there was one, was overcome.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

CALIFORNIA REPORTER

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SECOND SERIES

54 Cal.App.2d 782

LOWRY v. STANDARD OIL CO. OF CALIFORNIA et al.

Civ. 13177.

District Court of Appeal, Second District, Division 3, California.

Oct. 13, 1942.

Hearing denied Dec. 8, 1942.

1. Trial ⇐105(2)

Where action for an assault by service station attendant was tried on theory that attendant having just overpowered one attempting robbery and believing plaintiff to be a participant in the holdup may have been justified in running out of the station brandishing a gun and testimony with respect to justification was given by both attendant and plaintiff without objection, jury could properly have found the facts on that issue even though justification was not pleaded.

2. Assault and battery ⇐43(2)

Instruction that even though an innocent person at the scene and time of an actual robbery conducts himself in such a manner that victim of the robbery as an ordinary reasonable person would be justified reasonably in believing that such person was a participant in the robbery, the victim would not be justified in attempting, by the use of necessary force, to defend himself or his property or to apprehend the person creating such impression was error. Pen.Code, § 837.

3. Assault and battery ⇐13, 15

Whether a man is justified in acting in defense of himself or his property depends not upon his own belief as to his peril, but upon whether a reasonable man, situated as he was, seeing what he saw, and knowing what he knew would be justified in believing himself or his property in danger.

4. Assault and battery ⇐24(3)

In action for an assault on pedestrian by service station attendant who had just subdued a bandit attempting to rob the station, an issue in the case was whether a station, an issue in the case was whether a reasonable man situated as was the attendant would be justified in running out of the station brandishing a gun towards pedestrian whose comment regarding hurting the bandit had caused attendant to believe him to be a participant in the holdup.

5. Assault and battery ⇐10

Where service station attendant having just subdued a bandit attempting to rob the station pursued for a short distance a pedestrian he saw outside the station watching the struggle in the belief that pedestrian was a participant in attempted holdup, station attendant was not required to announce preliminarily to pursuit that his intention was to arrest pedestrian as a participant in order to justify such pursuit in civil action for an assault. Pen. Code §§ 837, 841.

6. Arrest ⇐68

Notice of intention to make an arrest may be indicated from the circumstances, and it is not necessarily a requirement that notice of such intention be given by express statement before taking the person into actual or potential custody. Penal Code § 841.

7. False imprisonment ⇐13

Where a person has reasonable grounds to believe that another is stealing his property, as distinguished from cases where the offense has been completed, he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner and is not on such account subject to civil action for false imprisonment, even though the person detained was suspected of a misdemeanor only.

8. Assault and battery ⇐42

In action for an assault by service station attendant on pedestrian whom attendant saw outside the station watching him subdue a bandit attempting to rob the station, whether the state of mind of the attendant in pursuing the pedestrian was that of attempting his apprehension as a participant in the holdup was for the jury.

9. Appeal and error ⇐882(3)

Where it was agreed at trial of action for assault that defendant's attendant in pursuing plaintiff believed he had committed a crime and court rejected requested instruction as to justification and gave instruction excluding all theories of justification as a defense if plaintiff were innocent, whether purpose of pursuit was to apprehend plaintiff as suspected participant in a holdup was an issue at trial and was not inadmissible as a new theory of justification presented first on appeal.

10. Appeal and error ⇐1064(1)

Instruction that reasonable belief of service station attendant that pedestrian whom he saw outside the station watching him subdue a bandit attempting to rob station was a participant in attempted holdup would be no defense to action for assault based on attendant's pursuit of pedestrian, if pedestrian was innocent, was prejudicially erroneous.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by John E. Lowry against Standard Oil Company of California and others for personal injuries resulting from an alleged assault by named defendant's employee. From a judgment for plaintiff, defendants appeal.

Judgment reversed.

Hearing denied; CURTIS and CARTER, JJ., dissenting; TRAYNOR, J., not participating.

Reginald I. Bauder, of Los Angeles, for appellant Standard Oil Co.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff obtained judgment, based upon a verdict, against defendant Standard Oil Company for $10,572 damages for personal injuries resulting from an alleged assault by defendant's employee. Defendant appeals from the judgment and asserts that the court erred in giving certain instructions and in refusing other instructions requested by defendant.

The complaint alleged that, while plaintiff was a pedestrian upon a public sidewalk adjacent to defendant's service station, an employee of defendant "did wilfully and unlawfully assault" plaintiff with a revolver and ran after him in such a manner that plaintiff was caused to run away, fall and become injured. The answer denied those allegations, and did not include a plea of justification.

Appellant does not claim that the evidence was insufficient to justify the verdict. It is appropriate, however, for a proper understanding of the contentions relative to the instructions, that the substance of the evidence as to liability be stated.

It was stipulated that the employee was acting in the course of his employment by defendant at the time of the injury to plaintiff.

On August 18, 1939, about 10 p.m., a man entered a gasoline service station building of defendant Standard Oil Company at the southwest corner of Beverly and Rampart Boulevards in Los Angeles and in an attempted "holdup" hit the station attendant on the head with a gun. The attendant wrestled with the bandit, took the gun from him and subdued and kept him there until the police arrived. The bandit was convicted of the felony there committed. It was stipulated that a holdup had actually occurred.

Plaintiff testified that he was walking east on the south sidewalk of Beverly Boulevard and was about 25 feet west of the service station when his attention was attracted to the station by the breaking of glass in the side of the station building; that he continued walking, then stopped and stood "a very few seconds" on the sidewalk (which was 18 feet from the station door) in front of the three gasoline pumps, noticed two men in the station, and that "one had the other down on the floor" and was kicking him; that plaintiff said, "Hey, you fellows are going to hurt one another there," and one of them said, "Come on in here"; that he proceeded to walk away and when he had gone 10 feet a man came running out of the station chasing plaintiff as fast as he could run; that the man had a 38 or 45 automatic "in his right hand," pointing and clicking it at plaintiff and with his left hand was "pulling it back and working it at the same time" (he testified at three different times on direct examination that the gun was *clicked* at him. On cross-examination, in his last reference to the gun, he said it was *fired* four or five times at him); that plaintiff ran east on Beverly as fast as he could when he saw the man come out of the station, and he

could not say whether or not the man stopped when plaintiff started to run; that plaintiff did not see him after plaintiff started to run; that plaintiff fell "in the street" when he was about halfway across Rampart Boulevard, or 40 feet from the street corner, fractured his arm about 2 inches below the shoulder, and injured his shoulder; that he "got up quick" as he could, ran about 1½ blocks, rested a few minutes, then walked to the police station at First and Hill Streets (which was 2 miles from where he fell and 2 blocks from where he lived), asked for a doctor, and then several policemen asked him if he was involved in a holdup at Beverly and Rampart (the service station attendant had reported the holdup to the police); that in reply plaintiff related the circumstances above mentioned and in addition said the *"attendant, thinking I was an accomplice,"* came out with a gun; that he was taken to the receiving hospital and the doctor there said, after he had examined him, that there was nothing to worry about and it (the arm) would be all right in 2 or 3 days; that plaintiff said he would see his private doctor the next morning, Saturday; that he did not see another doctor until the following Monday morning; that a few days later he entered the Veterans' Hospital; that he did not tell the doctor or anyone, at the time of registering at the hospital or at all, that a car ran through a red sign at Beverly and Rampart and struck him, fracturing his arm and 6 ribs (the written record of the hospital made at the time plaintiff entered the hospital stated, "The car ran through a red sign and struck him recently fracturing his left arm and six ribs." It was stipulated that the record of the hospital did not include a statement or reference that a man with a gun was chasing plaintiff. Before plaintiff made such answer that he did not say a car ran through a red sign, he was asked 13 successive times whether he did so state. His purported answers to the questions, prior to his responsive answer, were to the effect that he was in pain, that he told the clerk the same as he had told in court, that he did not understand the question, and that the clerk made the record); that he did tell the clerk who registered him at the hospital that a man with a gun was chasing him; that he explained to the clerk "about the holdup" and said, "They have a police record," and the clerk said, "We aren't interested in holdups out here * * * was a car involved?" and plaintiff said, "There was cars at this red light and the cars moved off as this light went and it happened about the time I fell in this accident, fell and broke my arm"; that his business, prior to the accident and since 1925, was that he did "bits and parts and extra work in the movies"; that he had no steady work but would work on call; that he averaged about $100 a month during a year; that on the evening of the accident he was returning home from a club, of which he was a member, composed of approximately 50 ex-service men who made their living by working in motion pictures.

The receiving hospital doctor testified that he did not tell plaintiff there was nothing to worry about and that the arm would be all right in 2 or 3 days; that he told plaintiff that his shoulder was broken, that it should be set, and that he should take gas; that plaintiff refused to take gas and the doctor did not attempt to set the shoulder, but put his arm in a sling and told him to see a doctor.

The station attendant, Greenlee, testified that he had been employed by the defendant company 30 years and had operated that station 6 years; that it was 18 feet from the sidewalk to the station building; that the station was lighted brightly and he was dressed in the regular white uniform; that after the holdup man hit him on the head several times with a gun, Greenlee wrestled with him and knocked the gun from his hand; that glass in the side of the building was broken, he was cut on the head by the glass, and dazed by the blows on his head; that he first saw plaintiff when plaintiff was on the driveway between the pump and the sidewalk looking in the station, and saying, "Don't hurt him, don't hurt him"; that he believed plaintiff was a participant in the holdup; that Greenlee grabbed the gun which was on the floor, went out the door, and plaintiff was running east on Beverly; that plaintiff fell in the street, got up, and Greenlee did not see him again until the trial; that Greenlee did not leave the station premises, the farthest he was away from the building was 18 or 20 feet, and he turned back from that point to see about the other man in the station who was then "getting up on his feet"; that he wrestled again with the bandit and put him down on the floor again and kept him there until the police arrived; that he had never seen

plaintiff prior to the holdup; that he did not have any recollection of trying to click or fire the gun; that he did not say, during the wrestle or at all, "Come on in here," and did not hear the bandit say that or anything to that effect.

Plaintiff claims that defendant's failure to plead justification for the alleged assault precludes any attack by defendant upon the trial court's rulings in refusing to give defendant's proposed instructions upon the subject of justification. Defendant contends that the case was tried on the theory that the question of justification was involved and that the issue of justification as a defense was available to defendant even though it was not pleaded. The testimony above set forth and the following references to occurrences at the trial indicate that the case was tried on such theory: In the opening statement in behalf of plaintiff it was said, "And this station man kept pursuing him presumably under the impression that he was in cahoots with the holdup man." It was stipulated at the beginning of the trial and at the close thereof that a holdup had actually occurred. It was agreed that the employee acted in the belief that plaintiff was a participant in the holdup. Plaintiff testified as to his impressions why he was chased and testified as to the essential facts with respect to justification. The employee testified as to the essential facts with respect to justification. No objections were made on behalf of plaintiff to questions by defendant on cross-examination of plaintiff or in examination of the employee concerning essential facts as to justification for the acts of the employee. (A comment was made on behalf of plaintiff, however, to the effect that mistaken identity was not a defense.) Three of the instructions given (hereinafter referred to particularly) related to the question whether there could be justification for the acts of the employee. A proposed instruction was requested by plaintiff to the effect that mistaken identity "is not in itself justification for an assault upon plaintiff." No objections were made by plaintiff to questions asked the employee as follows: "Now, Mr. Greenlee, in the light of what had transpired and the position of the plaintiff there, were you under the impression or belief that he was a participant in this holdup?"; "Was there anything that transpired there that night to cause you, or which did cause you to run after him or threaten him in any way aside from your belief that he was a participant in this holdup which had just taken place?"; "Do you remember any circumstance that arose at the time that would cause you to run after him excepting your belief that he was a holdup man?"

[1] The facts as to what occurred preceding the injury to plaintiff were undisputed practically. The only points in dispute related to whether one of the men in the service station said, "Come on in here" or words to that effect; whether plaintiff said "* * * you * * * are going to hurt one another," or whether he said, "Don't hurt him"; and whether plaintiff was in the driveway or on the sidewalk. Plaintiff did not see the employee after the employee came out of the door and therefore the distance plaintiff was chased was not in dispute. It appears that the facts in the trial would have been the same if a plea of justification had been included in the answer, as the facts were in the trial without such a plea. In other words it does not appear that any different issue of fact would have been presented if a plea of justification had been made. A distinction should be noted between this case wherein all the evidence offered by defendant relative to justification was received without objection, and a case wherein defendant sought to introduce evidence of justification and was precluded therefrom because he had not pleaded justification. Plaintiff was not confronted at the trial with an offer of evidence, under defendant's theory of justification, which placed plaintiff at a disadvantage or inconvenience by reason of the absence of a plea of justification. Under the circumstances of this particular case wherein the evidence presented by each party as to the alleged assault was practically the same, it is reasonable to infer, if any objection had been made that any offered evidence was inadmissible because a plea of justification had not been made, that defendant would have sought permission to amend the answer to include such a plea; and it is reasonable to infer that such permission would have been granted. The case was tried upon the theory that justification was an issue and it would have been proper for the jury to find the facts upon that theory. (Starkweather v. Eddy, 1927, 87 Cal.App. 92, 98, 261 P. 763; Thomson v. Leak, 1933, 135 Cal.App. 544, 547, 27 P.2d 795.

The trial court instructed the jury that: "A person who is not a participant in a holdup or engaged in any unlawful act is entitled to recover damages from an employer whose employee commits an assault upon him while acting in the course of his employment, notwithstanding said employee may have been reasonably justified under the circumstances in believing that plaintiff was a participant in said holdup."

Although justification was not pleaded, the court undertook, in giving the above instruction at the request of plaintiff, to instruct the jury relative to justification. Respondent states that the instruction does not relate to justification for the assault, but the term "justified" used therein referred only to the employee's belief; that the only issue covered by the instruction was that of mistake in identity; that plaintiff was not a participant in the holdup and therefore it was immaterial that the employee had reason to believe he was a participant. This was not a case of mistaken identity. There was no mistake as to the identity of plaintiff. The employee pursued the only other person present, the one he intended to pursue, the one who expressed concern at the time the uniformed and standing employee was kicking the floored bandit.

The court also gave the two following instructions:

"If you believe that the assault may have been committed by the employee without any unlawful intention, nevertheless his good intention cannot change the assault, which is essentially an unlawful act, into a lawful act."

"No person has the right to assault one who is innocent of wrongdoing. To assault such a person is unlawful."

The three above quoted instructions constituted all of the given instructions relating to justification or probable cause.

[2] Those instructions amounted to a pronouncement that there could be no justification under any circumstances if the plaintiff was not in fact an actual participant in the holdup. In other words, the effect of those instructions was that even though an innocent person at the scene and time of an actual robbery conducts himself in such a manner that the victim of the robbery, as an ordinary reasonable person, would be justified reasonably in believing that such person was a participant in the robbery, the victim would not be justified in attempting then and there, by the use of necessary force, to defend himself or his property, or to apprehend such person who created such impression or belief. Under that instruction a victim of a felony, which is then and there actually being committed in his presence, must, in attempting then and there to defend himself or his property or to apprehend the participants, act only upon *positive* knowledge that a person is in fact a participant who then and there creates a reasonable belief in the mind of the victim, an ordinary reasonable person, that he is a participant. That instruction unduly restricts a person in the exercise of his right to defend himself or his property, or to apprehend the perpetrator of a felony when as an ordinary reasonable person he has reasonable cause for believing that a person has committed a felony.

The case of Nakashima v. Takase, 1935, 8 Cal.App.2d 35, 46 P.2d 1020, was an action for damages for wrongful death. Defendant therein noticed in the daytime that the glass near the lock in the door of his cafe had been cut but not removed. He anticipated that burglary and theft might be committed at the cafe. At night he returned to the cafe with a shotgun and secreted himself in the dark cafe. Soon thereafter the glass in the door was broken and two persons entered the cafe and walked to various places therein. Defendant shot and killed one of them without first giving him a warning or an opportunity to identify himself. The court said at page 38 of 8 Cal.App.2d, at page 1022 of 46 P.2d, "The findings of the trial court that the defendant 'was justified in believing that they (Nakashima and his partner) were there in the attempted commission of a felony' and that 'the circumstances * * * were such as to reasonably and properly cause a belief in his (defendant's) mind that the persons in his place of business were attempting a felony * * *' are sufficient in our opinion to justify the shooting and to exonerate defendant from any civil or criminal liability." The court said further, at page 39 of 8 Cal.App.2d, at page 1022 of 46 P.2d "Under such circumstances, defendant had a right as a reasonably prudent person to assume that if he gave any warning he would have to pay for his charity with his own life or to his great bodily harm."

[3, 4] The standard or rule with reference to the circumstances under which a

person may act upon appearances was stated in People v. Albori, 1929, 97 Cal. App. 537, 275 P. 1017. It was there stated (page 544 of 97 Cal.App., page 1020 of 275 P.) that if a person acts on appearances that he is in imminent danger and believes his apprehension is based on sufficient cause, "* * * he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only, did the person acting on appearances himself believe that he was in * * * peril * * * but would a reasonable man, situated as defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?" A question in this case, therefore, was whether a reasonable man, situated as the employee was, would be justified in acting as the employee did. The court did not give an instruction based upon that standard above stated for the reason, apparently, that it considered justification was not a defense if plaintiff was innocent.

Section 837 of the Penal Code provides: "A private person may arrest another: * * * 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

[5, 6] It was not a requirement under the circumstances here presented, as plaintiff contends it was, that the employee should have announced preliminarily to his pursuit of plaintiff that his intention was to arrest or apprehend him. Pen.Code, § 841. That section provides: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, * * * except when the person * * * is pursued immediately after its commission * * *." The employee pursued him immediately, but did not go more than 20 feet and at no time during the pursuit was within 20 feet of plaintiff. When plaintiff fell, the employee was more than 40 feet away. Notice of intention to make an arrest may be indicated from the circumstances and it is not necessarily a requirement that notice of such intention be given by express statement before taking the person into actual or potential custody. Allen v. McCoy, 1933, 135 Cal.App. 500, 509, 27 P.2d 423, 28 P.2d 56. The intention of the employee in pursuing him may be determined from all the surrounding circumstances. Immediately before pursuing plaintiff he had apprehended and subdued the bandit. Later developments revealed that he subdued the bandit again and kept him until the police came and arrested him.

The case of Allen v. McCoy, supra, was a false imprisonment action. Defendant, a sheriff, arrested plaintiff without a warrant for a crime not committed in defendant's presence. Defendant had been notified that two men and a woman, who had committed a felony, were fleeing in an automobile from pursuing officers; that the automobile had overturned in an attempt to turn into an unfrequented side road; and that the fugitives had escaped in the adjacent timber and brush. The woman lost a shoe at the wrecked automobile. Defendant, several officers and other men searched for several hours for the fugitives. They found, among other clues, footprints of two men and a woman with only one shoe in a nearby dirt road. They followed the tracks to a gate near an old abandoned cabin. The posse approached the cabin. Plaintiff, a stranger in the community, who had been occupying the cabin a few days, opened the door, then closed it and stayed inside. Defendant shot into the building three times, then plaintiff came out and defendant put handcuffs on him. After a few minutes of investigation, plaintiff was released by defendant with an apology. The court said at page 507 of 135 Cal.App., at page 426 of 27 P.2d, "An officer is not liable for false imprisonment for the arrest without a warrant of a person who he has reasonable grounds to believe is guilty of a crime. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case."

[7] In Collyer v. S. H. Kress & Co., 1936, 5 Cal.2d 175, 54 P.2d 20, plaintiff was apprehended, as he was leaving defendant's store, by one of defendant's detectives who claimed he saw plaintiff steal articles in the store. The detective escorted plaintiff back into the store and detained him for about twenty minutes for the purpose of investigation, then he was arrested by the police and charged with petty theft. Later a jury found him not guilty. The action was for damages for false imprisonment. The only question involved was whether defendant had the right to detain plaintiff for the purpose of investigation. The court said at page 180 of 5 Cal.2d, at page 23 of

54 P.2d: "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it. * * * However, there seems to exist considerable confusion in the cases as to whether probable cause is a defense in false imprisonment cases involving misdemeanors. The broad statement occasionally appears to the effect that probable cause is no defense in actions for false imprisonment. [citing cases] The cited cases involved unlawful arrests under the authority of illegal process issued in civil actions. In such instances, * * * it is obvious that probable cause is not pertinent to any issue in the case. * * * However, those authorities which hold, where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner [citing cases], must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable. * * * And, of course, we may properly refer to probable cause as a defense in false imprisonment cases as constituting that justification for the arrest which may be announced by statutory enactment. With the foregoing explanation, the authorities are harmonized, and it is made clear that probable cause is a justification for the detention of the plaintiff in the instant cause." See Bettolo v. Safeway Stores, Inc., 1936, 11 Cal.App.2d 430, 54 P.2d 24, and Driscoll v. Shipp, 1937, 21 Cal.App.2d 369, 69 P.2d 429.

[8] Although the case now before the court was not a false imprisonment action and the plaintiff was not apprehended, as the plaintiffs were in the Allen and Collyer cases, supra, nevertheless the rule stated in those cases, that probable cause was a defense in an action wherein a person was actually apprehended, should apply in the present case wherein the conduct of the pursuing employee, if it was his intention to apprehend plaintiff, amounted only to an attempt to apprehend as distinguished from actual apprehension. In the present case it was a question of fact to be determined by the jury, under proper instructions, whether the state of mind of the employee in pursuing the plaintiff was that of attempting the apprehension and holding of him until the police arrived.

Plaintiff asserts that the theory of attempted arrest was not a theory upon which the case was tried and that defendant may not urge such a theory for the first time upon appeal. The specific statement that the employee attempted to arrest the plaintiff was not made at the trial. It was agreed that the employee acted in the belief that plaintiff was a participant in the holdup. A proposed instruction by defendant (but not given) was in substance that should the jury believe that the circumstances surrounding plaintiff's presence at the service station were such as to justify the belief by Greenlee that plaintiff was a participant in the robbery, and that the conduct of Greenlee "was incident with such belief", then Greenlee was not guilty of an assault.

[9] One of the most obvious things included in conduct "incident with such belief," that is, belief that plaintiff was a participant in a robbery then and there being committed, would be an attempt to apprehend plaintiff and hold him for the police, as Greenlee had done just previously in treating with the bandit under similar but more aggravated circumstances. Under such circumstances, particularly when the defense was justification and the court gave an instruction which excluded all theories of justification as a defense, if the plaintiff was innocent, it should not be concluded that an attempt to apprehend or arrest plaintiff is a new theory of justification presented first on appeal.

Two other special instructions requested by defendant, and refused, related to justification and were to the effect that if the conduct of Greenlee under the circumstances was such as might reasonably be expected, or was reasonably justified.

Greenlee was not guilty of assault. Another special instruction so requested was to the effect that the mere fact that plaintiff was without fault would not make the conduct of Greenlee actionable. Plaintiff states that such instructions were erroneous because they did not state what constituted justifiable assault.

It will not be necessary, by reason of the disposition of this appeal on other points, to rule upon the sufficiency of those instructions.

[10] The instructions heretofore quoted and which were given, to the effect that justification was not a defense if plaintiff was innocent, were erroneous prejudicially. It is reasonable to conclude that if those instructions had not been given and proper instructions had been given, a different result at the trial would have been probable.

The judgment is reversed.

SCHAUER, P. J., and SHINN, J., concur.

21 Cal.2d 59

FUENTES v. LING.

S. F. 16720.

Supreme Court of California.

Oct. 29, 1942.

1. Automobiles ⇐245(72)

A pedestrian, struck by automobile while crossing street in middle of block in business district in San Francisco contrary to ordinance, was not guilty of contributory negligence as a matter of law merely because of violation of ordinance, since the Vehicle Code regulates the use of public roadways by pedestrians to the exclusion of local ordinances. Vehicle Code, §§ 458, 560–564, 562(a), St.1935, pp. 164, 188.

2. Automobiles ⇐217(3)

The Vehicle Code providing that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway does not prohibit a pedestrian from crossing outside of a crosswalk. Vehicle Code, § 562(a), St. 1935, p. 164.

3. Automobiles ⇐245(72, 90)

A pedestrian, who crossed a well-lighted business street in the middle of the block, was not as a matter of law guilty of violating the Vehicle Code or of negligence proximately contributing to his injury where he proceeded on his way after observing an automobile approaching from a distance of 200 feet with nothing to obstruct pedestrian's view or driver's view. Vehicle Code, §§ 458, 560–564, 562(a), St. 1935, pp. 164, 188.

4. Appeal and error ⇐1008(1)

In action by pedestrian for injuries received when struck by automobile while crossing street in middle of block in business district, the questions of negligence and contributory negligence were for the trial court to determine. Vehicle Code, §§ 458, 560–564, 562(a), St.1935, pp. 164, 188.

5. Appeal and error ⇐1010(1)

Where findings of trial court on questions of negligence and contributory negligence were supported by the evidence, findings would not be disturbed on appeal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Robert Fuentes against Lee Ling for personal injuries sustained when struck by an automobile operated by defendant. From a judgment for plaintiff for $4,373 and costs, the defendant appeals.

Judgment affirmed.

For prior opinion, see 120 P.2d 128.

Snook, Snook & Chase and Snook & Chase, all of Oakland, for appellant.

Leon A. Blum and Michel Lipman, both of San Francisco, for respondent.

TRAYNOR, Justice.

This action was brought by plaintiff to recover damages for personal injuries that he incurred when struck by an automobile operated by defendant. The accident occurred at about 7 o'clock on the evening of December 30, 1938, on Third Street between Kirkwood and LaSalle Avenues in San Francisco. Third Street, an arterial boulevard extending north and south, is a main highway between San Francisco and points south. It is approximately eighty feet wide and is marked by white lines dividing six lanes of traffic. Between Kirkwood and LaSalle Avenues, the frontage of Third Street is occupied by stores, apartments, flats, and a public garage and constitutes a business district as that term is used in traffic laws. When the accident occurred it was a clear night and the street was well lighted by street lights and Christmas light streamers strung throughout the block. Plaintiff, clad in a dark suit, was crossing Third Street at right angles from east to west in the middle of the block when he was knocked down by the automobile that defendant was driving south on the west side of Third Street in the second lane of traffic. There is no pedestrian crosswalk in the middle of the block where plaintiff attempted to cross and where the accident occurred. There are such crosswalks marked by white lines at the intersections of Third Street. Plaintiff testified that he was more than halfway across the street when he first saw defendant's car approaching from a distance of approximately 200 feet, and that he thought that he could cross in safety before defendant's car traveled the distance of 200 feet or reached the middle of the block, although the car was traveling at a "fast" speed. A traffic officer's report described plaintiff at the time of the accident as "under the influence of intoxicants," and hospital records described plaintiff as having a strong alcoholic breath, but plaintiff testified that

he was not drunk and had taken no intoxicants on the day of the accident. Defendant and his son, who was riding with him in the front seat, testified that they did not see plaintiff before the impact although they were both observing the highway. They, as well as other occupants of the automobile, estimated its speed as between 18 and 20 miles per hour. Witnesses for the plaintiff testified that the automobile was traveling at a rate of 40 to 45 miles per hour. Defendant brought his car to an almost immediate stop after the right front part of the car struck plaintiff. Plaintiff fell to the pavement with his head near the west curb and his feet under the running board of the car at about five feet north of the car's front bumper. There were no skid marks on the pavement.

After a trial without a jury, the court made findings in favor of plaintiff and entered judgment for him in the amount of $4,373 and costs. Defendant has appealed from the judgment on the ground that plaintiff was guilty of contributory negligence as a matter of law and that the evidence was insufficient to support the findings and judgment.

[1] The contention that plaintiff was guilty of contributory negligence as a matter of law rests on the violation of section 10 of article 3 of Ordinance 7691, New Series, of San Francisco which provides: "When within the central traffic district or a business district no pedestrian shall cross a roadway other than by a crosswalk." Plaintiff admittedly violated the ordinance. It has recently been held, however, that the Vehicle Code (§§ 458, 560–564, St.1935, pp. 164, 188) regulates the use of public roadways by pedestrians to the exclusion of local ordinances. Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482. The San Francisco ordinance is indistinguishable from the Los Angeles ordinance held invalid in the Pipoly case. It follows therefore that plaintiff's violation of the ordinance did not constitute contributory negligence per se.

[2, 3] Defendant contends that plaintiff's conduct was also a violation of the Vehicle Code and therefore constituted contributory negligence as a matter of law. Section 562 of the Vehicle Code provides: "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." It does not prohibit a pedestrian from crossing outside of a crosswalk, however. Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 109. Moreover the statute provides that "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." It cannot be said that as a matter of law a pedestrian who crosses a well lighted business street in the middle of a block is guilty of violating the statute or of negligence proximately contributing to his injury when he proceeds on his way after having observed an automobile approaching from a distance of 200 feet, with nothing to obstruct his view or that of the driver. See Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317; Genola v. Barnett, supra; Mitrovitch v. Graves, 25 Cal.App.2d 649, 78 P.2d 227; Varner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123; White v. Davis, 103 Cal.App. 531, 284 P. 1086. Section 563 of the Vehicle Code prohibits pedestrians from crossing except in a crosswalk between adjacent intersections where traffic is controlled by a traffic control signal device or by police officers. There is no evidence, nor is it contended that the traffic was so controlled at the intersections of Third Street and Kirkwood or LaSalle Avenues.

[4, 5] The questions of negligence and contributory negligence were for the trial court to determine (Quinn v. Rosenfeld, supra; Genola v. Barnett, supra; Mitrovitch v. Graves, supra; White v. Davis, supra), and its findings when supported by the evidence will not be disturbed on appeal. The evidence as to the negligence of defendant was conflicting. The ability of defendant to stop his automobile within five feet after the collision suggests the improbability of excessive speed, but even if the court accepted the defendant's version in that regard it might have concluded that defendant was negligent in not observing plaintiff on a well lighted street. The evidence as to plaintiff's intoxication was also conflicting, but even if the court believed that plaintiff had taken intoxicants it does not necessarily follow that his judgment or motor coordination were so affected as to make him guilty of contributory negligence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., and SCHAUER, Justice pro tem, concurred.

21 Cal.2d 71

PEOPLE v. DUANE.

Cr. 4418.

Supreme Court of California.

Oct. 29, 1942.

1. Criminal law ⇐620(1)

Where three informations charged defendant with kidnapping of named person with intent to commit robbery, robbery of such person on same occasion, and assault on him with force and violence on later date, alleged offenses were sufficiently "connected in their commission" to justify consolidation of cases for trial. Pen. Code, §§ 211, 954.

See Words and Phrases, Permanent Edition, for all other definitions of "Offenses Connected in Their Commission".

2. Robbery ⇐13

One who assaults another, with intent to take personal property in his possession from his person or immediate presence against his will by force or fear, is guilty of "assault with intent to commit robbery". Pen.Code, § 211.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault with Intent to Commit Robbery".

3. Criminal law ⇐620(1)

A difference in alleged dates of commission of connected crimes against same person, as charged in different informations accusing same perpetrator, does not preclude consolidation of the several cases for trial, in absence of proof of prejudice. Pen.Code, § 954.

4. Criminal law ⇐620(1)

Where four informations charged defendant with kidnapping of named person, with intent to commit robbery, on two different dates, and robbery of such person on same occasions, alleged offenses were sufficiently "connected in their commission" to justify consolidation of cases for trial, though one of informations alleged kidnapping of both such person and his wife with intent to rob them. Pen.Code, §§ 211, 954.

5. Indictment and information ⇐127

Different offenses of robbery and accompanying offenses of kidnapping and assault with intent to rob, alleged in separate informations to have been committed against different persons on different dates, could have been charged in different counts of one information. Pen.Code, § 211.

6. Criminal law ⇐620(1)

Consolidation of criminal informations or indictments for trial must be for good cause shown and in interest of justice, which presupposes absence of prejudice to accused's substantial rights.

7. Criminal law ⇐620(1)

Consolidation for trial of cases wherein different informations charged defendant with kidnapping three persons with intent to rob them, robbing two of them, and assaulting one of them with intent to rob, was proper as against objection based solely on difference in alleged dates of commission of various offenses, in absence of surrounding circumstances indicating prejudice to defendant by consolidation.

8. Criminal law ⇐620(1)

Indictments or informations, alleging different dates of commission and different victims of several offenses charged, may be consolidated for trial.

9. Criminal law ⇐620(1)

Consolidation for trial of informations charging defendant with connected crimes against different persons is not jurisdictional, but merely procedural.

10. Criminal law ⇐1163(1)

It is incumbent on defendant, appealing from conviction of crime, to show substantial prejudice to his rights, and error cannot be based on a bald declaration by his attorney.

11. Criminal law ⇐620(1), 1148

Whether consolidation of criminal cases for trial should be granted rests within sound discretion of trial judge, whose decision must be based on just and proper consideration of particular circumstances in case and will be disturbed on appeal only where abuse of discretion is shown.

12. Criminal law ⇐1159(1)

In prosecution for robbery and kidnapping, jury's finding, implied from verdict of conviction, that box, removed from defendant's automobile at about time of his arrest, contained dynamite, as witnesses testified that defendant told victim, whose home they testified that defendant threatened to blow up if victim refused to obey defendant's orders, was binding on Supreme Court on appeal.

13. Criminal law ⇐739(2)

The credibility of witnesses, testifying on question of accused's alibi, was solely for jury's consideration.

14. Criminal law ⇐665(4)

Where there was no suggestion of collusion between accused and witness, violating court's order excluding witnesses from court room, and no showing that accused had any control over such witness' conduct or that witness did not act in entire good faith with belief that she was not included in such order because she was assisting as counsel in accused's defense though not formally associated with his counsel in case, court erred in refusing to permit such witness to testify in support of defendant's alibi.

15. Criminal law ⇐665(4)

A witness' violation of order excluding witnesses from courtroom does not render him incompetent nor furnish grounds for refusal to permit him to testify, but proper recourse is to contempt proceedings against witness.

16. Criminal law ⇐670

Where attorney, with whom accused testified that he was consulting at time of crimes charged, was not permitted to testify for any purpose on any matter, it was unnecessary for accused to offer proof of character of such attorney's proposed testimony supporting accused's alibi in order to show prejudice by exclusion of such testimony.

17. Criminal law ⇐670

Where trial court erroneously refuses to permit witness to testify for accused under any circumstances or on any subject, regardless of admissibility or relevancy of witness' testimony, on ground that witness is wholly incompetent to testify, and it can be ascertained from record that such testimony would be vital, no offer of proof is necessary to establish prejudice to accused from such ruling.

18. Robbery ⇐13

To establish crime of "assault with intent to commit robbery", it is not essential to prove that perpetrator was armed with a weapon. Pen.Code, § 220.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault with Intent to Commit Robbery".

19. Criminal law ⇐1159(1)

In prosecution for assault with intent to commit robbery, where charge that accused was armed with weapon was added and separate verdict based thereon returned, in conformity to statutory requirements, for benefit of Board of Prison Terms and Paroles in fixing minimum term of imprisonment, insufficiency of evidence to support such verdict was not ground for reversal of conviction on original charge. Pen.Code, §§ 220, 969c, 1158a.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

James Duane was convicted of three kidnappings with intent to commit robbery, three robberies, and assault with intent to rob, and he appeals.

Judgment of conviction for assault with intent to rob modified and affirmed as modified, judgments of conviction for one kidnapping with intent to rob and one robbery reversed, and remaining judgments of conviction affirmed.

Adopting in part opinion of District Court of Appeal, 122 P.2d 365.

Raine Ewell and Raoul D. Magana, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., David K. Lener and Dennis Hession, Deputy Attys. Gen., and Matthew Brady, Dist. Atty., and Harmon D. Skillin, Asst. Dist. Atty., both of San Francisco, for respondent.

CARTER, Justice.

The appeal in this action comes before this court pursuant to an order granting a hearing after decision by the District Court of Appeal, First Appellate District, Division One. After a consideration of that decision we adopt, with the omissions and additions hereinafter appearing, the opinion prepared by Mr. Justice Ward when this case was pending before the District Court of Appeal.

"Appeal from judgments and orders denying a new trial following the conviction of defendant on seven separately charged offenses. The informations charged the commission in the City and County of San Francisco of the following: Case No. 32,-109, kidnapping on March 16, 1940, of Antone Burkard with intent to commit robbery; case No. 32,111, robbery on the same

occasion; case No. 32,105, assault with force and violence on July 7, 1940, on Antone Burkard, with intent to rob; case No. 32,106, kidnapping on July 10, 1940, of Allen F. McLean, with intent to commit robbery; case No. 32,107, robbery of McLean on the same occasion; case No. 32,-108, kidnapping on August 6, 1940, of Frances McLean and Allen F. McLean, with intent to commit robbery; case No. 32,104, robbery of McLean on the same occasion.

"Each information charged that defendant, in the commission of the designated offense, was armed with a weapon, to wit, a pistol; and each contained an allegation of previous conviction in California of a felony, to wit, receiving stolen property, in connection with which a sentence was served; also of conviction in the State of Arizona of the crime of felony, to wit, burglary, for which sentence was likewise served. Defendant entered pleas herein of not guilty, but admitted the prior convictions. Over his objection, the above cases were consolidated, and, following trial, he was found guilty as charged in each information.

"The cases involve a series of kidnappings and robberies, the robberies being of two Safeway grocery stores, and the victims of the kidnappings, the managers thereof respectively; in one of the cases the wife of one of the managers was kidnapped with her husband. One of the cases involves an assault upon one of such managers, with intent to commit robbery.

"It is contended by appellant that the court erred in consolidating the cases for trial. So far as pertinent to the facts herein, under the provisions of section 954 of the Penal Code, two or more indictments charging offenses connected together in their commission, or crimes or offenses of the same class, may, in the discretion of the trial court, be consolidated for trial or may be divided into two or more groups and each group tried separately.

[1, 2] "For the purpose of convenient consideration, three of the informations may be referred to as the Burkard cases, the other four as the McLean cases. In each of the cases charging robbery, kidnapping was committed in furtherance and in consummation thereof, hence 'connected * * * in their commission.' Pen.Code, § 954; People v. Morales, 56 Cal.App. 270, 204 P. 1088. Among the Burkard cases there appears an offense of assault with intent to rob, alleged to have been committed upon the same victim four months after the original robbery and kidnapping perpetrated upon him. The felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by force or fear, is robbery. Pen.Code, § 211. One who assaults another under circumstances set forth in section 211, with intent to commit the consummated offense, is guilty of an assault with intent to commit robbery. Both offenses are denounced in the Penal Code as crimes against the person. Pt. 1, tit. 8, chapters 4 and 6. Each offense is characterized by practically the same essential features, except that in robbery there must be a felonious taking of property.

[3] "Each information in the Burkard cases alleges the same perpetrator and the same victim. Up to this point the alleged offenses are sufficiently 'connected.' In People v. Johnston, 114 Cal.App. 241, 299 P. 805, it was held permissible to include robbery and burglary in the same information. However, there is a difference in the alleged dates of commission, but it has been held that this contention, standing alone, is without merit in the absence of proof of prejudice. In People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806, the indictment contained three counts of murder, the first alleged to have been committed on or about February 2, 1928, and the other two on or about May 16, 1928. In People v. Feigelman, 65 Cal.App. 319, 320, 223 P. 579, the court said: 'The fact that the two crimes charged against the defendant were committed, the one more than a year after the other, does not in our opinion furnish any ground for the claim that the court abused its discretion in consolidating said actions and causing them to be tried at the same time.'

[4] "The conclusions herein relative to the Burkard cases may be considered as applicable to the McLean cases of kidnapping and robbery on July 10 and August 6, 1940. The only allegation of factual difference appearing in the informations is that in the kidnapping on August 6th it is alleged that Allen F. McLean and Frances McLean were enticed and forcibly taken away by the defendant with intent to restrain them and thereby commit a robbery. The evidence

discloses that Frances McLean is the wife of Allen McLean. If appellant had been charged in a separate information with the offense of kidnapping the wife, Frances McLean, with intent to commit robbery of the husband, Allen, on the same date, the offenses would have been sufficiently connected to warrant consolidation.

[5, 6] "The next point for consideration is the consolidation of the two groups, the Burkard and the McLean cases. Here we have offenses of the same general class, but alleged to have been committed upon different persons on different dates. The different offenses of robbery, and the accompanying offenses of the same class of crime under separate counts, could have been charged in different counts in one information. Technically the consolidation was without error, but the consolidation for trial of criminal informations or indictments must be 'for good cause shown' and 'in the interest of justice,' which presupposes that the consolidation must be without prejudice to the substantial rights of the accused. A defendant may be prejudiced if forced to stand trial on one charge with a codefendant or codefendants who are charged with a distinct and unconnected offense. The charges may be of the same class and therefore subject to consolidation, but if unconnected and dependent upon evidence of an entirely different state of facts, one defendant may be prejudiced by evidence introduced in support of an information charging a second defendant with a separate offense. This state of facts appeared in People v. Davis, 42 Cal.App.2d 70, 108 P.2d 85. See, also, People v. O'Connor, 81 Cal.App. 506, 254 P. 630; People v. Foward, 134 Cal. App. 723, 26 P.2d 532; People v. Aguinaldo, 3 Cal.App.2d 254, 39 P.2d 505; People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970.

[7] "Based upon the above, as applied to the facts in the present case, we find that no valid objection could be presented to the consolidation of the Burkard and McLean cases solely upon the difference in allegations of dates of commission of the offenses unless peculiar circumstances surrounding the transactions, which do not appear on this appeal, should of themselves indicate that the defendant would be prejudiced by the consolidation.

[8] "One further factual subject deserves consideration, namely, the perpetration of the crimes upon different victims. A consolidation under circumstances unnecessary to mention, which do not apply to the present case, may give rise to a reasonable conclusion that a defendant has in fact been prejudiced. However, the consolidation of indictments alleging different dates and different victims has been approved in this state. In People v. Kelly, 203 Cal. 128, 133, 134, 263 P. 226, 228, the offenses alleged in different counts presumably were committed on the same date. In that case the court said: 'Appellant therefore argues that the provision of law (Pen.Code, § 954), under which the present indictment was filed, is unconstitutional in that it makes it possible for one, accused as he was, to be placed on trial at the same time, and with the same jury, on three separate and distinct charges of murder, committed at different times, at different places, upon different individuals, and requiring different evidence from different witnesses to establish each separate act. We know of nothing in the state or Federal Constitutions sustaining appellant's position, and we do not agree with his contention that two crimes of the same grade, or class, could not be joined in separate counts in one indictment at the common law.' In People v. Hanna, 100 Cal.App. 509, 280 P. 379, two defendants were charged jointly in one information with robbery, and in a second information with another robbery. One of the defendants pleaded guilty to one of the charges. The court properly granted a motion that the two defendants be tried separately, and that the two charges against one of them be consolidated. In People v. Northcott, supra, the defendant was charged with three crimes of murder on two separate dates. Evidence of separate and distinct crimes other than murder, having no direct connection with the charges of murder alleged in the indictment, was introduced for the purpose of establishing a general scheme or plan. Had Northcott been granted separate trials, the facts of one murder might with equal force have been introduced for the same purpose. In People v. Thorn, 138 Cal.App. 714, 734, 735, 33 P.2d 5, 15, the court said: 'As we have seen, the three groups of crimes joined are forgery, fraud in keeping accounts in corporate books, and presenting false claims of insurance. The Legislature it seems to us, meant by the use of the words, "the same class of crimes or offenses," in such section, offenses possess-

ing common characteristics or attributes, and it would seem that the different offenses set out in the information here do have many attributes in common. Fraud is involved in them all, and the purpose of each is to obtain property or credit by false writings. The inference drawn by the jury was that they were so used. The offenses charged were closely related in the plan and scheme of their commission, and the joinder saved useless repetition of evidence, time and expense, both to the state and to the defendant. We think the different offenses were properly joined.' In People v. Garcia, 2 Cal.2d 673, 42 P.2d 1013, the defendant was tried for two separate murders. At pages 680, 681 of 2 Cal. 2d, at page 1017 of 42 P.2d, the court said: '* * * the evidence when considered in its entirety suggests that the two homicides were the culmination of a plan on defendant's part to "get" his two victims before they "got" him.'

[9-11] "In the present case the defendant had developed a well defined plan to unlawfully and feloniously obtain the property of Safeway Stores, Inc. The assault by force, violence and intimidation, and the kidnapping of Burkard, McLean, and the latter's wife, were merely incidents to the accomplishment of his purpose. The methods used in the perpetration of the crimes were manifestly similar. The consolidation saved the state and the defendant the ordeal of possibly seven separate trials. The consolidation was not jurisdictional; merely procedural. People v. Thomas, 45 Cal.App.2d 128, 113 P.2d 706; People v. Aguinaldo, supra; People v. Shepherd, supra. It is incumbent upon defendant on appeal to show substantial prejudice to his rights. A bald declaration by his attorney is insufficient upon which to base error. 'The determination whether a motion for severance of trial should be granted always rests within the sound discretion of the trial judge. There can be no clearly defined rule for determining when a defendant is entitled to a separate trial because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. Only where an abuse of discretion is shown will the ruling of the trial court be disturbed upon appeal.' People v. Eudy, 12 Cal.2d 41, 46, 82 P.2d 359, 361. What has been said of severance is equally applicable to consolidation. An abuse of discretion herein is not shown—on the contrary, the order of consolidation appears to be in the interest of justice.

"The nature and character of many of the objections raised by the attorney for appellant cannot be definitely determined. In many instances reference to certain cross-examination is set forth as improper, the reviewing court being left to conjecture the basis of the claimed impropriety. However, in justice to the appellant, the entire record has been considered. It does not reveal misconduct on the part of the court or the district attorney, as contended by appellant, that could be the basis for a holding of prejudicial error. The evidence contained in the record—as to which, except that relating to alibis, there is little, if any, dispute—is sufficient to uphold conviction of each offense charged.

[12] "There is testimony that appellant at the time of the commission of one of the offenses showed his victim a box which he said contained dynamite, stating that it would be used to blow up Burkard's home if he refused to obey appellant's orders. This evidence appears in proof of the allegations of the Burkard robbery and kidnapping cases. About the time of appellant's arrest, a package containing dynamite was removed from his car. Appellant's claims—that his statement that the box contained dynamite was no proof that it actually did, and that evidence of a test explosion of the dynamite by the police was fabricated to impress the jury—are without merit. At least the jury's implied finding is binding on this court.

[13] "A substantial conflict appears in each instance wherein appellant offered evidence tending to prove an alibi. The credibility of the witnesses in this as in other respects was a matter solely for the consideration of the jury."

[14, 15] Appellant contends, with respect to cases Nos. 32,106 and 32,107, that prejudicial error was committed in refusing to allow Mrs. Leep, a witness called by him to testify. The background of that refusal was as follows: At the beginning of the trial an order was made excluding all witnesses. Mrs. Leep, an attorney-at-law who had been appellant's counsel in civil matters, was seated at the counsel table with appellant's attorney, Mr. Toner, throughout the trial in the instant case and consulted with him and appellant from time

to time. She was not, however, formally associated with Mr. Toner as defendant's counsel in the instant case. The prosecution asked several of appellant's witnesses on cross-examination whether they had consulted with Mrs. Leep prior to taking the stand, the last witness so questioned being Mrs. Meegan, by whom appellant sought to prove an alibi in action No. 32,-109. Mrs. Meegan testified that she had discussed her testimony with Mrs. Leep, but that Mrs. Leep had not suggested any testimony to be given by her. The record discloses that after Mrs. Meegan left the stand the following transpired: "Mr. Toner (appellant's counsel): I would like at this time to ask Mrs. Leep to take the stand. Mr. Skillin: Well, of course we object, if your Honor please, to Mrs. Leep being sworn or testifying in this matter. The Court: She interviewed all of the witnesses. I couldn't allow it. She has been sitting here in court all the time the witnesses were being examined. Mrs. Leep: It is really my fault. I forgot I wasn't the man's attorney, because I had acted as his attorney, and I really felt in my heart I still was his attorney, and I have been trying to help him, as you know, here. The Court: There is no need of making any speech here, Mrs. Leep. Mr. Toner: Well, I am calling her, if the Court please, in good faith, because I feel that she didn't at the time realize as she sat here at counsel table that she would be excluded and not allowed to come forward as a witness in this matter. And that is why I am calling her. The Court: I don't see how I can permit it, under the objection." Thereafter appellant testified that he was with Mrs. Leep in connection with a transaction in which she was advising him on July 10, 1940, during the time the crimes charged in cases Nos. 32,-106 and 32,107 were claimed to have been committed. The situation was thus one in which a defendant's witness in a criminal action was not permitted to testify on his behalf or even take the stand, because she had violated the court's order excluding witnesses. In connection with that violation there is no suggestion of collusion between defendant and the witness, nor does it appear that he had any control over her conduct. From all that appears the witness was acting in entire good faith, believing that she was not included in the order of exclusion because she was assisting as counsel in the defense of defendant.

There can be no doubt that the court committed error in refusing to permit Mrs. Leep to testify. The violation by a witness of an order excluding witnesses from the courtroom does not make such witness incompetent nor furnish grounds for a refusal to permit him to testify. The proper recourse is contempt proceedings against the witness. People v. Russell, 34 Cal.App. 2d 665, 94 P.2d 400; Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370; People v. Mack, 115 Cal.App. 588, 2 P.2d 209; People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368.

[16, 17] It is obvious that testimony by Mrs. Leep concerning appellant's claimed alibi for the crimes charged in cases Nos. 32,106 and 32,107, was of vital importance to appellant and the exclusion thereof would necessarily be prejudicial unless it may be said that appellant cannot show prejudice because he made no offer of proof showing the character of Mrs. Leep's proposed testimony. It is true that no such offer was made but it was unnecessary under the circumstances here presented. It will be remembered that appellant testified that at the time the crimes were committed in those cases, he was with Mrs. Leep, and the latter was not even permitted to be sworn or take the witness stand. She was not permitted to testify as a witness for any purpose on any matter whatsoever. True, she was called to the stand before appellant had testified to circumstances vital to his alibi, but the reasons for the rule requiring an offer of proof are that the trial court may have an opportunity of ascertaining the admissibility of the offered evidence and to enable a reviewing court to determine whether there was error in excluding the evidence, and if so, whether it was prejudicial. Here, under the latter reason, it is clear that prejudicial error was committed. Although the witness immediately preceding the calling of Mrs. Leep had been questioned regarding a discussion of her testimony with Mrs. Leep, and from that it might appear that the latter's testimony would deal with that subject, the entire record should be examined; and the more reasonable conclusion is that Mrs. Leep was to be used to establish appellant's alibi. That view is fortified by the fact that the preceding witness admitted that she discussed her testimony with Mrs. Leep. Manifestly, it would have been an idle gesture for appellant to again attempt to have

Mrs. Leep testify after he had testified with reference to the alibi because the court had absolutely refused to permit her to testify upon any subject under any circumstances, and that refusal had no relation to and was not based upon the nature, admissibility, or relevancy of any testimony she might give. Rather, it was a declaration that she was wholly incompetent to testify in the case. Where the trial court erroneously refuses to permit a witness to take the stand or be sworn to testify under any circumstances or upon any subject without regard to the question of the admissibility or relevancy of the evidence the witness might give, basing its refusal on the ground that the witness is wholly incompetent to testify, and it can be ascertained from the record that the witnesses' testimony would be vital, no offer of proof is necessary to establish that such error was prejudicial. See Theatrical Enterprises, Inc., v. Ferron, 119 Cal.App. 671, 7 P. 2d 351; 64 C.J. 123. The judgments of conviction in actions Nos. 32,106 and 32,-107, must therefore be reversed.

[18, 19] "In action No. 32,105 appellant was charged with assault with intent to commit robbery, wherein it was alleged also that he was armed with a weapon, to-wit, a pistol, and the jury returned two separate verdicts, one finding appellant guilty of 'assault with intent to commit robbery, as charged in the information,' and the second finding that 'the charge of being armed with a weapon' was true. There is no direct proof that on this occasion appellant was armed with a pistol. There is evidence that he approached his victim, Burkard, menacingly; that Burkard ran, and that appellant ordered him to halt or be shot. Upon the calls of Burkard's wife for help, and the appearance of others at the scene, appellant disappeared. However, the charge of assault with intent to commit robbery is based on the provisions of section 220 of the Penal Code, and upon an examination thereof it will be found that in order to establish the crime denounced therein it is not essential to prove that the perpetrator was armed with a weapon. The charge that he was so armed was added and the separate verdict based thereon was returned to conform to the requirements of sections 969c and 1158a of the Penal Code; that is, for the benefit of the Board of Prison Terms and Paroles in fixing the minimum term of imprisonment. Therefore the insufficiency of the evidence to support the latter verdict does not serve as ground for reversal of the conviction based on said section 220. It appears, however, that after properly pronouncing sentence on this conviction, the trial court in the exercise of the authority conferred by section 669 of the Penal Code, made an order that the sentence run consecutively to those pronounced on certain other convictions. It is ordered, therefore, that the order so made be set aside and that a new order be entered by the trial court directing whether, in view of the present state of the record, the appellant shall serve the sentence heretofore pronounced on this conviction concurrently with or consecutively to any other sentence or sentences imposed; that said new order be made and entered within sixty days after the filing of the remittitur herein in the trial court, and that a copy thereof be forwarded to the warden of the state prison wherein appellant is imprisoned.

"In accordance with the views above expressed it is ordered that the judgment of conviction in action No. 32,105 be modified by striking therefrom the words 'while armed with a weapon,' and as so modified the judgment of conviction (in that action) and the order denying the motion for new trial be and the same are affirmed." It is ordered that the judgments of conviction and the orders denying motions for a new trial in actions Nos. 32,106 and 32,107, be and they are hereby reversed. The judgments of conviction and orders denying new trials in each of the remaining actions are affirmed. It is further ordered that a copy of the remittitur herein be served upon the Board of Prison Terms and Paroles.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., and SCHAUER, Justice pro tem., concurred.

55 Cal.App.2d 161

EAGLE OIL & REFINING CO., Inc., v. PRENTICE.

Civ. 13767.

District Court of Appeal, Second District, Division 2, California.

Oct. 27, 1942.

1. Costs ⇐251

Appellant's expenditures for service of briefs, petitions, etc., printed copy of decision and opinion of District Court of Appeal, and stenographic hire in preparation of briefs before delivery to printer, are not chargeable as costs.

2. Costs ⇐258

The inability of appellant, appearing in propria persona, to dictate subject matter of his brief to printer orally, and unreasonableness of requiring it to be written in longhand, do not justify allowance of expenditure, not permitted by statute, for printing brief, as item of costs. Code Civ. Proc. § 1034.

3. Appeal and error ⇐1171(3)

Reversal of trial court's order, disallowing certain items of costs after Supreme Court's reversal of judgment appealed from, is not justified because of disallowance of $1.50 notarial fees for making proof of services of notice of appeal, copies of petition for rehearing in District Court of Appeal, and copies of petition for hearing in Supreme Court, as the law disregards trifles. Civ.Code, § 3533.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Eagle Oil & Refining Company, Incorporated, against B. H. Prentice. From an order disallowing certain items of costs after reversal of a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 19 Cal.2d 553, 122 P.2d 264.

B. H. Prentice in pro. per. for appellant.

No appearance for respondent.

W. J. WOOD, Justice.

Plaintiff recovered a judgment against defendant in the superior court, which on an appeal by defendant was reversed by the Supreme Court, 19 Cal.2d 553, 122 P.2d 264. Upon the going down of the remittitur defendant filed a memorandum of costs and disbursements, which on motion of plaintiff was retaxed by the court and items totaling $39.48 were disallowed. Defendant has appealed from that part of the order which disallowed these items. No brief has been filed on behalf of plaintiff.

[1, 2] Among the items which defendant claims were erroneously disallowed by the trial court was the sum of $7.49 which, according to defendant's brief, was the cost of "service of briefs, petitions, etc."; the sum of $.50, designated as "cost printed copy decision and opinion of District Court of Appeal"; also the sum of $29.99, which defendant states was expended for "stenographic hire" in the preparation of his briefs before delivery to the printer. These expenditures are not chargeable as costs and the court did not err in disallowing them. Section 1034 of the Code of Civil Procedure provides that no amount shall be allowed as costs for printing briefs in excess of $100. Defendant argues that "an appellant, appearing in propria persona, just cannot dictate the subject matter to the printer by word of mouth and to require it to be written out in longhand is simply asinine." The predicament of defendant does not justify the court in allowing an expenditure which is not permitted by the statute. Sime v. Hunter, 55 Cal.App. 157, 202 P. 967.

[3] Defendant contends that the court erred in disallowing the sum of $1.50, notarial fees for making proof of services of the notice of appeal, of copies of the petition for a rehearing in the District Court of Appeal, and of copies of the petition for a hearing in the Supreme Court. A reversal of the order would not be justified because of the action taken by the trial court as to these three items. "The law disregards trifles" Civ.Code, § 3533; see Connell v. Harron, Rickard & McCone, 7 Cal.App. 745, 95 P. 916, where the doctrine de minimus non curat lex was applied to a claim in the sum of $7.85.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

55 Cal.App.2d 322

PEOPLE v. McILVAIN.

Cr. 3590.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1942.

Hearing Denied Nov. 27, 1942.

1. Rape ⇐51(4)

Evidence sustained conviction of rape by force and violence. Pen.Code, § 261.

2. Assault and battery ⇐92

Evidence sustained conviction for assault by means of force likely to produce great bodily injury. Pen.Code, § 245.

3. Criminal law ⇐543(2)

On the receipt of credible and authentic information that prosecutrix had left the state shortly before trial of rape and assault prosecution, and in the absence of any reason to believe that she had returned, further search in the few days remaining before the trial was not required in order to lay a foundation for the introduction of prosecutrix' evidence given at preliminary examination. Pen.Code, § 686.

4. Criminal law ⇐543(1), 1153(6)

In rape and assault prosecution, whether prosecutrix' testimony given at preliminary examination was admissible because of the people's inability to have her present at the trial was addressed to the trial court's discretion, and, in absence of abuse of discretion, that decision was conclusive on appeal. Pen.Code, § 686.

5. Criminal law ⇐543(1)

In rape and assault prosecution, trial court did not abuse its discretion in admitting prosecutrix' testimony given at preliminary examination, on ground of the people's inability to have her present at the trial. Pen.Code, § 686.

6. Criminal law ⇐687(2)

In rape and assault prosecution, trial court did not abuse its discretion in granting district attorney's motion, during the arguments, to reopen the taking of evidence and to receive the testimony of a police chemist to the effect that he had just made an examination of one of the prosecutrix' garments which had been introduced as an exhibit at the preliminary, and that he had found thereon what might have been a blood spot.

7. Criminal law ⇐1209

Convictions of defendant of rape committed with "force" and "violence" and of assault by means of force likely to produce great bodily injury were not invalid on theory that to punish defendant for rape and allegedly included offense of assault would constitute "double punishment". Const. art. 1, § 13; Pen.Code, §§ 245, 261, 263.

The word "force" implies physical power exerted on persons or things. "Violence" denotes the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. Force, violence, compulsion, coercion, constraint, restraint agree in the idea of the exertion of power against the will, wish, or consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Punishment", "Force" and "Violence".

8. Criminal law ⇐1209

Where it appeared from the definitions of two offenses that all elements of one are included in the other, a conviction of the latter offense is also a conviction of the former within meaning of constitutional provision relating to double punishment for the same offense. Const. art. 1, § 13.

9. Rape ⇐6

The words "force" and "violence" as used in defining rape do not import a degree of force or violence likely to produce great or any bodily injury, but mean a degree of force or violence necessary to overcome whatever resistance is encountered. Pen.Code, § 261.

10. Rape ⇐14

In order to constitute "rape", there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent". Pen.Code, § 261.

See Words and Phrases, Permanent Edition, for all other definitions of "Consent" and "Rape".

11. Criminal law ⇐29

If a violation of that section of the Penal Code punishing assault by means of force likely to produce great bodily injury

involves a factual element not necessarily involved in the commission of the crime of forcible rape, the two are distinct offenses for which separate convictions may be had. Const. art. 1, § 13; Pen.Code, §§ 245, 261, 263.

12. Rape ⇐6

The gravamen of the offense of "forcible rape" is the violation, sexually, of the person of a female by the use of force or violence sufficient to overcome her resistance and bodily injury is not of the essence of the offense. Pen.Code, §§ 261, 263.

See Words and Phrases, Permanent Edition, for all other definitions of "Forcible Rape".

13. Assault and battery ⇐55

The gravamen of the offense of "assault by means of force likely to produce great bodily injury" is the likelihood of bodily injury as the result of the force used or attempted to be used, and the degree of force used is not as important as the manner in which it is used. Pen.Code, § 245.

14. Criminal law ⇐1144(13)

Appellate Court was required to construe the evidence most strongly against the defendant.

SCHAUER, P. J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jodie Bruan McIlvain was convicted of rape and assault, and he appeals.

Judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant was found guilty by jury verdict of the crimes of rape committed with force and violence and of assault by means of force likely to produce great bodily injury, charged by separate counts of an information. Sentence was imposed upon each conviction, the term of imprisonment on the assault charge being ordered to run concurrently with that upon the rape charge. Defendant's motion for new trial was denied and he gave oral notice of appeal, which will be regarded as an appeal from the judgment as to each count and from the order denying his motion for new trial as well. Upon the appeal he relies upon the following grounds for reversal: (1) That the evidence was insufficient to establish his guilt of either offense; (2) that the court erred in the admission of testimony of the prosecutrix given at the preliminary examination upon an insufficient showing of inability on the part of the People to have her present at the trial; (3) alleged error in the reopening of the case for the receipt of further evidence on behalf of the People; and (4) that the crime of assault by means of force likely to produce great bodily injury is included within the crime of forcible rape and that therefore he has been convicted twice for a single offense. There is no merit in any of these contentions.

[1, 2] The prosecutrix, an unmarried woman 33 years of age, accompanied defendant, 27 years of age, and two other young men, in an automobile to a dance hall in Santa Monica, several miles from the home of prosecutrix in Culver City. After dancing until the place was closed and having indulged in moderate drinking, defendant and prosecutrix started for the latter's home at about 1:30 a. m. in an automobile which defendant had borrowed from the other young men. They arrived at the home of the prosecutrix at about 7 a. m., where they met the husband of a niece of the prosecutrix. The intervening time had been spent in the car, all but an inconsiderable part of it at a secluded spot off the highway where defendant had driven and stopped the car. During the four or five hours while the car was thus parked defendant was continuously endeavoring to rape the prosecutrix against her vigorous resistance. While he failed to completely accomplish his purpose, defendant did succeed in going far enough in his attempt to satisfy the law as it defines the crime of rape. In the struggle defendant threw the prosecutrix from the front seat into the rear seat of the car and onto floor of car and repeatedly struck her; she was bruised, sustained a one-inch laceration of the wall of the vagina as a result of the insertion of defendant's fingers, which caused her pain and which was accompanied by a threat of defendant that if she did not submit he would further injure her. Upon her arrival home prosecutrix stated to her niece's husband, in the presence of

defendant, that she had been wrestling with defendant since 1:30; defendant said he was sorry and that he had brought her home. The prosecutrix went to bed, her sister came for her about 10 o'clock that morning, found her in bed and took her to a physician, where she was physically examined. All of the foregoing facts were testified to by the prosecutrix at the preliminary examination of defendant and this testimony was used at the trial. The physician testified that the examination disclosed evidence of the laceration hereinbefore mentioned. Defendant admitted having been in the car with the prosecutrix at the place and for the time described by the latter, admitted having embraced and kissed her; denied that she objected to his advances, that he had any thought of improper conduct or that he committed any of the acts of force and violence as testified to by the prosecutrix. A police officer who placed defendant under arrest testified that defendant then told him that he had driven the prosecutrix home, had stopped the car at some location, that he and the prosecutrix had wrestled about for awhile, that he was so drunk he did not remember exactly what happened, and that he did not blame prosecutrix for having him arrested. The evidence was sufficient to sustain the verdicts of guilty under both counts of the information.

[3-5] In laying a foundation for the introduction of the evidence of the prosecutrix given at the preliminary, the People proved that an investigator from the District Attorney's office went to the home of the prosecutrix on March 6, 21 days before the trial, and again on March 17 and found no one at home. He then went to the office of the physician, for whom he had a subpoena and who was a witness in the case and was referred by him to prosecutrix' sister, whom he also questioned. The sister testified that her former home and that of prosecutrix had been in Colorado; that their aged parents and other relatives lived there; that prosecutrix had told her that she was going to Colorado; that she decided definitely to go and left on the 14th of March; that prosecutrix took all of her possessions with her, including her clothes; that she, the witness, had received a letter from her mother stating that prosecutrix had arrived in Colorado Springs and that she still was in the State of Colorado. She produced a letter identified as having been written by her mother in Colorado Springs and which was dated March 17 and received by the witness March 19. The letter was handed to counsel for defendant, who said: "I object to this exhibit being read, except the portion referring to Collie [the prosecutrix]." The portions not objected to were then read and consisted of statements that the prosecutrix had arrived and with others had gone on to Denver. The witness further testified that she had not seen her sister in California since receiving the letter and was positive that she had not returned. Upon this showing defendant's objection to the introduction of the evidence given at the preliminary was overruled and the testimony was read. It is now contended that the efforts made to locate the witness did not amount to due diligence so as to justify the receipt in evidence of the testimony of the witness given at the preliminary hearing, as required by section 686 of the Penal Code. The officer served a subpoena on the sister and no doubt gained from her information that the prosecutrix had departed for Colorado under the circumstances which she later described when called as a witness. It was not shown that the officer who made the search for the witness, or the District Attorney, had any reason to believe at the time that the statements of the sister were untrue or that further efforts to locate the witness would be worth while. Upon the receipt of credible and authentic information that the witness had left the state shortly before the trial, and in the absence of any reason to believe that she had returned, further search in the few days remaining before trial was not required. The question was one addressed to the discretion of the court; in the absence of abuse of discretion in the ruling, and none was shown, the decision is conclusive upon appeal. People v. Levine, 1936, 12 Cal. App.2d 410, 412, 413, 55 P.2d 556, People v. Tiracorda, 1935, 8 Cal.App.2d 517, 519–20, 48 P.2d 116; People v. Land, 1934, 137 Cal.App. 196, 198, 30 P.2d 433; People v. James, 1933, 133 Cal.App. 751, 24 P. 2d 859.

[6] During the arguments, on motion of the District Attorney the taking of evidence was reopened and the testimony of a police chemist was received to the effect that he had just made an examination of one of the garments of the prosecutrix which had been introduced as an exhibit at the preliminary and that he had found

thereon what might have been a blood spot. Defendant was given an opportunity to offer evidence in rebuttal but did not do so or request a continuance. Of this testimony appellant here says: "The testimony itself amounts to no evidence when scrutinized. * * * If it had been a conclusive test perhaps the evidence might have been of some probative value, but as it was, it had no value as evidence. * * *" It appears from a statement of the District Attorney, in requesting permission to offer the additional testimony, that some statement had been made by defendant's counsel during the argument respecting the articles of clothing. The arguments are not contained in the transcript but it is fair to infer that the additional testimony was offered to meet some claim on the part of defendant that the People's case was incomplete in the particular which was covered by the testimony in question. However that may be, the ruling was within the discretionary powers of the court in controlling the conduct of the trial. No abuse of discretion was shown. People v. Roberts, 1933, 131 Cal.App. 376, 385, 386, 21 P.2d 449, 22 P.2d 25; People v. Hamil, 1925, 73 Cal.App. 649, 653, 654, 238 P. 1075; People v. Anderson, 1922, 57 Cal.App. 721, 728, 208 P. 204; People v. Kennedy, 1920, 48 Cal.App. 545, 192 P. 556; People v. McPherson, 1907, 6 Cal.App. 266, 270, 91 P. 1098.

[7] The final proposition advanced is that the offense of assault by means of force likely to produce great bodily injury is included within the offense of forcible rape and that inasmuch as defendant was found guilty of rape, to punish him for the included crime of assault would constitute double punishment for a single offense within the meaning of section 13, Article I of the Constitution. No authority is cited which supports this contention, nor is it tenable. We have found no case involving the question of double punishment as applied to these two offenses, which is somewhat surprising in view of the fact that they are so frequently committed in the course of a continuous series of acts culminating in the commission of rape; but whether this situation results from the rarity of prosecution for both offenses or because the question of double punishment has not been raised on appeal is unimportant. It is clear to us that there is no merit in the contention that defendant has suffered double punishment.

[8] Where it appears from definitions of two offenses that all of the elements of one are included in the other, a conviction of the latter offense is also a conviction of the former. This follows as a necessary conclusion of law because the statutes furnish conclusive proof of the existence of identical elements. There is no such proof as to the two crimes involved here. The crime of rape here involved is defined by section 261 of the Penal Code as an act of sexual intercourse accomplished with a female where she resists but her resistance is overcome by force or violence. The crime charged in count II is defined in section 245 of the Penal Code as follows: "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison" etc.

The information charged the commission of rape by force and violence in conventional form. The charging portion as to count II reads as follows: "That the said Jodie Bryan McIlvain, on or about the 20th day of November, 1941, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously assault one Collie Rae Young, a human being, by means of force likely to produce great bodily injury, to-wit, by hitting and striking said Collie Rae Young about the head and body with said defendant's fists, and tearing the vagina of the said Collie Rae Young, all with great force and violence and all of which was likely to, and which did, produce great bodily injury to the said Collie Rae Young."

[9] The words "force" and "violence" found in section 261 have slightly different shades of meaning; Webster's New International Dictionary, 2d edition, unabridged, under the word "force" says: "Force (see power), the most general term, implies physical power exerted upon persons or things; * * * Violence denotes the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage, or fury." Under synonyms it is said: "Force, violence, compulsion, coercion, constraint, restraint agree in the idea of the exertion of power against will, wish or consent." Under synonyms for "violence" the author says, "See force." The words as used in defining rape do not import a degree of force or violence likely to produce great or any bodily injury.

Considered with their context the words mean a degree of force or violence necessary to overcome whatever resistance is encountered.

[10] The courts no longer follow the primitive rule that there must be resistance to the utmost. A woman who is assaulted need not resist to the point of risking being beaten into insensibility. If she resists to the point where further resistance would be useless or, in the words of the statute, until her resistance is overcome by force or violence, submission thereafter is not consent. People v. Norrington, 1921, 55 Cal.App. 103, 202 P. 932; People v. Brown, 1934, 138 Cal.App. 748, 33 P.2d 460.

At the outset of our discussion of defendant's contention that he has been twice convicted for a single offense, we might say that this is true as to the offense of simple assault, which is involved in both crimes, but that that fact is immaterial because of the other elements that were involved in the offenses charged. People v. Kimmerle, 1928, 90 Cal.App. 186, 265 P. 525, and cases hereinafter cited. Likewise immaterial is the fact that both offenses were committed simultaneously. They were not thereby merged. People v. Parker, 1925, 74 Cal.App. 540, 549, 241 P. 401.

In People v. McDaniels, 1902, 137 Cal. 192, 69 P. 1006, 59 L.R.A., 578, 92 Am.St. Rep. 81, the court reviewed the authorities, pointed out the conflicting rules respecting the question of double jeopardy resulting from a former conviction or acquittal (extensively briefed in note in 92 Am.St. Rep. 89) and at page 199 of 137 Cal., at page 1009 of 69 P., stated the law as it is followed in our own state as follows: "So it may be concluded that in England, since Lord Denman's act, and in this country, wherever a statute permits a conviction of any lower offense necessarily included in a higher one with which the defendant is charged, a conviction or acquittal of such higher offense is a bar to a subsequent prosecution for any lower offense necessarily included in it, and, e converso, a conviction for any lower offense necessarily included in the higher is a bar to a subsequent prosecution for such higher offense, and this conclusion is fully sustained by the prior decisions of this court hereinbefore cited."

In People v. Coltrin, 1936, 5 Cal.2d 649, at page 660, 55 P.2d 1161, at page 1166, the court said: "If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment. People v. Mazzola, 99 Cal.App. 682, 279 P. 211. But where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both. In re O'Connor, 80 Cal.App. 647, 252 P. 730, 732."

In People v. Day, 1926, 199 Cal. 78, 248 P. 250, the defendant had been convicted of violation of section 244 of the Penal Code (throwing acid upon the person of another) and also of section 245 of the Penal Code quoted above. In affirming the double conviction which resulted from a single "transaction" the court pointed out that there is an element of the offense defined by section 245 not present in the offense defined by section 244, stating (page 86 of 199 Cal., page 253 of 248 P.): "To find the defendant guilty under the first count it was immaterial whether the victim did or did not suffer great bodily harm or whether the acid thrown had the property of causing great bodily harm. To find the defendant guilty under the second count it was necessary to find that the means and force used was likely to produce great bodily harm. In other words, if the jury believed that the acid thrown was not a means or force likely to produce great bodily harm, it was at liberty to acquit upon the second count and convict upon the first count. It is immaterial that the evidence may show that as a matter of fact the acid was means likely to produce great bodily harm, and that as a matter of fact the victim did suffer great bodily harm. The determination of this fact was for the jury."

[11] Under the settled law of this state if a violation of section 245 of the Penal Code involves a factual element not necessarily involved in the commission of the crime of forcible rape, the two are distinct offenses for which separate convictions may be had. It is immaterial whether the force used and which would constitute a violation of section 245 was also the force used in the commission of the crime of forcible rape.

The question is not whether force likely to produce great bodily injury was actually used in accomplishing the rape, not wheth-

er it was necessary in the particular instance to use such force to overcome resistance or whether rape is usually accomplished by means of such extreme force, but it is whether the crime of forcible rape is possible of commission without the use of force likely to produce great bodily injury. If it is possible, then the use of such force is not necessarily an element of forcible rape. In this connection no distinction is to be drawn between the actual and the attempted use of force in a violation of section 245; defendant's argument assumes the actual application of force which necessarily includes both "attempt" and "ability." We must inquire as to the nature of the two offenses. Rape is further defined by section 263 of the Penal Code as follows: "The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime."

[12] The gravamen of the offense of forcible rape is the violation, sexually, of the person of a female by the use of force or violence sufficient to overcome her resistance. Bodily injury is not of the essence of the offense.

[13] The gravamen of the other offense is the likelihood of bodily injury as a result of the force used or attempted to be used. The degree of force used is not as important as the manner in which it is used. A slight blow on the eye might be far more injurious than a severe blow in the back. The defendant here, according to the testimony of the young woman, repeatedly struck her, threw her from one seat to another and onto the floor of the car, inserted his fingers into her vagina in order to hurt her and make her submit and he used sufficient force to tear the wall of the vagina. That was a violation of section 245. That crime was as distinct from rape as would have been an assault with a deadly weapon, although perhaps not recognizable as clearly without somewhat closer inspection. The element of the use of force likely to produce great bodily injury is over and above the force "necessarily" involved in overcoming resistance in the crime of rape just as the use of a deadly weapon would be. It is this added element that justifies the double conviction and punishment. Defendant's argument that there is no such additional element takes for a premise that there can be no forcible rape without the use of force likely to produce great bodily injury. The fallacy of the argument is demonstrable without the citation of precedent, the possession of technical knowledge or the use of a vivid imagination. Wherefore we undertake to say that a strong man could overcome the resistance of a frail woman or a man of no unusual strength could overcome the resistance of a well intoxicated woman, or one suffering from serious physical disability and commit the crime of rape without the use of force likely to produce great bodily injury. If this is not true, why not? If it is not true, then it would be proper to instruct the jury in a prosecution for rape by means of force or violence that the defendant should be acquitted of rape unless the proof established the use of force or violence likely to produce great bodily injury. This would give us a new definition of rape; and unless one charged with forcible rape could be acquitted of that offense and convicted of violation of section 245 (and without specifically charging the latter offense), which would do violence to the clear legal definition of the two offenses, there can be no inherent inclusion in the former offense of all of the elements of the latter. People v. Herbert, 1936, 6 Cal.2d 541, 545, 58 P.2d 909.

If it be suggested that the act of sexual intercourse is itself one likely to produce great bodily injury, there are several obvious reasons why that argument is beside the point. First and foremost is the fact that the act of intercourse is not the force by which resistance is overcome. Again, in rape, the penetration need be only infinitesimal and may cause not the slightest injury. It is no more reasonable to say that the act of sexual intercourse committed by force constitutes an assault by means of force likely to produce great bodily injury than to say it is an assault with a deadly weapon. As to the fallacy of the latter suggestion, see opinion of Chief Justice Bleckley of the Supreme Court of Georgia in Jackson v. State, 1892, 91 Ga. 322, 18 S.E. 132, 44 Am.St.Rep. 25.

Another suggestion that comes to mind, but which is irrelevant, is that women do as a rule resist attempts at rape to the utmost and frequently until they have received the most shocking injuries or lose consciousness. If the law demanded such extreme resistance, lest they be held to have consented, there would be more plausibility to defendant's argument. The fact that in this state no recognition is given

to the harsh rule as to resistance which has at times been followed in other jurisdictions, is eloquent proof of the cruelty of the latter rule which compelled a woman to continue resistance against her attacker solely to protect her honor, after it had become useless to further defend her person. And may it not have been for the protection of women against the use of force likely to produce great bodily injury that the rule requiring resistance to the uttermost was modified?

[14] Construing the evidence most strongly against defendant, as we must, it appears that he deliberately perpetrated two distinct crimes. There is no sufficient reason for holding that having committed the offense of assault by means of force likely to produce great bodily injury, he escaped liability for that crime by committing the additional crime of rape. Perhaps it would be a good thing to prosecute such offenders for both crimes. There are many cases of attack where the perpetrators of rape and attempted rape inflict serious injuries by means of force far more brutal and severe than were the uncouth methods of the defendant.

The judgment as to each count and the order are affirmed.

PARKER WOOD, J., concurred.

SCHAUER, Presiding Justice (dissenting in part).

I concur in the judgment as to Count I and in the opinion so far as it supports that portion of the judgment. I dissent as to the affirmance of Count II.

In my opinion the offense of "assault by means of force likely to produce great bodily injury" is necessarily included within the type of forcible rape charged in the information and depicted in the evidence in this case. The main opinion, whether or not it recognizes the fact, proceeds on a failure to distinguish between the offense of battery and that of assault. Assault does not require actual application of force. It is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Pen.Code, sec. 240. A battery is "any willful and unlawful use of force or violence upon the person of another." Pen.Code, sec. 242. An assault "by any means of force likely to produce great bodily injury" is by section 245 of the Penal Code made punishable as a felony. It was of this type of assault that defendant was convicted under Count II.

Certainly it is conceivable that the same defendant could commit two distinct crimes involving the same victim on the same day. One of those crimes could be forcible rape and one could be assault by means of force likely to produce great bodily injury. But the main opinion here does not treat of any such situation. The conviction in this case stands not upon any separate incident but solely upon the acts of defendant in committing the crime of forcible rape of which he was convicted under Count I. His acts in committing the rape are precisely the same acts upon which his conviction under Count II depends.

It is to be remembered that "assault" is only an attempt to commit battery. The very force necessary to overcome the resistance essential to constitute the offense of forcible rape, *coupled with the implications of such attempt,* which if successfully carried out include not only physical, mental, and psychic shock, but also a likelihood of causing the victim to become pregnant, should be held to be such as is "likely to produce great bodily injury." Surely pregnancy as a result of forcible rape is great bodily injury. So also is the "outrage to the person and feelings of the female" which constitutes the essential guilt of rape.

I am not willing to hold that as a matter of law a woman who has been forcibly raped has not suffered great bodily injury. Furthermore, the fact as to whether the ultimate object of the rape is fully accomplished is not necessarily material; i. e., complete penetration and emission are not essential to constitute the crime of rape; neither is either essential to constitute the crime of *assault* by means of force likely to produce great bodily harm. Since an assault is merely an *"unlawful attempt* * * * to commit a violent injury," the *attempt* does not need to reach fruition. If the attempt is carried far enough to constitute rape then indubitably it has been carried far enough to evidence the "unlawful attempt" constituting assault. The necessary *implications* of the force used in such attempt have been previously surveyed.

The judgment as to Count II should be reversed.

55 Cal.App.2d 126

MILLER v. SUPERIOR COURT OF COLUSA COUNTY et al.

Civ. 6887.

District Court of Appeal, Third District, California.

Oct. 26, 1942.

1. Justices of the peace ⇐164(2)

Where defendant on appeal, which was asserted to be taken on questions of both law and fact, to the superior court from default judgment and order of justice court denying motion to set aside the default, filed a purported statement which contained no reference to any exhibits, notices, affidavits, orders, or other papers or documents on file with the justice court, superior court properly dismissed the appeal. Code Civ. Proc. §§ 473, 975.

2. Appeal and error ⇐957(1)

The granting of relief from a default lawfully taken is a matter of discretion which will not be interfered with on appeal unless an abuse of discretion is clearly shown.

Proceeding by E. Vayne Miller, petitioner, against the Superior Court of Colusa County, and others, respondents, to review an order of the Superior Court of Colusa County dismissing appeal from a judgment of a Justice Court.

Writ of review denied.

E. Vayne Miller, of Colusa, in pro. per., for petitioner.

C. D. McComish, of Colusa, for respondent.

ADAMS, Presiding Justice.

Petition for writ of review.

On January 21, 1942, an action was begun in the Justice's Court of Colusa Judicial Township, County of Colusa, by Elizabeth Sartain, seeking to recover from E. Vayne Miller the sum of $164.50 and costs. Defendant demurred to the complaint, but the demurrer was overruled and he was given ten days to answer. On his failure to answer within the time allowed, his default was entered on April 2, and judgment rendered for plaintiff in the sum of $169.50. On April 4, defendant filed an answer in form of a general denial, and on April 11, he filed notice of motion to set aside the judgment, "upon the grounds of defendants or employees inadvertence, surprise, mistake and excusable neglect," his affidavit being attached thereto. Upon hearing, the motion was denied. On April 14, defendant filed notice of appeal to the Superior Court of Colusa County, from the judgment, and in particular, from the order of the justice's court denying his motion to set aside the default. The appeal was asserted to be taken on questions of both law and fact. No statement of the case accompanied same, but on May 1, a purported statement was filed in the superior court, reading:

"That a complaint and summons was filed in the Justices Court of the Colusa Judicial Township and was thereafter served on Defendant and his time to appear was March 31st 1942, and that his answer actually arrived from Los Angeles on about the 2nd or 1st day of April 1942 and default judgment was entered against Defendant on or about the 1st day of April 1942 and that on or about the 11th day of April 1942 that Defendant did move to set said judgment aside on the grounds set forth in Section 473, Code [C.] C.P. and that Justice of Peace denied said motion and that Defendant did appeal from said judgment and order denying said motion to the above entitled court."

There is no evidence that said statement was filed with, or settled by, the justice, or that it was ever served upon the adverse party.

On May 18, plaintiff served and filed notice of motion to dismiss defendant's appeal, on the grounds that the judgment being a default judgment was not appealable and that the order denying motion to set aside default, being an order made after judgment, must be on questions of law alone and that appellant did not properly perfect his appeal, since no statement of the case was served or filed as required by section 975 of the Code of Civil Procedure. Motion to dismiss was heard by the superior court, and after argument by counsel an order was made and entered dismissing said appeal.

Petitioner now asks this court to determine "the lawfulness" of the aforesaid order of dismissal, asserting that the complete record of all of the proceedings in the justice's court was before the superior court, that no evidence was taken in the

justice's court, that the appeal was an appeal upon a question of law only, and that a statement of the case therefore was not necessary and was surplusage because the error complained of by appellant appeared in the papers sent up. Annulment of the order of dismissal is asked upon the ground that the court acted without, and in excess of its jurisdiction, and that it erred in dismissing said appeal, for the reason that the law did not require the filing of a statement of the case, and that a statement was actually filed.

Appellant relies upon a line of cases beginning with Southern Pacific Co. v. Superior Court, 59 Cal. 471, 474, as authority for his contention that no statement is necessary. It is true that in the above cited case it was held that on such an appeal on questions of law alone, where the alleged errors appeared in the copy of the justice's docket or in the copies of papers sent up by the justice, as required by sections 975 and 977 of the Code of Civil Procedure, there was no necessity for a statement. The court said that section 975, supra, related to "statements" containing "the grounds on which the party intends to rely upon the appeal, and so much of the evidence as may be necessary to explain the grounds,"—that is, cases in which a statement of evidence was necessary to explain the grounds, and that since the papers required to be sent up under section 977, supra, showed the error relied upon, there could be no necessity for a statement. Section 975, supra, was, however, amended in 1941, so that now said section requires that when the appeal is on questions of law alone, the statement of the case must contain not only so much of the evidence but also "such other proceedings" as may be necessary for a determination of the appeal. Also, section 977, supra, as amended in 1941, provides that the papers to be transmitted to a superior court upon filing of the notice of appeal, etc., when such appeal is on questions of law alone, are a certified copy of the entries in the docket relating to the action, all written pleadings in the action, the statement as settled, and all exhibits, notices, affidavits, orders, and other papers and documents on file with the court "which are referred to in the statement by designations sufficient to identify them," the notice of appeal and the undertakings filed. In the case before us there is no reference in the purported statement to any exhibits, notices, affidavits, orders or other papers or documents on file with the court.

[1] In Butler v. Superior Court, 3 Cal. App.2d 508, 39 P.2d 860, this court held that while an appeal from the justice's court on questions of law alone, where the certified copy of the docket contained all the information that was necessary to determine the question involved, the superior court was not without jurisdiction to hear and determine the appeal even though no statement on appeal was settled or transmitted to that court. Rauer's Law, etc., Co. v. Superior Court, 26 Cal.App. 289, 152 P. 957; Himovitz v. Justice's Court, 77 Cal. App. 95, 246 P. 82, 263 P. 384; Peacock v. Superior Court, 163 Cal. 701, 126 P. 976. But that where the certified copy of the docket did not contain the necessary information upon which the questions of law might be determined, and no statement was settled or transmitted to the superior court, and the papers necessary to such determination were not legally before that court, the superior court was without jurisdiction, and had no adequate record upon which it might decide the questions of law, and that the purported appeal was properly dismissed. So in the instant case. The statement filed in the superior court was neither filed in the justice's court, nor settled nor served; it contains no portion of the record upon which an error of the justice's court could be determined, and no such record was legally before the superior court.

[2] Furthermore, as to the alleged error of the justice's court in refusing to set aside defendant's default, it is well established that the granting of relief from a default lawfully taken is a matter of discretion which will not be interfered with on appeal unless an abuse of discretion is clearly shown. 14 Cal.Jur. 1072. An examination of petitioner's affidavit filed in support of his motion to set aside the default does not convince us that the justice's court abused its discretion in denying defendant's motion in this case.

The writ of review is denied.

THOMPSON, J., and SCHOTTKY, J., pro tem., concurred.

55 Cal.App.2d 115

RUNGIE v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13838.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1942.

1. Prohibition ⇐13

An appeal from order removing minor's guardian automatically stays all proceedings in trial court until final determination of appeal, so as to preclude issuance of writ of prohibition to restrain such court from enforcing order. Code Civ.Proc. § 949.

2. Prohibition ⇐13

A writ of prohibition will not issue where its issuance will accomplish no useful purpose.

Original proceeding by Clara Rungie for a writ of prohibition to restrain the Superior Court of Los Angeles County from enforcing a judgment removing the guardian of Louis H. J. Case, a minor, and ordering the minor's delivery to his father. On respondent's demurrer to the petition.

Demurrer sustained, and alternative writ discharged.

William Bronsten, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent court from proceeding to enforce a judgement removing the guardian of Louis H. J. Case, a minor, and ordering the delivery of the minor to its father, Howard L. Case. Respondent has demurred to the petition for a writ of prohibition.

[1, 2] At the oral argument it was made to appear to the satisfaction of this court that an appeal had been taken from the order to which the alternative writ of prohibition was directed. Therefore, pursuant to the provisions of section 949 of the Code of Civil Procedure, this appeal automatically stayed all proceedings in the trial court until the final determination of the appeal (In re Stratton, 133 Cal.App. 738, 739, 24 P.2d 832), and an order issued in the present proceeding would be idle and of no effect. The law is established that a writ of prohibition will not issue where the issuance thereof will accomplish no useful purpose.

For the foregoing reasons respondent's demurrer is sustained and the alternative writ heretofore issued is discharged.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 27

LORRAINE v. CITY OF LOS ANGELES.

Civ. 12722.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1942.

Hearing Denied Dec. 7, 1942.

1. Appeal and error ⇐1010(1)

If there be substantial evidence to support a finding of fact, it will not be disturbed.

2. Appeal and error ⇐996

That an inference contrary to that deduced by trial court might have been drawn by another reasonable mind will not justify a reversal.

3. Negligence ⇐134(11)

The rule that plaintiff must prove in a personal injury action that negligence of defendant is the proximate cause of the injury suffered does not require demonstration of the connection between proved negligence and resultant injury.

4. Negligence ⇐134(2)

The rule that plaintiff must prove that negligence of defendant is the proximate cause of the injury suffered does not require that an eye witness be produced to testify directly to the fact, and circumstantial evidence alone, if convincing, is sufficient.

5. Municipal corporations ⇐819(4)

Evidence that there was a hole in a sidewalk large enough for a man to put his whole foot in it, that female pedestrian

fell where the hole was located, and that her foot was caught as if in a trap, throwing her forward upon the ground, supported finding that the defective condition of the sidewalk was the "proximate cause" of pedestrian's injuries, justifying recovery against city.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Municipal corporations ⇐791(1), 821(16)

"Constructive notice" of a dangerous condition in a sidewalk can be shown by the long continued existence of the condition and it is for jury to determine whether the condition complained of has existed for a sufficient time to give the municipality constructive notice thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

7. Municipal corporations ⇐819(6)

Evidence established that city had "constructive notice" of dangerous condition of a sidewalk, justifying recovery by a pedestrian injured by a fall thereon.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Cecille Lorraine against the City of Los Angeles, California, for personal injuries sustained by plaintiff from a fall on a sidewalk. Judgment for plaintiff and defendant appealed. Plaintiff died during the pendency of the appeal and Ben H. Brown, as administrator of her estate, was substituted as respondent.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Victor P. Spero and Bourke Jones, Deputy City Attys., all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, Ernest Purdum, Deputy Co. Counsel, and David B. Larimer, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by the city of Los Angeles from a judgment recovered by plaintiff Cecille Lorraine on account of personal injuries sustained by her when she fell on a broken sidewalk. Said Cecille Lorraine died during the pendency of this appeal, and Ben H. Brown, as administrator of her estate, was substituted in her place as party respondent.

The evidence adduced at the trial of said action reveals that on October 15, 1937, around 4:30 p. m., Cecille Lorraine alighted from a street car at the terminus of a car line on Vine Street about a quarter of a block north of Hollywood Boulevard in the city of Los Angeles. She crossed Vine Street and stepped up onto the sidewalk at a point 10 or 12 feet north of the intersection of Vine Street and Hollywood Boulevard, took a few steps, probably a distance of three feet, and (as she testified) "then my foot must have caught in something, and I took a double-header which threw me with great force onto the pavement. * * * The only thing I felt, I was caught. I felt my foot was caught." As a result of the fall said Cecille Lorraine sustained a fracture of the proximal extremity of the humerus and other painful injuries.

The witness Barrere testified that he observed the condition of the sidewalk at the point in question practically every day during the month of October, 1937, and took particular note of it on October 16th; that he observed there was a culvert (storm drain catch basin) the top of which formed part of the sidewalk and that close to one corner of the catch basin cover the sidewalk was broken away, forming a hole over 12 inches long, well over 2 inches deep and that "I could put my whole shoe inside the hole." Said witness described the location as being 12 to 15 feet from the corner of Hollywood Boulevard and about 3 feet east of the easterly curb line of Vine Street, such condition being shown in a photograph admitted in evidence as Plaintiff's Exhibit 3. He also stated that he had observed for about a month or six weeks prior to the accident that the sidewalk was in much the same condition as it was on the day on which he took particular note of it.

The witness Cook, a right-of-way solicitor for Southern California Edison Company, testified that at the request of the attorney who filed Mrs. Lorraine's claim with the city of Los Angeles, he measured the hole in question on October 16, 1937, noted such measurements upon a tracing which he made at that time, which was introduced in evidence as Plaintiff's Exhibit 4, and attempted unsuccessfully to make a plaster cast of the hole. He stated that the hole was twelve feet west from a point ten feet north of the southwest corner of the California Bank Building located at the north-

east corner of Hollywood and Vine; that the hole was ragged, 18 inches long, "about 7 inches in width at the widest point," and varied in depth from one-quarter inch to three inches.

The witness Gravatt, an investigator for the Board of Public Works of the City of Los Angeles, testified on behalf of appellant to the effect that he photographed and took measurements of the hole on November 24th and on November 26, 1937, one of such photographs being introduced in evidence as Defendant's Exhibit D, and that the length of the hole was 18 inches; that the width varied from two inches at the south end to five inches at the north end, the widest point being seven inches; that the depth ranged from a quarter of an inch on the east side to an inch and three-quarters on the west side, which was the deepest point.

It is urged by appellant "that the evidence is insufficient to support the findings, for the reason that

"1. The evidence does not show that the asserted defective condition of the sidewalk was the cause of plaintiff's fall thereon; and

"2. It does not appear that the City of Los Angeles had knowledge or notice of the *dangerous character* of the defect relied upon by plaintiff and a reasonable opportunity to make repair." (Italics included.)

In connection with point one, above, appellant maintains that "Admittedly, plaintiff caught her foot and fell approximately at the place where the sidewalk was in the condition of which she complains, but the fact that a person falls upon a sidewalk or other public way at a place where it may be defective is, without more, insufficient to establish that the allegedly defective condition was the proximate cause of such person's fall." Further, "In view of the complete absence of any evidence that plaintiff's fall upon the sidewalk was caused by the defective condition thereof, it follows that the finding that plaintiff's injuries were caused by defendant's negligence is not supported by the evidence."

[1-4] This precise question was raised in the case of Redmond v. City of Burbank, 43 Cal.App.2d 711, 713, 111 P.2d 375, 377, where the court said: "If there be substantial evidence to support a finding of fact, it will not be disturbed by the appellate court. Beck v. Sirota, 42 Cal.App.2d [551], 109 P.2d 419; Restrepo v. Weber Baking Co., 115 Cal.App. 111, 300 P. 980. Because an inference contrary to that deduced by the trial court might have been drawn by another reasonable mind, that will not justify a reversal. Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 86 P.2d 829. * * *

"The rule that plaintiff must prove that the negligence is the proximate cause of the injury suffered (Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480), does not require demonstration of the connection between proved negligence and the resultant injury. It is not necessary that an eye witness be produced to testify directly to the fact. Circumstantial evidence alone, if convincing, is sufficient. County of Alameda v. Tieslau, 44 Cal.App. 332, 337, 186 P. 398."

[5] The evidence conclusively established that there was a hole in the sidewalk large enough for a man to put his whole foot in it; that Cecille Lorraine fell at the very spot where this hole was located (which appellant admits); and that her foot was caught, as if in a trap, which threw her forward with great force upon the ground. This sufficiently supported the trial court's finding that the defective condition of the sidewalk was the proximate cause of Cecille Lorraine's injuries.

With respect to appellant's lack of knowledge or notice of the dangerous character of the defect in the sidewalk, there was evidence that the hole was large enough to be conspicuous—large enough for a man to put his entire shoe inside it, and also that such defective condition had existed for a month or six weeks prior to the date of Mrs. Lorraine's fall.

[6] It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice. See Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Edwards v. City of San Diego, 126 Cal.App. 1, 14 P.2d 119; Wise v. City of Los Angeles, 9 Cal.App.2d 364, 49 P.2d 1122, 50 P.2d 1079; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643.

[7] The fact that it is appellant's duty to inspect and keep in repair the public sidewalks of the city, together with the facts and circumstances established by the

evidence herein, clearly justify an inference that appellant had constructive notice of the dangerous character of the defective sidewalk existing at one of the busiest and most prominent intersections in the city of Los Angeles.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concurred.



55 Cal.App.2d 108

PIRE et al. v. GLADDING McBEAN & CO. et al.

Civ. 12134.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1942.

Rehearing Denied Nov. 25, 1942.

See 130 P.2d 981.

1. Negligence ⇐83

The "last clear chance" doctrine is only applicable to a defendant who actually perceived the predicament of a plaintiff in time to have avoided the accident by due diligence, and a defendant cannot be held liable on the theory that he would have discovered the peril of the other but for remissness on his part.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Appeal and error ⇐1067
Automobiles ⇐246(58)

In action for death of one who was struck by truck at night while he was pushing his stalled automobile at left side near steering wheel, trial court's failure to give instructions on the last clear chance doctrine was prejudicial error under the evidence.

3. Automobiles ⇐246(39)

In action for death of one who was struck by truck at night while he was pushing his stalled automobile at left side near steering wheel, giving of instruction on imminent peril was not error under the evidence.

4. Automobiles ⇐194(2)

Contract hauler who was employed by a fruit buyer who also engaged in the trucking business as a contract hauler, to haul to canneries fruit which the fruit buyer was unable to haul in his own trucks, on a tonnage basis for specified trips, was an "independent contractor" and not an "employee" and hence recovery could not be had from the fruit buyer for death of one struck by contract hauler's truck.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by John Pire, a minor, etc., and others, against Gladding McBean & Co., and others, and Gene Morrison, and others, to recover for the death of Lawrence Pire, deceased. From an adverse judgment, the plaintiffs appeal.

Judgment reversed in part and affirmed in part.

George Olshausen and John K. Hagopian, both of San Francisco, for appellants.

Bronson, Bronson & McKinnon and J. T. Blalock, all of San Franciso, for respondents.

SPENCE, Justice.

Plaintiffs, as the surviving wife and minor children of Lawrence Pire, deceased, sought to recover damages for the death of said deceased. Upon a trial by jury, the court directed a verdict in favor of defendant Gene Morrison, the alleged employer of defendant Charles Hickey, and the jury returned its verdict accordingly. The jury also returned a verdict in favor of defendant Charles Hickey upon the issues submitted to it with respect to said defendant. Judgments were entered upon said verdicts and plaintiffs appeal from said judgments.

Appeal from Judgment in Favor of Defendant Charles Hickey.

Plaintiffs urge the following grounds for a reversal of the judgment in favor of defendant Charles Hickey: First, that the trial court erred in refusing to instruct the jury on last clear chance; second, that the trial court erred in instructing the jury on imminent peril; and third, that the trial

court erred in excluding a purported map of the scene of the accident. The consideration of these grounds requires a brief summary of the evidence.

The accident occurred at about 2 a. m. on the morning of August 22, 1939, at a point on U. S. Highway 99 about 7 miles north of the city of Lodi in San Joaquin County. Both vehicles involved were proceeding in a southerly direction on the right side of said highway. Deceased's car was a Star Durant automobile and defendant was driving a heavy truck or tractor, with a semi-trailer and trailer loaded with peaches. The highway near the scene of the accident was straight and practically level.

Deceased had had some difficulty with his car and, after stopping the same, he had attempted to start it with the self-starter and also with the hand-crank but without success. Deceased and his passenger then attempted to start the car by pushing it along the highway and they were so engaged when defendant Hickey's truck collided with the rear end of the deceased's car. Deceased, who had been pushing the car from the left side near the steering-wheel, was killed.

Defendant Hickey testified that he was travelling at about 25 miles per hour; that he first saw the car of the deceased when he was about 30 to 40 feet from it; that the tail light of deceased's car was not lighted; and that upon seeing said car he applied his foot brake and pulled to the left but nevertheless struck the left rear end of said car.

There was other testimony, however, bearing upon the questions presented by the appeal. There was testimony that the tail light of deceased's car was lighted; that the night was perfectly clear; that there were no other vehicles in the vicinity at the time the accident occurred; and that defendant Hickey's headlights would reveal objects on the highway at a distance of 200 to 250 feet.

[1] There is no dispute between the parties concerning the essential elements which must be present in order to warrant the application of the last clear chance doctrine. The particular element to which attention must be directed here is set forth in New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, at page 101, 215 P. 72, at page 74, where it was said: "It is a well-settled rule in this state that this doctrine is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence. A defendant cannot be held liable upon the theory that he would have discovered the peril of the other but for remissness on his part." See also Isham v. Trimble, 5 Cal. App.2d 648, 43 P.2d 581; Alcamisi v. Market Street R. Co., 67 Cal.App. 710, 228 P. 410. Nor is there any dispute between the parties concerning the correctness of the requested instructions in this regard for said instructions, in setting forth the elements, specified that the doctrine was applicable if "defendants were aware of decedent's dangerous situation" and "then had a clear chance to have avoided injuring decedent by the exercise of ordinary care and failed to do so."

[2] The solution of the real dispute between the parties hinges upon the question of whether there was any substantial evidence upon which the jury might have found that defendant Hickey was aware of deceased's dangerous situation in time to have avoided the accident by the exercise of ordinary care. Admittedly the only direct evidence on the subject was that given by defendant Hickey who testified that he first saw deceased's car when he was about 30 to 40 feet from it. But the jury was not bound by such direct evidence and the authorities indicate that the other evidence in the record constituted substantial evidence from which the jury might have inferred that defendant Hickey actually saw the deceased's car and was aware of the dangerous situation when more than 30 to 40 feet therefrom and in ample time to have avoided the accident by the exercise of ordinary care. Bailey v. Wilson, 16 Cal. App.2d 645, 61 P.2d 68; Galwey v. Pacific Auto Stages, Inc., 96 Cal.App. 169, 273 P. 866; see, also, Argo v. Southern Pacific Co., 39 Cal.App.2d 706, 104 P.2d 77; Hellman v. Bradley, 13 Cal.App.2d 159, 56 P.2d 607; Handley v. Lombardi, 122 Cal.App. 22, 9 P.2d 867; Smith v. Los Angeles R., 105 Cal.App. 657, 288 P. 690; Giorgetti v. Wollaston, 83 Cal.App. 358, 257 P. 109; vol. 2, Cal.Jur. Ten-year Supp., pp. 189, 190. We are therefore of the opinion that the failure to give instructions on the doctrine of last clear chance constituted prejudicial error under the circumstances.

[3] Plaintiffs' second assignment of error relates to the giving of an instruction on imminent peril. It is apparently conceded that the instruction contained a correct statement of the law on the subject but

plaintiffs contend that there was no evidence justifying the submission to the jury of the issue of imminent peril. No authority sustaining plaintiffs' contention has been called to our attention and, in view of the evidence in the record including the conflicting evidence concerning the tail light on deceased's car, we are of the opinion that the trial court did not err in giving said instruction.

Plaintiffs' third assignment of error relates to the exclusion by the trial court of a purported map. The court sustained an objection upon the ground that no foundation had been laid. The map appears in the transcript and is entitled "Preliminary Map of Accident Site." From the discussion of counsel it appears that the map was a preliminary map which had been loaned to plaintiffs' counsel by defendant Hickey's counsel to assist in the preparation for trial. The only ground urged for its admission is that it was a document produced by the opposing party. Plaintiffs cite and rely solely upon a statement in 7 Wigmore on Evidence, 3d Ed., p. 632, but that statement appears to have been based upon a statute in another jurisdiction. We are not called upon, however, to discuss the question of whether the trial court's ruling constituted error for plaintiffs have wholly failed to show, or even to suggest, that the error, if any, in excluding said map was prejudicial.

Appeal from Judgment in Favor of Defendant Gene Morrison.

Plaintiffs contend that the trial court erred in directing a verdict in favor of defendant Gene Morrison. It is plaintiffs' theory that there was sufficient evidence to sustain a finding that defendant Hickey was an employee of defendant Morrison rather than an independent contractor.

Defendant Morrison had been engaged in business for many years as a buyer, licensed by the department of agriculture. For several years he had also engaged in the trucking business as a "contract hauler," under the name of Associated Transporation Company. Defendant Hickey was also engaged in the trucking business as a "contract hauler." The latter owned a fleet of four trucks and was licensed to haul goods anywhere in this state.

During the peak of the season when Morrison was purchasing fruit and contracting for the hauling of the fruit to the canneries, he frequently found that his own equipment was insufficient and that he needed to obtain the services of other contract haulers. He therefore obtained such services on a tonnage basis for specified trips or in other words on a "load-to-load basis". At the time of the accident, defendant Hickey was hauling peaches on such basis, under a contract with defendant Morrison, from a point near Yuba City to San Jose.

[4] We find no evidence in the record which would have sustained a finding that defendant Hickey was an employee of defendant Morrison. The uncontradicted evidence shows that defendant Hickey was a licensed contract hauler, operating a fleet of trucks; that he paid the cost of maintenance and repair thereof; that he received no salary or wages from defendant Morrison; that he contracted with defendant Morrison solely for the result of his work and on a specified tonnage basis; that defendant Hickey alone had the right to hire and dismiss the drivers of his trucks and to select the driver who was to operate any particular truck on any particular haul; that he was free to select the route and could leave at any time after the truck was loaded provided he arrived at the cannery at any time during the next canning day; that he was never directed what to do or how to do it after the trucks had been loaded; and that there was no reservation by defendant Morrison of any right to give such directions. All of the evidence shows that defendant Hickey's status was essentially that of an independent contractor (13 Cal.Jur. 1014) and we find no evidence from which the jury might have found that defendant Morrison had the right of complete or unqualified control, the existence of which right is an essential characteristic of the employer-employee relationship. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241. The trial court therefore properly directed a verdict in favor of defendant Morrison.

The judgment in favor of defendant Hickey is reversed. The judgment in favor of defendant Morrison is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

55 Cal.App.2d 107

JEFFS v. JEFFS.

Civ. 13757.

District Court of Appeal, Second District, Division 1, California.

Oct. 21, 1942.

1. Divorce ⇐183

Where there was no bill of exceptions or reporter's transcript on appeal from interlocutory judgment of divorce, the reviewing court was precluded from considering any matters of fact not a part of the judgment roll.

2. Appeal and error ⇐907(3)

On appeal based on judgment roll alone, findings were required to be given a liberal construction which would uphold rather than defeat the judgment.

3. Divorce ⇐286

Where interlocutory divorce judgment awarded plaintiff $450 to be paid by defendant in six monthly installments, which was roughly one-half of value of community property as alleged in the pleadings, reviewing court, on appeal based on judgment roll alone, was required to assume that trial court in making award was disposing of community property, which precluded contention that trial court failed to find for either party concerning community property.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Alice Helen Jeffs against Milton D. W. Jeffs for divorce. From interlocutory judgment of divorce, the plaintiff appeals.

Affirmed.

Peggy Halloran, of Los Angeles, for appellant.

Leonard S. Barnes and F. Paul Hornaday, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

[1] In this appeal from an interlocutory judgment of divorce there is no bill of exceptions or reporter's transcript. Therefore, this court is precluded from considering any matters of fact not a part of the judgment roll. Ward v. Ward, 15 Cal.2d 234, 100 P.2d 773.

[2] Complaint is made that the trial court failed to find for either party as to community property. The appeal being based upon the judgment roll alone, the findings must be given a liberal construction which will uphold rather than defeat the judgment. Ward v. Ward, supra.

[3] Under the provisions of the interlocutory judgment, there was ordered paid to appellant $450 in six monthly installments. This is roughly one-half the value of the community property as alleged in the pleadings. Therefore, it must be assumed that the trial court in making this award was disposing of the community property. Johnston v. Johnston, 33 Cal.App.2d 90, 91 P.2d 142.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



55 Cal.App.2d 234

YUCAIPA FARMERS CO-OPERATIVE ASS'N et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13773.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

1. Workmen's compensation ⇐1430

Evidence established that a co-operative association of which farm owner was a member, and not the association's foreman, was the "employer" of an injured cherry picker, justifying a compensation award against the association.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

2. Workmen's compensation ⇐235

The power of a person at will to terminate the service of one engaged to perform a task is persuasive that the relationship was that of "master and servant".

See Words and Phrases, Permanent Edition, for all other definitions of "Master and Servant".

3. Workmen's compensation ⇐306, 309

When a person performing work for another is subject to the control of such other and is liable to be discharged for disobedience, he is not an "independent contractor" but an "employee", and where the contract contains no terms relating to power of control, such power must be determined from inferences to be drawn from the circumstances, the relationship, character of the parties, nature of the work to be done, the time within which it is to be completed, and the conduct of the parties toward each other.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

4. Workmen's compensation ⇐1710

If from all the facts only a single inference and one conclusion may be drawn, whether one be an "employee" or "independent contractor" is a "question of law", but, if either may reasonably be determined from the circumstances, it is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

5. Workmen's compensation ⇐192

Where all appearances indicated to cherry pickers that co-operative association harvesting cherry crop was the owner of, or in authority over, the crop, and there was no intimation that association's management had stated to workers that association was not under contract with farm owner, association was the ostensible "agent" of an undisclosed "principal", and was liable as "employer" of an injured worker for workmen's compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Principal".

Petition by the Yucaipa Farmers Co-operative Association to review an award of the Industrial Accident Commission in favor of Rosetta Fennell and others.

Award affirmed.

F. Britton McConnell, J. L. Kearney, and Herbert S. McCartney, Jr., all of Los Angeles, for petitioners.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

MOORE, Presiding Justice.

A writ of review was heretofore issued under the apprehension that at the time she received her injuries respondent Rosetta Fennell was an employee of respondent Thompson and not of Yucaipa Farmers Co-operative Association, hereinafter referred to as Yucaipa. Upon a more thorough study of the case we have derived a different conclusion.

June 21, 1941, Mrs. Fennell accompanied by her husband and Mr. and Mrs. Beatty called at the office of Yucaipa in quest of employment to pick cherries. They were told by the party in charge that Yucaipa had no need of laborers but that Mr. Thompson needed some pickers on the Kuffel ranch. The group then proceeded to the Kuffel ranch where they found respondent Thompson. He told them that he was foreman for the association; that Yucaipa was doing the picking; that he was gathering the cherries for Yucaipa; that he was in charge; that he was not "contracting these cherries himself * * * that he was merely a foreman for the Yucaipa people." He then stated that it was necessary for him to ascertain whether Yucaipa had the barrels for the cherries. After having his inquiry satisfied at the office of Yucaipa, Thompson returned with the Fennells and Beattys to the orchard and put them to work.

After Mrs. Fennell had worked for a short time, she suffered some physicial injuries while picking cherries. She endured pain and discomfort during her ten days on the Kuffel farm, but did not abandon her work. About fourteen days after the accident at Thompson's suggestion, Mrs. Fennell called on Yucaipa and inquired whether or not they would pay her doctor's bill incurred as a result of her injuries. She was there told that payment would not be made for the reason that she had waited too long. The employment of Mrs. Fennell and her associates continued for about ten days, during which time Mr. Thompson supervised all of their activities and paid them in the orchard with cash at the termination of their employment.

Mr. Homer T. Hill, assistant manager of Yucaipa, was called to the stand after the testimony of Mrs. Fennell and her associates had been received. He testified that the executor of the Kuffel estate had taken out a membership in Yucaipa; that he had requested Yucaipa to supervise the harvest-

ing of the crop on the Kuffel estate so that the association "could pick it up and deliver it at the plant and then sell it or haul it to the commission men here in Los Angeles"; that Yucaipa had contracted with Thompson to gather the Kuffel cherries and agreed to pay him 2½ cents per pound for harvesting the crop; that Yucaipa officials did not know anything about who was employed by Thompson or how much they were paid; that Yucaipa had no interest or control over his disposition of the moneys to be paid him for harvesting the cherries.

If the testimony had closed at this point, petitioners would be in a more favorable position than they were placed by the further testimony of Yucaipa's assistant manager. The following is his testimony relating to Yucaipa's contract with Thompson:

"Q. If about the third day he was on the job nothing happened out there, Thompson would be put off that place pretty quick, wouldn't he? A. That's right.

"Q. He was just hired to pick this fruit and you paid him according to the amount of fruit that was delivered at your warehouse? A. Yes, sir.

"Q. If that fruit was not delivered in a reasonable time, you got some one else to do the job? A. Yes.

"Q. And you had no recourse? A. None whatever. * * *

"The Referee: In other words, you don't know who is supposed to take care of these people then? A. No, sir."

From this testimony it is emphasized that Yucaipa had already crystallized its own interpretation of its engagement of Thompson as an independent contractor. Such construction of the agreement is further justified by the answer given Mrs. Fennell on the occasion of her request for payment of her doctor's bill and by the fact that Yucaipa supplied the equipment used by the workers in picking the cherries.

The workers having applied for employment at the Yucaipa office were sent to Thompson who was in charge of the Kuffel land which was under contract to Yucaipa to supervise the harvesting of the cherries grown there. Not only did Thompson hold himself out to the workers as foreman of the pickers for Yucaipa, but likewise did Yucaipa put Thompson in the position of one possessed of authority to act on behalf of Yucaipa. Nothing was said by him or by the officers of Yucaipa to indicate that he had contracted on his own account to gather the cherry crop. His statement to the pickers was that he was Yucaipa's foreman. When they asked Yucaipa for employment, its office sent them to Thompson.

[1-4] Upon such evidence, for the commission to have determined that Milt Thompson individually was employer of Mrs. Fennell would not only have operated an injustice but also, it would have gone contrary to the decisions of the appellate courts. The power of a person at will to terminate the service of one engaged to perform a task is a persuasive circumstance that the relationship was that of master and servant. Chapman v. Edwards, 133 Cal. App. 72, 77, 24 P.2d 211. When a person performing work for another is subject to the orders, control, and direction of such other, and is liable to be discharged for disobedience, then he is not an independent contractor, but an employee. Chapman v. Edwards, supra. And where the contract of the parties contains no terms expressly affirming or denying the power of control such power must be determined from the reasonable inferences to be drawn from all of the circumstances, the relationship and character of the parties; the nature of the work to be done; the time within which it is to be completed, and the conduct of the parties toward each other with reference to the subject of the contract. Press Publishing Co. v. Industrial Acc. Comm., 190 Cal. 114, 120, 210 P. 820. If from all of the facts only a single inference and one conclusion may be drawn, whether one be an employee or independent contractor is a question of law. Chapman v. Edwards, supra. But if from all the circumstances either may reasonably be determined, it is a question for the trier of the facts to answer.

[5] There is yet another reason why Yucaipa must be held as employer of Mrs. Fennell. All appearances indicated to the workers that Yucaipa was the owner of or in authority over the Kuffel cherry crop. If it was not in authority, it was the ostensible agent of an undisclosed principal. There is no intimation that its management ever stated to the workers at any time that it was not under contract with the Kuffel estate. Therefore aside from the other considerations above discussed, since Yucaipa was the ostensible principal, it was

liable as the employer of Mrs. Fennell and her associates at the time she received her injuries. Cowell v. Industrial Acc. Comm., 11 Cal.2d 172, 78 P.2d 1016.

The award is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



55 Cal.App.2d 92

McDOUGALL v. MORRISON.

Civ. 12128.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1942.

Hearing Denied Dec. 17, 1942.

1. Appeal and error ⇐931(1)

On appeal from judgment for plaintiff rendered in case tried without jury, all conflicts in evidence were required to be resolved in favor of plaintiff.

2. Negligence ⇐93(2)

If plaintiff's husband, who was driving automobile in which plaintiff was riding, was guilty of contributory negligence proximately causing collision with defendant's automobile, such contributory negligence would be imputable to the plaintiff so as to bar her recovery for injury sustained.

3. Automobiles ⇐208

Under Vehicle Code, motorist entering highway from private drive has duty to look for approaching automobiles, and not to proceed if one is coming unless as a reasonably prudent person he believes, and has a right to believe, that he can pass in front of approaching automobile in safety. Vehicle Code, § 553, St.1935, p. 187.

4. Automobiles ⇐208

In determining rights of parties under rule making it duty of motorist entering highway from private drive to look for approaching automobiles and not to proceed if one is coming unless, as a reasonably prudent person, he believes, or has right to believe, that he can pass in front of the approaching automobile in safety, each case must turn upon its own facts. Vehicle Code, § 553, St.1935, p. 187.

5. Negligence ⇐136(9)

"Contributory negligence" as a matter of law can only be found where reasonable minds cannot conclude that a reasonably careful and prudent person, situated as was the plaintiff, would not have acted as he did.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

6. Appeal and error ⇐996, 1011(1)

If circumstances are such that reasonable minds might differ on issue of contributory negligence, or if the evidence is in conflict, the finding of the trier of the facts is conclusive.

7. Automobiles ⇐206

A motorist, who stopped automobile before entering a highway from a private driveway and observed approaching automobile but knew that he had time to turn into the highway if driver of approaching automobile was proceeding at lawful rate, had right to assume that the driver was obeying the law. Vehicle Code, § 553, St.1935, p. 187.

8. Automobiles ⇐244(35, 37, 43)

Evidence sustained judgment for occupant of automobile which was driven by her husband for injuries sustained when defendant's automobile sideswiped husband's automobile immediately after it entered highway from private drive, on ground that defendant was negligently driving 50 or 60 miles an hour in residential zone, that such negligence was "proximate cause" of accident, and that husband reasonably believed he had time to enter highway ahead of defendant's automobile, and was not guilty of contributory negligence. Vehicle Code, § 553, St.1935, p. 187.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Era Bell McDougall against William Morrison for injuries sustained in an automobile accident. From an adverse judgment, the defendant appeals.

Affirmed.

Theodore Tamba, of San Francisco, for appellant.

Francis N. Foley, of San Mateo, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover for personal injuries alleged to have been received when the automobile in which she was riding collided with that driven by the defendant. The case was tried before the court without a jury, and resulted in a judgment for plaintiff. From that judgment defendant prosecutes this appeal, his sole contention being that, as a matter of law, the evidence shows that plaintiff was guilty of contributory negligence. A reading of the record demonstrates that, on the basic issues of negligence of defendant, contributory negligence of plaintiff, and proximate cause, the evidence is in direct conflict. For that reason the judgment cannot be disturbed.

The accident occurred on a rainy night on December 20, 1940, at about 6:30 p. m. on the El Camino Real in the city of San Mateo. Plaintiff lives on the west side of El Camino Real, about half way between Tilton Avenue to the south, and Mt. Diablo Avenue to the north. The garage connected with plaintiff's home is back a considerable distance from the highway, and is connected therewith by a driveway. The front of plaintiff's house is bordered by a hedge, and between the curb and the sidewalk is a row of large trees, extending both northerly and southerly from plaintiff's residence. On the night in question, plaintiff's husband, accompanied by plaintiff, drove down the driveway intending to drive north on El Camino Real. According to the evidence produced by plaintiff, her husband stopped their car at the edge of the highway where he had a clear view in both directions. The husband testified that he looked both north and south, and saw the headlights of two approaching vehicles, one from the north, about four or five blocks distant, and the other (defendant's) some five hundred feet away at about Tilton Avenue to the south; that it seemed to him a safe time to come out; that he watched defendant's car at all times; that he proceeded out into the highway in low gear and then changed to second; that he proceeded straight out into the highway, and, when he reached the white line in the center, turned north (the same direction in which defendant was proceeding); that just as he was turning and straightening out his car he noticed how defendant's car was "climbing right up on top of me when my wife hollered how fast he was going"; that defendant was going fifty or sixty miles an hour at the time of the accident. The car of defendant sideswiped that of plaintiff, damaging plaintiff's car on the right side, and causing plaintiff to be thrown to the highway, suffering the serious injuries of which complaint is made. Plaintiff corroborated her husband's testimony in all material respects. The evidence also showed that the highway in front of plaintiff's home is over fifty feet wide; that the accident occurred while plaintiff's car was facing north and straddling the center white line; that no automobiles were parked on the east side of the highway; that there was a clear area on the highway over twenty feet to the right of plaintiff's car. Admittedly, the lights on both plaintiff's and defendant's cars were on. After the accident, defendant's car kept its forward motion and stopped about three hundred feet to the north of the place of collision.

Defendant's testimony, and that of his companion, contradicted that of plaintiff and her husband in material respects. Their testimony was to the effect that they were traveling but thirty miles an hour. Defendant testified that his headlights illuminated the highway, which was wet, for about one hundred feet, but that he did not see the lights on plaintiff's car until just before the collision, when but about ten or fifteen feet from the point of contact. The brake system on defendant's car was injured as a result of the accident. In an effort to explain why he did not see plaintiff's car he testified that plaintiff's car came out of the driveway on an angle. There was evidence that defendant had been drinking, but no evidence that he was intoxicated.

[1] From this summary of the evidence it is obvious that the material facts are sharply in dispute. All such conflicts, under elementary principles, must be resolved in favor of respondent.

[2] The theory of defendant is, that plaintiff's husband was guilty of contributory negligence, as a matter of law, in failing to yield the right of way, and that such contributory negligence is imputable to plaintiff. Of course, if plaintiff's husband was guilty of contributory negligence proximately causing the accident, such contributory negligence would be imputable to plaintiff so as to bar her recovery. (See

cases collected 3 Cal.Jur. (Ten Year Supp.), p. 542, § 52.) The contention of appellant that he was entitled to the right of way as a matter of law is predicated upon section 553 of the Vehicle Code, St.1935, p. 187, which reads as follows: "The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right of way to all vehicles approaching on said highway." It seems to be the theory of defendant that, under this section, in every case a vehicle driving on a highway has the right of way over one proceeding from a driveway, and that, in every such case, regardless of the negligence of the driver proceeding on the highway, the driver proceeding from the driveway is guilty of negligence, as a matter of law, if a collision results. Appellant claims to find support for this startling doctrine in Uhl v. Fertig, 56 Cal.App. 718, 206 P. 467; De La Torre v. Johnson, 203 Cal. 374, 264 P. 485; Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951; Neilson v. Houle, 200 Cal. 726, 254 P. 891, and Nix v. Woodworth, 11 Cal.App.2d 322, 53 P.2d 765. These cases do not stand for the broad rule that one proceeding on a highway has, under all conditions, an uncontrolled and absolute right of way over vehicles proceeding out of private driveways. Although all of them involved collisions between a vehicle proceeding on a highway and one coming from a private driveway, and all of them held that the person driving from the private driveway was negligent, all but Uhl v. Fertig, supra, were affirmances. In other words, in all but the last named case, it was held that under the facts there involved the trier of the facts was justified in finding that the person proceeding from the private driveway was guilty of negligence. Most of them indicated that a contrary holding would likewise have been supported. The case of Uhl v. Fertig, supra, did hold, under the facts there involved, that the person proceeding out of the private driveway was guilty of contributory negligence as a matter of law, and did reverse a judgment for plaintiff. But in that case the plaintiff proceeded out of a blind driveway, without stopping or sounding his horn, at a rapid rate of speed. The court properly held that, under the circumstances, plaintiff was guilty of contributory negligence as a matter of law.

[3] The true rule is that, under the section of the Vehicle Code above quoted, it is made the duty of the driver of an automobile entering the highway from a private drive to look for approaching cars, and not to proceed if one is coming, unless, as a reasonably prudent and cautious person he believes, and has a right to believe, that he can pass in front of the other in safety. Wakefield v. Horn, 109 Cal.App. 325, 293 P. 97; see, also, Conley v. Marvin, 210 Cal. 330, 291 P. 830; see cases collected 5 Am.Jur. p. 670, § 306; Henderson v. O'Leary, 177 Wis. 130, 187 N.W. 994, 24 A.L.R. 946.

[4-6] Each case must turn upon its own facts. Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did. The situations where a court will so declare are rare. Casselman v. Hartford Acc. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Enz v. Johns, 112 Cal.App. 1, 296 P. 115. If the circumstances are such that reasonable minds can differ, or, if the evidence is in conflict, the finding of the trier of the facts is conclusive.

[7, 8] In the present case, plaintiff's husband stopped before entering the highway. He saw defendant's car nearly five hundred feet away. He knew he had plenty of time to turn into the highway if defendant was proceeding at a lawful rate. He had a right to assume that defendant was obeying the law. The slightest care on defendant's part would have avoided the accident. If he had been watching the roadway he could not have failed to have observed the glare of plaintiff's lights on the wet highway. He had twenty feet of clear highway to the right of plaintiff's car, and if he had swerved to the right the accident would have been avoided. The trier of the facts was justified in finding that the negligence of the defendant in driving fifty or sixty miles an hour in a residential zone was the proximate cause of the accident. The trier of the facts was also justified in impliedly finding that a reasonable and prudent person situated as was plaintiff's husband would have reasonably believed he had plenty of time to enter the highway. Under such circumstances, the judgment cannot, and should not, be disturbed.

The judgment is affirmed.

KNIGHT and WARD, JJ., concurred.

55 Cal.App.2d 939

HARRIS v. McELLIGOTT et al.

Civ. 2885.

District Court of Appeal, Fourth District, California.

Oct. 15, 1942.

Appeal and error ⇐787

Where no undertaking was given for payment of cost of preparing transcript on appeal from superior court's judgment, such cost was not paid, no draft of proposed bill of exceptions was filed, no proceedings were instituted for such bill or transcript, except demand on court clerk for preparation of transcript, and no arrangement for preparation of reporter's transcript was made with reporter or otherwise, appeal should be dismissed on motion made over 10 months after service on appellants of notice of order denying new trial, as time for perfection of appeal had expired. Code Civ.Proc. § 953b; Rules for the Supreme Court and District Courts of Appeal, rules 5, 6.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Mae Lillian Shelton Harris against Ethel McElligott and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss the appeal.

Appeal dismissed.

No appearance for appellants.

Harry P. Sweet, of San Diego, for respondent.

PER CURIAM.

The certificates of the clerk of the Superior Court of San Diego County and the official court reporter thereof show that plaintiff and respondent secured a judgment against defendants and appellants in the sum of $2,782. Appellants filed a notice of appeal on January 8, 1942, and on the same date requested the clerk to prepare a transcript. No undertaking or security was given to secure the cost of preparing the transcript and the cost thereof has not been paid. The notice of entry of judgment was served on counsel for appellant on December 12, 1941. Notice of an order denying a new trial was served on him on December 31, 1941. No draft of the proposed bill of exceptions has been filed and no proceedings were ever instituted for such a bill of exceptions or a transcript on appeal except the demand above mentioned. No arrangement for the preparation of the reporter's transcript has been made with the reporter or otherwise, pursuant to section 953b of the Code of Civil Procedure. After due notice, on October 13, 1942, a motion was duly made to dismiss the appeal upon the grounds stated. The time within which appellants were allowed to perfect the appeal has expired.

Under rules 5 and 6 of the Rules for the Supreme Court and District Courts of Appeal the appeal should be and is dismissed. Peter v. Fullen, 35 Cal.App.2d 115, 94 P.2d 1019.



55 Cal.App.2d 104

AMBRA v. WOOLSEY et al.

Civ. 12209.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1942.

1. Automobiles ⇐171(5, 13)

Where one of two intersecting highways is a boulevard protected from traffic on the other by stop signs, the rule that first automobile to enter intersection has right of way does not apply, and motorist on boulevard has right to assume that driver on intersecting highway will obey stop sign and yield right of way.

2. Automobiles ⇐244(11, 36)

Where driver of automobile in which decedent was riding had ignored the boulevard stop sign and had driven at high speed in front of defendant who was approaching intersection on boulevard at moderate speed and who immediately applied his brakes and swerved to avoid collision, evidence sustained finding that defendant was not guilty of negligence which was "proximate cause" of decedent's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Grace Ambra against Stewart Woolsey and others to recover for the wrongful death of passenger in automobile which collided with automobile driven by named defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellant.

Clark & Heafey, of Oakland, for respondents.

DOOLING, Justice pro tem.

In this action for wrongful death the trial court, sitting without a jury, entered judgment for defendant. The decedent was riding in an automobile driven by one Bufardeci which was struck by an automobile driven by defendant Stewart Woolsey. The trial court found that the collision and resultant death were solely and proximately caused by the negligence of Bufardeci, and that defendant Woolsey was guilty of no negligence proximately contributing thereto.

While stated in different ways the only substantial claim of appellant is that under the evidence defendant Woolsey was guilty of negligence as a matter of law and that such negligence was a proximate cause of the fatal collision.

Taking the evidence most favorable to defendant Woolsey, he was driving eastward on San Antonio Road in Santa Clara County at a speed of 35 to 40 miles per hour, approaching its intersection with Charleston Road. At that intersection traffic on San Antonio Road was protected by boulevard stop signs on Charleston Road. Some distance back of the intersection defendant Woolsey saw a sign reading "Caution—Intersection," but he did not slacken his speed. Passengers in the Woolsey car saw the Bufardeci car being driven northerly on Charleston Road at a speed of 55 or 60 miles per hour when it was 300 or 400 feet from the intersection. As it approached the stop sign its speed was reduced to forty miles per hour, but it did not stop and continued into the intersection at 40 miles per hour. One of the passengers in the Woolsey car on cross-examination gave the following answer to the following question:

"Q. Didn't you think the condition was such that you should warn the driver to be careful? A. No, sir, because as the car approached the intersection it slowed down. I naturally assumed they were going to stop."

Defendant Woolsey did not see the Bufardeci car until it was 25 or 30 feet from the intersection. From that point it continued at a speed of 40 miles per hour into the intersection directly in front of the Woolsey car and was struck by it in the side.

[1] Appellant cites many cases having to do with collisions in intersections which are not guarded by stop signs, and applying the familiar rule that the first automobile to enter the intersection has the right of way. Such cases have no application to a collision in an intersection where one of the two highways is a boulevard protected from traffic on the other by stop signs. In such a situation the driver on the boulevard has a right to assume that the driver on the intersecting highway will obey the stop sign and yield him the right of way. Lindenbaum v. Barbour, 213 Cal. 277, 2 P.2d 161; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 22 P.2d 554; Inouye v. McCall, 35 Cal.App.2d 634, 96 P.2d 386; Silva v. Market Street Ry. Co., 50 Cal.App. 2d 796, 123 P.2d 904.

In Gritsch v. Pickwick Stages System, supra, this court said at pages 780, 781 of 131 Cal.App., at page 556 of 22 P.2d:

"Cases in other jurisdictions involving boulevards and 'arterial highways' recognize the general principle that the purpose of creating these through highways is to facilitate traffic upon them, and to that end the state may delay all traffic entering into such highways in order that those traveling upon the through highways may have a preferred right of way. [Citing cases.]

"From the Keir case [Keir v. Trager, 134 Kan. 505, 7 P.2d 49, 81 A.L.R. 181] we quote the following language, which is particularly applicable to the case here: 'The appellee was acting wholly within her rights in assuming that the appellants would stop before entering the highway, and she cannot be charged with negligence in acting on such assumption. She can only be charged with negligence under such circumstances from the time that she had knowledge that the appellants intended to disobey the stop sign and enter upon the highway. After she had such knowledge, she was bound to use the care of an ordinary, prudent person.'"

[2] It is not disputed that from the time the Bufardeci car passed the stop sign until the time of collision at the speed the two automobiles were going not over two seconds elapsed. During that interval there is testimony that defendant Woolsey put on his brakes and swerved in an attempt to avoid the collision. It certainly cannot be said under these circumstances that the evidence was such as to support no other finding than one of negligence on defendant Woolsey's part.

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



55 Cal.App.2d 171

MALASPINO v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.

Civ. 6901.

District Court of Appeal, Third District, California.

Oct. 27, 1942.

Hearing Denied Dec. 22, 1942.

States ⇐203

State controller had authority to bring action to recover on a claim filed by the Department of Institutions for the care and maintenance of an incompetent in a state hospital, as against contention that the Department had the exclusive right to institute the action, since the state was the "real party in interest" and the liability was due to the state rather than to the Department. St.1937, p. 1157 § 6658; Pol.Code § 433, subd. 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

Writ of review to Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Proceeding by Forrest J. Malaspino, as administrator of the Estate of Theresa Guiffra, deceased, against the Superior Court of Sacramento County and others to review a judgment of the Superior Court of Sacramento County.

Judgment affirmed.

Charles P. Snyder and George F. Snyder, both of San Andreas, for petitioner.

Earl Warren, Atty. Gen., and Rose M. Sheehan, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice pro tem.

Harry B. Riley, as State Controller of the State of California, commenced an action in the Justice's Court of Sacramento Township, against the administrator of the estate of Theresa Guiffra, deceased, petitioner herein, to recover the sum of $896.13, upon a claim filed by the Department of Institutions against said estate, for the care and maintenance of an incompetent daughter of said deceased, in a state hospital. The administrator demurred to the complaint, which demurrer was overruled, an answer was filed, and, upon trial, the justice's court rendered judgment in favor of plaintiff. An appeal was taken to the Superior Court of Sacramento County on questions of law and fact, and, after trial, judgment was rendered in favor of plaintiff. Petitioner has filed in this court a petition for a writ of review, and seeks therein to have the judgment against him annulled, upon the ground that the superior court, "in rendering said judgment against petitioner acted without and in excess of the jurisdiction of said court and judge."

Petitioner contends that the State Controller had no legal capacity to sue, but that the Department of Institutions, under section 6658 of the Welfare and Institutions Code, St.1937, p. 1157, had the exclusive right to commence such an action, and therefore, neither the justice's court nor the superior court, had jurisdiction to enter a judgment. He asserts that under section 6658 of the Welfare and Institutions Code, and the section immediately preceding it, the liability for the support of an insane person committed to a state hospital is created, and that the Department of Institutions has the exclusive right to commence an action to recover for such support.

Said section 6658 reads as follows: "The Department of Institutions may in its own name bring an action to enforce payment for the cost of determining the insanity of any person and securing his admission into a State hospital when his estate or any per-

son is liable for the same, or to recover for the use and benefit of any State hospital or for the State the amount due for the care, support, maintenance, and expenses of any patient or inmate therein, against any county, or officer thereof, or against any person, guardian, or relative liable for such care, support, maintenance, and expenses."

It will be noted that the section quoted states that the Department of Institutions may bring such an action, but we find no language in such section, or elsewhere in the Welfare and Institutions Code, that gives said department the exclusive right to commence the action. It must be borne in mind that the liability in question is one that is due to the State of California, and not to the Department of Institutions, and that what is here involved is merely the right to commence an action to recover the amount determined by the investigation of the Department of Institutions to be due to the State of California.

It is stated in section 433 of the Political Code that one of the duties of the State Controller is "to superintend the fiscal concerns of the state," and in subdivision 16 of said section it is stated that it is the State Controller's duty—

"To direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state; of which suits the courts of Sacramento county have jurisdiction, without regard to the residence of the defendants."

There is no inconsistency between these various sections. Section 6658 gives the Department of Institutions the right to maintain an action for such support, and section 433 of the Political Code empowers the State Controller, in line with his duty, "to superintend the fiscal concerns of the state," to commence an action to collect any and all moneys due to the state. Whether the action is commenced by the Department of Institutions or by the State Controller, the State of California is still the real party in interest, and the liability is one due to the State. Before we would be justified in holding that the Department of Institutions alone had the right to commence an action to recover the amount due to the State in the instant case, it must appear clearly that said section 6658, supra, confers such exclusive right, and in our opinion, said section cannot reasonably be construed as taking away from the State Controller the right and duty conferred upon him by section 433 of the Political Code to bring suit for any moneys due to the state.

The petitioner contends that the case of County of San Bineto v. Riley, 88 Cal.App. 131, 263 P. 349, is decisive of the issues here involved. In that case the county of San Benito petitioned for a writ of mandate in the District Court of Appeal, to compel the State Controller to deliver to said county certain state warrants for a sum representing the county's share of moneys collected by the State under the Motor Vehicle Fuel Act. Stats.1923, p. 571; Deering's Gen.Laws 1937, Act 2964. The State Controller, in his answer, did not deny that the county was entitled to warrants for the amounts, but interposed a special defense that the county had refused to pay an indebtedness due to the State under sections 2192 and 2193 of the Political Code, for the support of feeble-minded persons committed to the Sonoma State Home by the Superior Court of San Benito County, and in his prayer said State Controller asked that as a condition precedent to the issuance of a writ of mandate, the county of San Benito be required to pay to the controller the sums found by this court to be due from the county. The county's demurrer to said answer was sustained, and, in its opinion, the court pointed out that under the said Fuel Act it was the duty of the State Controller to draw his warrant in favor of each county for its proportion of the Motor Vehicle Fuel Fund, and that all said amounts should be placed in a special road improvement fund by the respective counties, and expended exclusively in the construction and maintenance of roads, bridges and culverts in such county, and the court said, at page 134 of 88 Cal.App., at page 350 of 263 P.:

"* * * there is no statutory law expressly or by implication vesting authority in the controller to suspend operation of a mandatory legislative act and thus deprive a county of certain moneys to which it is admittedly entitled, and which are designed to be used for a specified purpose, pending the settlement of a disputed indebtedness between the state and the county, arising under a statute entirely foreign to the par-

ticular one involved; and, manifestly, in the absence of such statutory authority he may not do so."

The court further held that it was not possessed of trial court powers, and was therefore without jurisdiction, equitable or otherwise, to hear or determine the merits of the disputed indebtedness set forth in the special defense. The court then went on to say, at page 137 of 88 Cal.App., at page 351 of 263 P.:

"Finally, it would appear that the two exclusive remedies provided for by section 2193 of the Political Code for the enforcement of the payment of state claims against counties for the maintenance of feebleminded persons committed to the Sonoma State Home must be exercised by the state commission in lunacy and that neither are available to the state controller. Said section declares that: '* * * the state commission in lunacy may require the county treasurer by writ of mandate to pay to the state treasurer upon an order of the controller all amounts found to be due the state, * * *' or that 'said commission may, in its discretion, recover sums due from counties * * * by the presentation of claims against the board of supervisors. * * *' In view of the foregoing provisions, it would seem that in any event the subject-matter of state claims arising under said section may not be resorted to by the controller as a legal excuse for the refusal to perform the statutory duty imposed upon him by said act."

Petitioner contends that this last quoted language of the District Court of Appeal is conclusive authority that the State Controller had no right to bring the action against him, and that the Department of Institutions had the exclusive right to bring the action. We are unable to agree with this contention. As already pointed out, we believe that section 433 of the Political Code would give the State Controller the right to bring the action, even though section 6658 of the Welfare and Institutions Code authorized the Department of Institutions to bring the action for the same liability. Furthermore, the language quoted was not necessary to the decision in the case, and if, by using the word "exclusive," the court intended to hold that the Controller could under no circumstances commence an action necessary to recover the moneys due from the state for the care of the feebleminded, then we must conclude that the court overlooked the plain provisions of section 433 of the Political Code, as the opinion makes no mention of said action. We have examined the briefs in said case, and find that section 433 of the Political Code was not called to the attention of the court by counsel for petitioner therein, as they based their argument entirely upon the two grounds hereinbefore mentioned.

This being a petition for a writ of review, in view of our conclusion that the State Controller had the authority to bring the action, and inasmuch as section 433, supra, gives the courts of Sacramento County jurisdiction of such actions, it is unnecessary to discuss some of the other contentions advanced by petitioner.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



HALLETT v. SLAUGHTER et al.*

Civ. 13742.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1942.

Hearing Granted Dec. 22, 1942.

1. Judgment ⇐380

A party who acquiesces in rendition of judgment and acknowledges its binding force "waives" right to have the judgment set aside on ground that it was entered because of fraud or mistake.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Judgment ⇐147

Where plaintiff after learning that default judgment had been entered against her recognized it as valid by stipulating that portions of her salary on which levy had been made should be paid in partial satisfaction of judgment, and in one instance plaintiff received greater portion of her salary on which levy had been made than she would have been entitled to under the law, plaintiff recognized validity of judgment, and "waived" right to have it set aside. Code Civ.Proc. § 710.

* Subsequent opinion 140 P.2d 3.

Appeal from Superior Court, Los Angeles County; Meyer B. Marion, Judge pro tem.

Action by Gladys Meyer Hallett against J. A. Slaughter and others to vacate a default judgment entered against the plaintiff in the Municipal Court of Los Angeles. From a decree for the plaintiff, the defendants appeal.

Reversed.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for appellants.

David I. Lippert, of Los Angeles, for respondent.

McCOMB, Justice.

From a decree in favor of plaintiff after trial befort the court without a jury in an equitable action to vacate a default judgment entered against plaintiff in the Municipal Court of Los Angeles, defendants appeal.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

April 17, 1940, defendants Slaughter and Trigg filed an action in the Municipal Court of the City of Los Angeles against plaintiff and her son, Eugene R. Hallett. May 21, 1940, Eugene R. Hallett filed an answer, on his own behalf solely, to the action. Thereafter on December 27, 1940, the action was dismissed as to him by plaintiffs therein. May 23, 1940, plaintiff in the present action was personally served with a copy of the summons and complaint filed in the municipal court action. These documents she took to her attorney, Paul W. Forker, who prepared an answer on her behalf, which plaintiff verified. The original answer, a copy thereof, and a one dollar filing fee were handed to the attorney's secretary with the request that she mail the original to the clerk of the municipal court and a copy to Mr. Gall, attorney for plaintiffs in that action. The original answer was never filed and Mr. Gall did not receive a copy thereof. Subsequently plaintiff asked her attorney what was happening in the case and if everything was all right, and she was assured by him that everything was all right.

December 27, 1940, plaintiffs in the municipal court action caused a default judgment to be entered against plaintiff herein in the sum of $1,157.25. Thereafter an abstract of the judgment was filed with the county auditor of Los Angeles County pursuant to the provisions of section 710 of the Code of Civil Procedure, thereby levying upon the earnings of plaintiff, who was a school teacher, and the county auditor returned to the municipal court $281.12 as due plaintiff herein. On or about January 10, 1941, plaintiff received from the county auditor a notice advising her of the levy on her salary. This was the first time she knew that a judgment had been entered against her. On the same day plaintiff signed and filed in the municipal court an affidavit claiming that the money held under levy was exempt.

January 17, 1941, plaintiff signed a stipulation on behalf of herself, with Attorney Gall representing defendants Slaughter and Trigg, whereby it was agreed that plaintiff should receive $140.56 of the $281.12, upon which the levy had been made, and that $140.55 should be paid to defendants Slaughter and Trigg in partial payment of their judgment. In February, 1941, pursuant to section 710 of the Code of Civil Procedure, another levy was made upon the salary due plaintiff, amounting to the sum of $281.11. On February 18, 1941, plaintiff signed another stipulation with Attorney Gall, whereby it was agreed that plaintiff receive $231.11 of the money under levy and that defendants Slaughter and Trigg receive $50 of said sum, to be applied on account of the judgment they held against plaintiff. Both of the foregoing stipulations were carried into effect without any objection being made by plaintiff to the judgment which had been entered against her.

Defendants rely for reversal of the judgment in the present case, among other propositions, upon the following one:

Plaintiff by her conduct has waived the right to have the judgment entered against her vacated.

[1] This proposition is tenable. The law is established that where a party acquiesces in the rendition of a judgment and acknowledges its binding force, such party thereby waives the right to have the judgment set aside upon the ground that it was entered because of fraud or mistake (34 Cor.Jur.(1924) 362, § 576; Spaulding & Co. v. Chapin, 37 Cal.App. 573, 578, 174 P. 334; Williams v. State, 151 Okl. 223, 3 P.2d 443, 445; Rawleigh Med. Co. v. McKinney Mo.App., 180 S.W. 440, 442).

[2] Applying the foregoing rule to the facts of the present case, it is evident that plaintiff, after learning of the judgment that had been entered against her, recog-

nized the same as a valid and subsisting judgment, by stipulating that portions of her salary upon which levy had been made be paid in partial satisfaction of the judgment entered in the municipal court. She also, in recognizing the validity of the judgment, in one instance received a greater portion of her salary upon which levy had been made than under the law she would have been entitled to.

For the foregoing reasons the decree is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 48

PARKER et al. v. SHELL OIL CO.

Civ. 11974.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1942.

1. Discovery ⇐81

Statute authorizing court to order either party to give other an inspection and copy of entries of accounts or any document or paper in his possession containing evidence relative to merits of action was intended to provide a remedy in nature of a "bill of discovery" is remedial in nature, and should be liberally construed. Code Civ.Proc. § 1000.

See Words and Phrases, Permanent Edition, for all other definitions of "Bill of Discovery".

2. Courts ⇐481
Discovery ⇐99

Under statute relating to inspection and copy of entries of accounts or documents in possession of opposite party when, in response to order, required documents were produced, motion judge had no authority to pass on admissibility or sufficiency of such documents and trial judge was not bound by order of motion judge excluding such documents from evidence. Code Civ.Proc. § 1000.

3. Motions ⇐46

Where a statute authorizes a prescribed procedure and court acts contrary to authority conferred, it has exceeded its jurisdiction and an order so made is void.

4. Courts ⇐481

Where motion judge, in excess of his jurisdiction, in proceedings for inspection of documents relied upon by plaintiff to establish open, mutual, and current accounts which documents had been produced on order, ordered exclusion of such documents from evidence by reason of their insufficiency, refusal of trial judge to disregard such order was error. Code Civ. Proc. § 1000.

5. Appeal and error ⇐684(1)

On appeal by plaintiff from judgment entered after trial judge refused to disregard order of motion judge excluding from evidence certain documents relied on by plaintiff to establish open, mutual, and current account, where transcript certified to by trial judge contained order of motion judge and all circumstances under which it had been secured were discussed before trial judge, the record was sufficient to permit appellate court to pass upon propriety of order of motion judge. Code Civ. Proc. § 1000.

6. Appeal and error ⇐659(3)

Where both trial judge and motion judge refused to certify record of motions and affidavits upon which exclusion order was predicated, such motions and affidavits were "documents in custody of clerk of trial court" and were "before trial court" and not included in record on appeal that would assist in a determination of appeal on its merits, within meaning of statute providing for diminution of the record, and, after motion for diminution, were properly before appellate court on certificate of the clerk. Code Civ.Proc. §§ 953, 1000.

See Words and Phrases, Permanent Edition, for all other definitions of "Documents Before Trial Court" and "Documents in Custody of Clerk of Trial Court".

7. Appeal and error ⇐659(3)

Where trial court refused to certify documents which were properly a part of record on appeal, appellants could, but were not required to, secure such certification by

writ of mandate and properly had such documents included in record on motion for diminution of the record. Code Civ.Proc. § 953.

8. Appeal and error ⇐659(1)

The purpose of statute relating to diminution of record is to permit appellate court to secure copies of documents in custody of clerk of trial court without necessity of a mandamus proceeding. Code Civ.Proc. § 953.

9. Limitation of actions ⇐178

Where a claim on express contract is barred by statute of limitations, plaintiff may not evade statute by pleading that claim as an open account. Code Civ.Proc. § 337, subd. 2.

10. Limitation of actions ⇐178

Where complaint alleged cause of action for rent due under a lease and second cause of action upon an open, mutual, current account, the first of which causes of action was barred by statute of limitations, the identity of the amounts sued for was not alone sufficient to indicate that the two causes of action were identical so as to bar second cause of action on same grounds. Code Civ.Proc. § 337, subd. 2.

11. Appeal and error ⇐690(4)

Generally, errors in exclusion of documentary evidence will not be considered unless the offered documents or some statement concerning them appears in record.

12. Appeal and error ⇐882(8)

Where respondent had moved to exclude documentary evidence of an account and secured a void order for such exclusion from motion judge and successfully argued that order was binding on trial judge and secured ruling that no evidence on such account could be introduced, respondents could not complain on appeal that appellants should have seen to it that documents constituting alleged account appear in record.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Ben Parker and others against Shell Oil Company to recover rent alleged to be due under a lease and a balance due upon an open, mutual, and current account. Defendant counterclaimed. From an adverse judgment, plaintiffs appeal.

Reversed.

Joseph W. Bernal and Edward E. Craig, both of Berkeley, for appellants.

McCutchen, Olney, Mannon & Greene and Henry V. Colby, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs brought this action to recover certain sums of money alleged to be due from defendant. The second amended complaint alleges in the first cause of action, that on January 15, 1932, the parties entered into a lease whereby plaintiffs leased to defendant certain designated real property on which a gasoline station had been erected; that the lease was for a definite term of three years, and thereafter, from year to year until terminated by notice; that under the terms of the lease defendant agreed to pay the plaintiffs as rent one cent a gallon for each gallon of gasoline delivered by defendant to plaintiffs under the terms of said lease; that from January 15, 1932, to August 1, 1936, there was delivered by defendant to plaintiff 490,195 gallons of gasoline under the lease; that as a result there became due as rent the sum of $4,901.96 of which but $1,642.93 has been paid; that by the terms of the lease the rent was payable in cash or by credit upon delivery of the gasoline to plaintiffs or on the 20th day of the calendar month next following; that there is now due and owing to plaintiffs as rent the sum of $3,259.02.

As a second "separate and distinct" cause of action plaintiffs alleged that within four years last past defendant became indebted to plaintiffs upon a balance due upon an open mutual and current account in the sum of $3,259.02. The original complaint was filed on June 7, 1940.

After its demurrer had been overruled, defendant, by its answer, admitted entering into the lease on January 15, 1932, and a copy of the lease is pleaded as an exhibit. It then alleged that contemporaneously with the execution of the lease the parties entered into a lease and consignment contract (which is also pleaded as an exhibit) whereby defendant sublet the leased premises to plaintiffs and appointed plaintiffs its agent to sell gasoline delivered to them by defendant; that by the lease and consignment agreement it was provided that, for each gallon of gasoline delivered, defendant would pay plaintiffs a commission, which, after adding thereto the rental provided by any other agreement, should equal the combined commission or rental

generally allowed by defendant to other dealers in the general area similarly situated, and provided, further, that such combined commission and rental should be as high as that generally allowed by the majority of the five major marketing companies to agents similarly situated. The answer further alleged that on February 20, 1932, the parties entered into a separate agreement (which is also pleaded as an exhibit) in reference to third structure gasoline. It is admitted that 490,195 gallons of gasoline were delivered to plaintiffs between January 15, 1932, and July 24, 1936, but it is alleged that for each gallon delivered, defendant paid plaintiffs the commission called for by the lease and consignment agreement; that the lease, and lease and consignment agreement were terminated by mutual consent on July 25, 1936.

Defendant, as to both causes of action, also pleaded the pertinent provisions of the statute of limitations, set up some affirmative defenses, and, by way of counterclaim, alleged an account stated as of August 26, 1936, showing a balance of $1,311.16 owing by plaintiffs to defendant.

Prior to trial, defendant, as permitted by section 1000 of the Code of Civil Procedure, moved the trial court for an order directing the plaintiffs to give defendant the right to inspect and copy all the entries comprising the open, mutual and current account pleaded. That order, in due course, was granted by the lower court. Thereafter, defendant, purporting to act under section 1000 of the Code of Civil Procedure, moved for an order excluding evidence of the entries of the account on the ground that plaintiffs had refused to comply with the order of the court for an inspection. By the affidavit accompanying the motion, the attorney for defendant avers that plaintiffs, pursuant to the order of inspection, produced certain papers consisting of copies of delivery invoices, the originals of cash receipts and the originals of numerous monthly statements; that counsel for plaintiffs informed counsel for defendant that these documents were the documents relied upon to show the open, mutual and current account. It is then averred that these documents do not constitute an open, mutual and current account. Attorney for plaintiffs filed a counter-affidavit in which he alleged that the documents exhibited to counsel for defendant showed debits and credits between plaintiffs and defendant. After hearing the motion, the lower court granted the same by an order providing that the "entries of said alleged open mutual and current account be and they hereby are excluded from being given in evidence at the trial of said action in support of said second cause of action."

Thereafter, the cause proceeded to trial before a jury before another department of the court presided over by another judge. In a pre-trial hearing outside the presence of the jury, it became obvious that the first cause of action, predicated on the written lease, except for a period of three months, was barred by the statute of limitations. (§ 337, subd. 1, Code Civ.Proc.) At the trial there was admitted in evidence invoices for deliveries made in May, June and July, 1936, but as to any evidence of deliveries prior to that time the court sustained objections based on the statute of limitations. So far as the first cause of action is concerned, there is no doubt that such rulings were correct, and appellants make no objection thereto. The respondent abandoned its counterclaim, and stipulated that judgment could be entered against it for the three-month period.

As to the second cause of action, the trial judge refused to admit any evidence at all, on the ground that the prior order of the judge hearing the motion was binding upon him. The plaintiffs were thus precluded from offering any evidence on their second cause of action. As a result of these rulings, judgment was entered in favor of plaintiffs in the amount of $168.35, representing the three months' deliveries not barred by the statute of limitations. Plaintiffs appeal.

Appellants' major contention on this appeal is that the order of the motion judge under section 1000 of the Code of Civil Procedure was void, and therefore not binding on the trial judge. Appellants urge that they were entitled to have the trial court pass upon the legal sufficiency of the various documents which they contend constituted their open, mutual and current account. With this contention we agree.

[1-4] Section 1000 of the Code of Civil Procedure was intended to provide a remedy in the nature of a bill of discovery. Levy v. Superior Court, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811. The section reads as follows: "Any court in which an action is pending, or a judge or justice thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book,

or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness." The section is remedial in nature and should be liberally construed to accomplish its purposes. Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259; Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178. But a liberal construction cannot supply a remedy or impose a penalty not expressly or impliedly contained in the statute. It will be noted that if a party improperly refuses to present the requested documents for inspection, the statute provides for three sanctions: (1) The documents not produced may be excluded from evidence; (2) a presumption is created that the documents are as alleged by the party seeking inspection; and (3) the person so refusing is punishable in a contempt proceeding. There is nothing in the statute to indicate that the Legislature ever intended that the court, in such a proceeding, should pass on the relevancy or the sufficiency of the documents to prove the allegations of the party relying on them. In fact, the nature of the sanctions provided in the statute demonstrates to a certainty that no such power was intended to be conferred. Although we have no doubt, in a proper case, that the trial court could order that no documents described in the affidavit in support of the order except those produced could be introduced in evidence at the trial, we are clearly convinced that when, in response to the order of inspection, the requested documents are produced, the trial court has no power to pass on the admissibility or sufficiency of such documents in such proceeding. That is exactly what the motion judge here purported to do. The appellants produced the documents upon which they rely to show their alleged open, mutual and current account. The motion judge, on motion of respondent, then made an order purporting to exclude those documents from evidence. Presumably, that order was made because the motion judge believed that such documents, as a matter of law, did not constitute an account of the type alleged. Regardless of the correctness of that conclusion, the motion judge was without power, in such a proceeding, to pass on the legal sufficiency of the produced documents. Where a statute authorizes a prescribed procedure, and the court acts contrary to the authority conferred, it has exceeded its jurisdiction, and the order so made is void. Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. Inasmuch as the order of the motion judge was void, the trial judge was not bound by it. When the trial judge refused to permit plaintiffs to offer evidence on their second cause of action, he did so on the ground that he was bound by the order of the motion judge. This ruling was erroneous. That it was prejudicial is obvious. The documents were not excluded because of any inherent defect, or because they were not relevant or competent. They were obviously admissible. Whether they were legally sufficient to prove the allegations of the complaint for which they were offered is another question, which we are not here called upon to discuss. The point is, that appellants were entitled to offer such documents in evidence, and have the trial court pass upon their sufficiency. By reason of the void order of the motion judge, upon which the trial judge erroneously relied, appellants were deprived of the opportunity of trying to prove their alleged cause of action. For this prejudicial error the cause must be reversed.

Respondent strenuously objects to any consideration being given to any of the affidavits supporting the motions made under section 1000 of the Code of Civil Procedure, urging that such documents are not properly before us. The transcript, as originally filed, included the order of the motion judge excluding the documents from evidence. By motion for diminution, appellants sought to add to the record the notice of motion for order of inspection, the respondent's jurisdictional and supporting affidavit, the affidavit of service, the order for inspection, the notice of motion for order excluding evidence, respondent's supporting and appellants' opposing affidavits. Over the opposition of respondent, the motion was granted, the documents being ordered filed upon certification by the clerk:

under section 953 of the Code of Civil Procedure, the order expressly reciting that it left open the question as to the sufficiency of the certification of such documents. Thereafter, respondent moved to dismiss the appeal on the ground there was no proper record upon which this court could pass upon the propriety of the order of the motion judge. The motion was denied.

[5-8] Aside from the supplemental clerk's transcript, enough appears in the transcript certified to by the trial judge to determine just what took place before the motion judge. The order of the motion judge appears in the record, and all the circumstances under which it had been secured were fully discussed before the trial judge. In the second place, section 953 of the Code of Civil Procedure provides: "* * * If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal." The documents here involved were "in the custody of the clerk of the trial court" and they were documents that were "before the trial court" but were "not included in the record on appeal," and an examination of such documents obviously would "assist in a determination of the appeal on its merits." The reason why those documents did not appear in the original transcript was, according to the moving papers filed on the motion for diminution, that the trial judge refused to certify them on the ground they involved matters not heard before him, and the motion judge refused to certify them on the ground that he had lost jurisdiction to certify them when the record was filed with the appellate court. Of course, appellants could have proceeded to secure such certification by writ of mandate, but they were not required to pursue that remedy, which, under the circumstances, would have been cumbersome and would have appreciably delayed the appeal. On the hearing of the motion for diminution, counsel for respondent were asked to designate any other documents they desired in order to complete the record. They designated none. Under such circumstances, section 953 of the Code of Civil Procedure confers ample power on the appellate court to secure such documents upon the clerk's certifications. The very purpose of the section was to permit the appellate court to secure copies of documents in the custody of the clerk without the necessity of a mandamus proceeding.

[9-12] The major contention of respondent is, that, even if the order of the motion judge was void, no prejudice to appellants occurred because the offered documents, as a matter of law, would not constitute an open, mutual, and current account. This contention is predicated on the argument that the account pleaded in the second count is based on the lease pleaded in the first, and that the law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of pleading that claim as an open account. That is undoubtedly the law. Tillson v. Peters, 41 Cal.App.2d 671, 107 P.2d 434; Cleaveland v. Inter-City Parcel Service, 22 Cal. App.2d 574, 72 P.2d 179; Lee v. De Forest, 22 Cal.App.2d 351, 71 P.2d 285; Stewart v. Claudius, 19 Cal.App.2d 349, 65 P.2d 933; People v. California S. Deposit, etc., Co., 41 Cal.App. 727, 183 P. 289. If the proffered evidence should show that appellants' second cause of action is for the rent due under the lease pleaded in the first, these cases would be authority for the proposition that no open account, as required by section 337, subdivision 2, of the Code of Civil Procedure, existed. But the record does not show that. Certainly, there is nothing in the second amended complaint to indicate that the two causes of action are identical, except the identity of the amounts sued for, and that, alone, is not sufficient. The defendant itself pleaded two other agreements between the parties. From the evidence that was introduced, it is apparent that respondent was selling products to appellants, some covered by the lease, some by the lease and consignment agreement, some covered by the agreement as to third structure gasoline, and some by oral arrangements. Some of the provisions contained in these agreements are ambiguous. It also appears that monthly debits and credits existed between the parties. The excluded documents might, under such circumstances, show an open account. We now have no way of knowing what those documents will show. While, normally, errors in the exclusion of documentary evidence will not be considered unless the offered documents or some statement con-

cerning them appear in the record (2 Cal. Jur., p. 696, § 400), that rule does not apply to this case. In this case, appellants were prohibited from offering evidence on the trial by reason of a void order secured by respondent prior to trial. Respondent is responsible for the present status of this appeal. It made the motion to exclude evidence of the account and secured the void order. Then it successfully argued that that order was binding on the trial court, and secured a ruling that no evidence on the second count could be introduced. Under such circumstances, it should not now be permitted to contend that appellants should have seen to it that the documents constituting the alleged account appear in the record. Appellants were entitled to a trial of the issues presented by the second count. By the action of the trial court, on argument of respondent, they were deprived of such trial. Such error is prejudicial as a matter of law.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.



55 Cal.App.2d 31

BELT et al. v. CITY OF LOS ANGELES.

Civ. 13749.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1942.

Hearing Denied Dec. 7, 1942.

1. Pleading ⇐8(17)

In action against city for death of 11-year old boy, resulting when boy fell from groin maintained by defendant across a beach and was drowned, complaint which merely stated conclusion that groin was an "attractive nuisance", without alleging facts in support of such conclusion, was insufficient, especially where it did not appear that deceased was unable to observe and realize the danger existing from the groin, or that such danger was concealed.

See Words and Phrases, Permanent Edition, for all other definitions of 'Attractive Nuisance".

2. Municipal corporations ⇐857

Complaint which failed to allege that groin from which 11-year old boy fell and was drowned was erected for recreational purposes, or was defective so as to require the posting of warnings, or the placing of guards, and which did not reveal how groin should have been constructed in order to prevent the accident without destroying its usefulness, was insufficient to sustain a cause of action under the Public Liability Act for an injury resulting from the dangerous and defective condition of public property, where it did not appear that deceased was unable to realize the danger, or that such danger was concealed. St.1923, p. 675.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by W. T. Belt and another against the City of Los Angeles, a municipal corporation, for the wrongful death of plaintiff's son, who was drowned in the Pacific Ocean. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar, Deputy City Atty., all of Los Angeles, for respondent.

YORK, Presiding Justice.

By the instant action plaintiffs seek to recover damages from defendant city for the alleged wrongful death of their minor son, who was drowned in the Pacific Ocean, when he fell off a groin which was "owned, controlled, managed and maintained" by said city "across a public beach which extended into the Pacific Ocean just north and west of the City of El Segundo." On the right side of said groin sand had accumulated and formed a beach which was flush with the top of said groin, on the same level therewith and extending approximately 100 yards toward the water. On the left side of the groin no beach was formed from the extension to the sea, but it formed a wall at right angles to said beach, said wall being approximately six feet above the swirling waters of the ocean. It was alleged in the complaint that on February 1, 1941, and for many years prior thereto, members of the public, together with their families, were accustomed to

visit said public beach, in the locality where this groin was maintained by defendant city, for the purpose of amusement and recreation; that the top of the groin was not protected in any way, no warnings were given or posted and no guards or protection of any nature were furnished.

A demurrer was sustained with permission to amend the complaint which was in one count framed on the theory of attractive nuisance. Thereafter plaintiffs filed their first amended complaint setting out two causes of action for the wrongful death, the first of which was based upon the theory of attractive nuisance, and the second upon the theory of the dangerous and defective condition of public property under the provisions of Public Liability Act of 1923, Stats. 1923, page 675, Deering's Gen.Laws, Act 5619.

Defendant demurred generally and specially to the amended complaint and contended that a groin could never constitute an attractive nuisance, and that no cause of action had been shown under the Public Liability Act, supra. Said demurrer was sustained without leave to amend and judgment dismissing the action was subsequently entered. This appeal is prosecuted from such judgment on the grounds that the court erred in holding as a matter of law (1) that a groin does not constitute an attractive nuisance, and (2) that no cause of action was stated under the Public Liability Act of 1923.

[1, 2] It is not contended that the groin was erected for recreational purposes; apparently, it was constructed and maintained solely to prevent the shifting of sand and the sloughing of the beach. It is not alleged that the groin was defective in any way, and whatever danger existed was perfectly obvious, even to a child of tender years. The conclusion contained in the complaint that the groin was an attractive nuisance is not borne out by the other allegations of said complaint. If plaintiffs had requested leave to amend their first amended complaint and had presented their proposed amended pleading in an attempt to cure at least the defects as to uncertainty, and such leave had been denied by the trial court, a different question would be presented to this court.

Under the facts and circumstances alleged in the first amended complaint, it does not appear that the groin constituted an attractive nuisance. Neither does it appear that the groin was maintained in a defective condition; therefore, no reason is shown for the necessity either of posting warnings or for placing guards around the groin.

The first amended complaint does not reveal how the groin could have been constructed or maintained, in order to prevent the occurrence of an accident such as is here under consideration, without destroying the usefulness of the groin itself.

The child, who was drowned, was eleven years of age, and it is alleged that he was well and strong, active, and a good student, so that we are not dealing with a person unable to observe and realize the existing danger. There is nothing alleged in the amended complaint to show that the existing danger was in any way concealed. In fact, the contrary is alleged.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.



55 Cal.App.2d 130

PEOPLE v. CORICA.

Cr. 548.

District Court of Appeal, Fourth District, California.

Oct. 26, 1942.

Rehearing Denied Nov. 6, 1942.

Hearing Denied Nov. 24, 1942.

1. Contracts ⇐102

A contract, legal in itself, is not unenforceable merely because one of parties knows of other party's intended purpose to violate law or public policy by means of contract or subject-matter thereof.

2. Contracts ⇐102

Where there is no moral turpitude in making or performing contract, mere fact that it incidentally assists party to evade law or public policy does not bar its enforcement, and if it is performed by promisee, promisor's knowledge that agreement or its performance may aid promisee to violate law or defy public policy is no defense when promisor neither combines nor

conspires with promisee to accomplish such result, nor shares in benefits of such violation.

3. Gaming ⇐79(1)

Generally, the furnishing of racing news to bookmakers is not of itself a "crime", in absence of combination or conspiracy to commit crime.

See Words and Phrases, Permanent Edition, for all other definitions of "Crime".

4. Conspiracy ⇐27

A conspiracy is punishable only when an overt act is committed within the state. Pen.Code, § 184.

5. Conspiracy ⇐24

An agreement or combination is gist of "criminal conspiracy", though statute requires performance of overt act to complete crime. Pen.Code, § 184.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Conspiracy ".

6. Conspiracy ⇐40

A conspirator need not perform an act, which is in itself unlawful, in carrying out "criminal conspiracy", to render him guilty thereof. Pen.Code, §§ 182, 184.

7. Conspiracy ⇐27

A criminal conspiracy to commit crime of pool-selling and bookmaking became complete when conspirators agreed to commit such unlawful acts, though they could not be punished, unless one or more of them committed an overt act within the state. Pen.Code, §§ 182, 184, 337a, subds. 1, 2, 6.

8. Conspiracy ⇐41

The purpose of criminal conspiracy need not be fully accomplished, nor overt act performed by each conspirator, in order to constitute such crime, but it is sufficient if one conspirator commits overt act in carrying out purpose of conspiracy, thus making all conspirators liable to punishment. Pen.Code, §§ 182, 184.

9. Conspiracy ⇐43(6)

An indictment for conspiracy to commit pool-selling and bookmaking need not allege particular part which each conspirator was to play in carrying out conspiracy. Pen.Code, §§ 182, 184, 337a, subds. 1, 2, 6.

10. Indictment and Information ⇐60

An indictment need not set forth particular circumstances of offense charged, but need only notify accused of such offense, as details thereof are furnished him by transcript of testimony on which indictment is founded. Pen.Code, §§ 870, 925, 951, 952.

11. Indictment and Information ⇐81(1)

An indictment charging that named defendant and "certain other persons" feloniously conspired to engage in pool-selling and bookmaking and agreed that "certain of said conspirators" would supply horse race results and information to persons maintaining pool-selling and bookmaking establishments was not demurrable for uncertainties in failing to name or identify defendants engaged in pool-selling and bookmaking and those furnishing racing news. Pen.Code, §§ 182, 184, 337a, subds. 1, 2, 6.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Anthony Corica was indicted with others for conspiracy to commit pool-selling and bookmaking in violation of statute, and from a judgment on an order sustaining a demurrer to the indictment, the People appeal.

Reversed with instructions.

Earl Warren, Atty. Gen., and Herbert E. Wenig, Deputy Atty. Gen., for appellant.

Calvin H. Conron, Jr., of Bakersfield, and Charles H. Carr, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal by the People from a judgment entered after an order sustaining a demurrer to an indictment charging Corica and twenty-four others with conspiracy to violate section 337a of the Penal Code.

The charging part of the indictment as it affects Corica, is as follows:

"Anthony Corica, also known as Tony Corica, (and others), are accused by the Grand Jury of the County of Kern, State of California, by this indictment, found this 29th day of January, 1941, of the crime of Felony, to-wit: Conspiracy to commit pool-selling and bookmaking, in violation of Sections 182 and 337a of the Penal Code of the State of California, committed as follows:

"That commencing on or about the first day of April, 1940, and continuing to and including the sixth day of December, 1940, said Anthony Corica, also known as Tony Corica, (and others) and certain other persons whose names are unknown to this Grand Jury, in violation of subdivision 1 of Section 182 of the Penal Code of the State of California, did willfully, unlawfully and feloniously conspire, combine and agree together and with each other that certain of their number would engage and they did engage at certain premises in the City of Bakersfield, County of Kern, State of California, including premises in said City, County and State located at: (Descriptions) in pool-selling and bookmaking and in laying, making, offering and accepting bets and wagers upon the results and purported results of horse races and would keep and occupy during all of said period of time said premises and each of them with books, papers, apparatus, devices and paraphernalia for the purpose of recording and registering bets and wagers and purported bets and wagers, and of selling pools and purported pools upon the results and purported results of horse races, in violation of subdivisions I, II and VI of Section 337a of the Penal Code of the State of California, and that certain of said conspirators would supply to each of the pool-selling and bookmaking establishments located on said premises, and to the persons maintaining the same and there engaging in pool-selling and bookmaking, race results and other horse racing news and information from the various race tracks throughout the United States for use in said unlawful betting and wagering transactions and pool-selling and bookmaking." Fourteen specific overt acts are charged.

The principal attack on the indictment is made on the ground that it charges that in carrying out the conspiracy certain of the defendants, without naming or identifying any of them, would engage in pool-selling and bookmaking and that certain of the defendants, without naming or identifying any of them, would furnish racing news information for use in the unlawful enterprise.

It is argued that the mere act of furnishing racing news and information is not a crime in California and that since Corica is not named as one of the conspirators who agreed to operate or participate in the operation of bookmaking establishments, we must, under the presumption of his innocence, presume that he was only to furnish racing news and that no crime was charged against him. (See 14 Cal.Jur. 48.) The California cases of People v. Brophy, 49 Cal.App.2d 15, 120 P.2d 946; Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470, and Ex parte Moore, 18 Cal.2d 889, 118 P.2d 478, are relied on to support this argument.

People v. Brophy, supra, was a case in which the appellant was convicted of perjury alleged to have been committed in a civil action which had as its purpose enjoining the removal of telephones installed under contract. Kreling v. Superior Court, supra, and Ex parte Moore, supra, were cases in which the two men had been convicted of contempt of court in violating the terms of an injunction issued by the superior court in People v. Annenberg which was an action to enjoin dissemination of racing news. In none of these cases was the question of conspiracy involved. The precise question before us here was not decided.

[1, 2] We do not question the rule announced in People v. Brophy, supra, at pages 30, 31 of 49 Cal.App.2d, at page 954 of 120 P.2d, upon which Corica relies here. It is there stated:

"The law is clear and decisive on the question of the enforceability of a contract even though one of the parties thereto has knowledge of an intended purpose of the other party, by means of the contract, or the performance thereof, to violate some law or public policy of the state. The rule in that regard is thus stated in 53 A.L.R. 1364, at page 1366:

" 'The rule, according to the great weight of authority, is to the effect that a contract legal in itself is not rendered unenforceable by the mere fact that one of the parties thereto has knowledge of an intended purpose of the other party thereto, by means of the contract or subject-matter thereof, to violate some law or public policy of some state; or, as is stated in 6 R.C.L. p. 696, "where there is no moral turpitude in the making or in the performing of the contract, the mere fact that an agreement the consideration and performance of which are lawful incidentally assists one in evading a law or public policy, is no bar to its enforcement, and that, if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the

promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation.'"

[3] For the purposes of this case we may concede that as a general rule it is the law of this state that the furnishing of racing news to bookmakers is not of itself a crime where no question of a combination or a conspiracy to commit a crime is involved. This concession does not settle the problem presented.

[4] Where two or more persons conspire to commit a crime there is a conspiracy. § 182, Pen.Code. A conspiracy is punishable only when there is an overt act committed within this state. § 184, Pen. Code.

[5] In People v. George, 74 Cal.App. 440, at page 457, 241 P. 97, at page 104, the court said: "It is evident that under the terms of section 184 of the Penal Code the agreement or combination is the gist of a criminal conspiracy. The negative mandate of the section, if we may employ a contradiction of terms, that 'no agreement amounts to a conspiracy' unless an overt act be performed in furtherance of it, must surely, when an overt act is performed, resolve itself into the affirmative that the agreement thereupon amounts to a conspiracy. This view is in accord with the law in the jurisdictions generally in which the performance of an overt act is necessary to fasten criminality upon those who conspire to consummate a forbidden purpose. At common law the combination was the gist of the conspiracy. Under the authorities the situation is not changed by statutes requiring the performance of an overt act in order to complete the crime. The agreement is still the gist of the offense."

[6] To render him guilty it is not necessary that a conspirator perform some act which is in itself unlawful in carrying out the criminal conspiracy. If there is a conspiracy to commit murder by means of poison sent through the mail, a conspirator may not escape responsibility because he only agreed to and did purchase the postage stamps with which the poison is sent to the victim, an act entirely lawful in itself, but punishable if done under an agreement among the conspirators and in carrying out the unlawful purpose of the conspiracy.

[7, 8] Here we have it alleged that the conspirators conspired together to commit the crime denounced by section 337a of the Penal Code. The conspiracy then became complete because the agreement to commit the unlawful act was the gist of the crime. This is true even though it is also true that the conspirators cannot be punished unless one or more of them commit an overt act within the state. It is not necessary that the purpose of the conspiracy be fully accomplished (People v. George, supra) nor that each conspirator perform some overt act. It is sufficient if one conspirator commit an overt act in carrying out the purpose of the conspiracy thus making all conspirators liable to punishment.

[9, 10] Under our simplified forms of criminal pleading it was unnecessary to allege just what particular part each conspirator was to play in carrying out the conspiracy. As was said in People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506, 508:

"Under our system of procedure in criminal cases, as a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be. Secs. 870, 925, Pen.Code. The former requirement that a pleading must set forth the particular circumstances of the offense charged, as now amended declares that it shall be sufficient if it charges 'in any words sufficient to give the accused notice of the offense of which he is accused'. Sec. 952, Pen.Code. The appellant herein was entitled simply to notice of the offense of which he was charged, but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment was founded. People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970; People v. Gilbert, supra [26 Cal.App.2d 1, 78 P. 2d 770]; Sec. 951, Pen.Code."

[11] This also disposes of the argument that the demurrer was properly sustained because of uncertainties in the indictment.

The judgment is reversed with instructions to the trial court to overrule the demurrer and to permit Corica to plead to the indictment.

BARNARD, P. J., and GRIFFIN, J., concurred.

55 Cal.App.2d 163

PEOPLE v. LEE.

Cr. 3593.

District Court of Appeal, Second District, Division 3, California.

Oct. 27, 1942.

1. Incest ⇐15

In prosecution for incest upon 13-year old daughter, no corroboration of daughter was required.

2. Incest ⇐14

In prosecution for incest upon 13-year old daughter, the testimony of daughter was not so inherently improbable that it was required to be disregarded where daughter testified to the act and opportunity for committing it existed notwithstanding that presence of others both actual and potential made time appear very inopportune for commission, animus of daughter against father and contradictions in her testimony.

3. Criminal law ⇐407(1)

It is improper to disclose to jury the fact that accusations were made against the defendant prior to the filing of information against him unless the conduct of the defendant in the face of the accusations constitutes an admission of guilt by express assent, by his silence or by acts or by conduct on his part which could be fairly construed as assent.

4. Criminal law ⇐407(2)

Where the only conduct of the defendant in the face of accusations preceding filing of information is to deny them, the district attorney should not offer evidence knowing that defendant had not remained silent under the accusation but had repelled it at the time it was made.

5. Criminal law ⇐407(2)

Even if the defendant had stood mute when accused by his daughter of incest, it would not correct error committed in receiving over timely and proper objection, the account of the accusations made previous to the occasion when the daughter was present.

6. Criminal law ⇐1169(12)

In prosecution for incest admission in evidence of accusations made against defendant before filing of information was prejudicial error where defendant repeatedly denied such accusations by district attorney and the evidence was conflicting.

7. Criminal law ⇐407(2)

In the absence of proof that defendant's failure to complete his sentences was due to his own hesitancy rather than interruptions by district attorney and defendant's 13-year old daughter making charge of incest, it could not be inferred that defendant had "admitted" charges shown in transcript of what had occurred in proceeding before district attorney prior to filing of information.

See Words and Phrases, Permanent Edition, for all other definitions of "Admit".

8. Criminal law ⇐429(1)

Whatever local arrangement may have been made with court reporter to take down in shorthand and to transcribe interviews between district attorney and those suspected of having committed crimes, activities of court reporter on such occasions were not a part of his official duties as a court reporter and his transcription of his notes had no official status. Code Civ. Proc. § 269 et seq.

9. Criminal law ⇐419(1)

In prosecution for incest where transcript of shorthand notes taken at interview of defendant by district attorney before filing of information was introduced in evidence, the words "no reply" in the transcript were "hearsay" and inadmissible and proof by someone present at interview was necessary to prove fact that defendant made no reply to accusation.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

10. Criminal law ⇐407(2)

The effect upon jury of permitting proof of accusations made against defendant charged with incest before filing of information must be gauged in light of court's remark that he had permitted such proof to show the conduct, acts and statements of a person under arrest for crime, and that the jury would give it what weight they felt it warranted.

11. Criminal law ⇐1169(9)

In prosecution for incest where doctor testified to physical examination of prosecuting witness and that her private parts showed there had been a penetration but

that whether penetration had been caused by a penis or some object used in masturbation could not be said but later testified that he had examined the girl "through her appearance and manner and all of those things", it was prejudicial error to permit doctor to testify that in his opinion the dilatation of the genitalia was due to sexual intercourse and not masturbation, particularly where facts upon which doctor based opinion were not stated and proof tended to show that the girl was familiar with practice of masturbation.

12. Criminal law ⇐706

It was "misconduct" for district attorney to ask repeated questions in the face of repeated adverse rulings concerning the immaterial matter of whether or not the two small nephews of defendant charged with incest had been given wine to drink.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

13. Criminal law ⇐1131(4)

Where conviction was reversed for error occurring at the trial the appeal from order denying a new trial was dismissed as having become "moot".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Joe Lee was convicted of incest and from order denying a new trial and from judgment of conviction, he appeals.

Judgment appealed from reversed and cause remanded for a new trial and appeal from order denying new trial dismissed.

Nelson & Castro, of San Luis Obispo, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

From the judgment which was entered following his conviction upon a charge of incest, and from the order denying his motion for a new trial, the defendant has appealed, contending that the evidence was not sufficient to support the jury's verdict and that there were prejudicial errors committed in the admission of evidence. The evidence, we find, was sufficient to support the verdict but it was not sufficient to cure the errors made in the course of its admission.

[1, 2] The only evidence that the defendant committed the crime of incest upon his thirteen-year-old daughter Barbara came from her lips, but no corroboration is required in such a case (People v. Hobday, 1933, 131 Cal.App. 626, 21 P.2d 1008; People v. Hall, 1938, 25 Cal.App.2d 336, 339, 77 P.2d 244, 246) and it is futile to argue on appeal that the testimony is so inherently improbable that it must be disregarded. The defendant has good grounds, however, for arguing that the question of his guilt or innocence must have hung in close balance before the jury, and that it was decided against him because of the errors that were made. His daughter testified that he had committed incest with her; he denied that he had. The defendant had the opportunity to commit the crime at the time when Barbara fixed its happening, but the actual presence in the room of two sleeping boys, and the potential presence of his wife, his brother and his sister-in-law in the adjoining kitchen all made the time appear very inopportune for its commission. It is apparent that the question was a close one, and its answer depended very greatly on Barbara's credibility.

The jury had cause to doubt her credibility. Her story was that her father spent some twenty to twenty-five minutes with her, first being familiar with her, then committing the crime charged. Asked if there was anyone in bed with her at the time other than her father, she replied: "I do not believe so. I would not be sure. No, I do not think there was." With respect to some matters not immediately connected with the crime her testimony was highly incredible, was self-contradictory and was contradicted by the testimony of others. At the time of the accusations, hereinafter to be considered, she appeared as a too eager witness.

Barbara's trustworthiness as a witness was also brought into doubt by her admitted animus toward her father. She testified that she was unjustly treated by her parents, by her father particularly, with respect to her freedom to go out with boys. She would be angry about the injustice for a time, but without flying into a rage about it. A few hours preceding the crime she became angry afresh with her father because, as she explained it, he would not let

her go to a show as he had promised. She also testified that this same evening he twisted her wrist, threw her down on the steps and used "the ruler across the bottom of her anatomy," and while the spanking did not make her angry, the twisting of the wrist did. From her own testimony, then, the jury might well have believed that as she went to bed instead of to the movies that evening of January 16 she was resentfully angry with her father, and that her anger carried over to set in motion the accusations which followed.

[3, 4] In at least two particulars errors were committed of so prejudicial a nature that the judgment must be reversed. One had to do with the admission of accusations made against the defendant prior to the filing of the information against him. It is the established law that it is improper to disclose to the jury the fact that such accusations were made unless the conduct of the accused in the face of the accusations constitutes an admission of guilt "by express assent, by his silence or by acts or by conduct on his part which could be fairly construed as assent." People v. Wong Loung, 1911, 159 Cal. 520, 531, 114 P. 829, 834. In those cases where the only conduct of the defendant in the face of the accusations is to deny them, then "The district attorney should not have offered this evidence, knowing as he did that [the defendant] had not remained silent under the accusation, but had repelled it at the time it was made." People v. Teshara, 1901, 134 Cal. 542, 544, 66 P. 798, 799. See further People v. Goltra, 1931, 115 Cal.App. 539, and its quotations on pages 550 and 551, 2 P.2d 35.

[5] The People do not contend for a different principle of law but would escape its application by claiming that the appellant stood mute when accused by his daughter. Were this so (and as we shall see the evidence does not support the claim) it would not correct the error committed in receiving, over timely and proper objections, the account of the accusations made previous to the occasion when the daughter was present. The interview between the district attorney and the defendant was in the presence of the court reporter of the San Luis Obispo superior court and was by him written out in the form of a statement. This statement was introduced into evidence and parts of it read to the jury by the district attorney. We quote the pertinent portions which were read to the jury: "Your daughter has been in here and says that you have been committing acts of sexual intercourse with her, and the last act you had was last Monday at 10:30. A. My daughter?

"Q. Yes, your daughter. And the one before that was on the 17th, and you have been doing this for a long time. Now, what have you got to say about it? A. I never.

"Q. You never? A. No, sir.

"Q. We understand you have been carrying on, and we will have her examined by a doctor and we have absolute proof and you better come through with it. A. Man, I would not do nothing like that—

"Q. She said you have been having intercourse with her since before she could remember. You know that is the truth. A. No.

"Q. No, she said—she said that is what happened. How about it, Mr. ? When did this start? I want the truth, and I am not going to—how about it? You have been having intercourse with her two or three times every week for a long time. A. No, I have not.

"Q. Do you mean to say your little girl would sit there and tremble and with tears in her eyes and make that kind of a statement if it was not true? A. I do not know.

"Q. Do you claim anybody else has molested your daughter? A. I could not say as to that. I don't know.

"Q. You have no information of any kind or character to indicate she had intercourse with anyone else, isn't that true? A. Yes, that is true.

"Q. Listen, I want you to tell me the truth, and I do not want anything but the truth, because that is what I am after. You know perfectly well that is what you did and no girl in her right mind would first admit that any man had intercourse with her, and secondly, that her father did. You know that? A. No, it don't stand to reason, it don't, I will admit.

"Q. What is the matter with you? A. The matter with me? What do you mean?

"Q. I mean because you have had sexual intercourse with her, and she is only 13 years of age and you have been saying that she was your wife and abusing her. Why don't you come through and tell the truth? You know perfectly well it is true. If you want her to get on the stand and testify under oath, that is what we will do.

Or you can save what little speck of manhood you have left, if you have any, and tell the truth about it. What are you going to do? A. Let her prove it.

"Q. Let her prove it. OK, if that is the way you want it. A. How in the hell am I going to admit to such a thing as that?

"Q. Because you did it.

"Q. Do you want to face your daughter? A. I wouldn't care.

"Q. You don't appear to be proud of her, if that is what you did, and she says you did. She says you have been pulling this stuff off for years. I will let you face her. We will take her over there and let you face her. What explanation, what conceivable explanation have you? A. In what way do you mean?

"Q. What explanation do you have for a girl making a statement that you have been having intercourse with her for so long? A. I really don't know.

"Q. That is a terrible thing to say. A. I know it is a terrible thing to say.

"Q. How can a girl make such a statement? Have you abused her so that she is mad at you? A. No, I never did.

"Q. All I say, you better make your peace with yourself, because if this girl sticks to the story in your presence, we are going to prosecute you to the limit of the law and there won't be anything to do. The best way you can do, if it is true, is to realize what you have done and stand up before the Court and say, 'I have got it coming.' That is all there is to it, because if you want—A. Would you want to admit to something you did not do?

"Q. If it was not true, of course not, but I am telling you that I cannot conceive it is not true and we will have her there at 12.00 o'clock, or about that time, to face you."

[6] It seems clear to us that the repeated objections of the defendant (not quoted by us) that the accusations made were not admitted by him when he heard them so they should not be admitted into evidence for the jury to hear, were well taken, and the repeated rulings of the trial court such as this one: "the statement will be considered by the jury, and they will give it what weight they deem it entitled to" were prejudicially erroneous. "It is not the declaration made in the presence of a defendant that can be taken as evidence against him. It is only his conduct in connection with the declaration that can be looked to for evidence of guilt, and if he flatly denies the charge there can be no evidence in this of guilt, and therefore the whole matter should be excluded, lest the jury may infer, from its being admitted, that they are warranted in treating it as evidence against the defendant." People v. Turner, 1905, 1 Cal.App. 420, 422, 82 P. 397, 398. The error was the more serious in this case because the person making the accusations was the district attorney, the law enforcement officer of the county, and he was insistent that the daughter's story could not be doubted; that he believed it beyond a doubt.

Before reading from the subsequent statement which, according to the court reporter, was "a true and correct copy of the transcription of his notes," the district attorney was sworn as a witness and testified that in addition to the parties present at the first interview (the district attorney, the court reporter, the defendant and one Lee Knight) Barbara and her mother were in attendance. Then over the defendant's renewed objection he read:

"Q. Well, Mr. Lee (addressing the defendant), I talked to you this morning, and here is your girl and here is your wife. I have approached this matter from every conceivable angle. The girl maintains the accusation. How about it?

"Barbara Lee: Yes, daddy, you know you did it, and time over and over again, you just cannot deny it because you know you have.

"Mr. Brazil: Q. How about it? That is your daughter telling you, and she is making a pretty straight accusation. Can you look her in the eye and tell her—

"Barbara Lee: Because he knows he did it—

"Mr. Brazil: A 13 year old girl, your own flesh and blood, and she is making a strong accusation—

"The Defendant: Listen, am I entitled to any legal—

"Mr. Brazil: Look her in the eye, sir, and tell your daughter you did not do it. I challenge you to do that. A. Barbara, I never did—

"Barbara Lee: You know you have, and you did it over and over again, and you know you have.

"Mr. Brazil: Q. You cannot tell me you didn't; with this girl challenging you—

"The Defendant: What do you want me to do?

"Mr. Brazil: Q. Act like a man and deny it. Look at her. Do you think that is a story, the way she is talking? Would she dare to make a false accusation the way she is doing it now? (No reply). What do you think of it, Mrs. Lee?" The defendant made an objection "to that statement, 'no reply,' on the ground that it calls for the opinion and conclusion of the witness," to which the witness, the district attorney, replied: "It is here."

[7-9] As we understand the People's position on appeal they admit that throughout the first interview the defendant consistently denied the charges made, but relying upon the matters we have quoted from the second interview they state "he stood mute." Again we call attention to the fact that there was no witness who testified concerning the defendant's conduct. The court reporter who took notes at the interview was a witness at the trial and so was the district attorney but neither stated how it was that the defendant failed to finish several of his sentences. Unless his failure to complete his sentences was shown to be due to his own hesitancy, rather than interruptions by the district attorney and Barbara, no inference of acquiescence on the defendant's part is justified. Whatever local arrangement may have been made with the court reporter to take down in shorthand and to transcribe interviews between the district attorney and those he suspected of having committed crimes, his activities on such occasions were not a part of his official duties as a court reporter and his transcription of his notes has no official status. Code Civ.Proc. § 269, et seq. The words "no reply" in the statement being read by the district attorney were therefore inadmissible as hearsay, a ground of the defendant's objection to the use of the statement. If the defendant made no reply, when given an opportunity to do so, someone present should have so testified, but no one did.

[10] The effect upon the jury of the reading of this statement is to be gauged in the light of these remarks:

"The Court: I am permitting this statement to come in to show the conduct, acts and statements under arrest for crime. It is admissible and the jury will give it what weight that they feel it warrants.

"Mr. Brazil: May I continue reading it, then?

"Mr. Castro: It is only admissible for the purpose of an admission.

"The Court: No, conduct, acts and statements of a person under arrest."

[11] We are further of the opinion that an error was made with regard to another subject. A doctor who had made a physical examination of Barbara, testified that her private parts showed that there had been a penetration, but whether it had been by a penis or some object used in masturbation could not be said; to answer that question one would have to see the act itself. That his examination of Barbara was not limited to her physical condition appears from his affirmative answer to this question, put to him by the district attorney: "You examined the girl as to her appearance and manner and all of those things?" Then this question was asked: "And with reference to this particular case, based upon your physical examination and history, and all facts upon which you based an opinion, did you have an opinion at that time in your own mind as to whether this enlargement of the vaginal tract was the result of sexual intercourse or the result of some other act?" Following a "yes" answer the doctor was permitted, over the defendant's objection, to give it as his opinion "that the dilatation of the genitalia was due to sexual intercourse and not masturbation."

The doctor's opinion should not have been received. It was not a professional opinion, for he had stated, the obvious, that a physical examination could not determine the cause of the condition seen. In part, at least, his opinion was based on his conclusion that Barbara was to be believed, a matter not the subject of expert testimony. What other elements were included in "all the facts upon which you based an opinion" we do not know, but none of them were made to appear to be facts upon which a professional opinion was proper. There was evidence that Barbara was familiar with the practice of masturbation. In the premises, in this case upon which so much depends upon Barbara's credibility, the error cannot be said to be anything other than prejudicial.

[12] It was misconduct for the district attorney to ask repeated questions in the face of repeated adverse rulings concerning the immaterial matter of whether or not the two small nephews of the defendant had been given wine to drink. Con-

cerning other contentions of error we deem it unnecessary to speak; the necessity of a new trial already appears.

[13] The judgment appealed from is reversed and the cause remanded for a new trial. The appeal from the order denying a new trial having become moot, is dismissed.

SCHAUER, P. J., and SHINN, J., concur.



55 Cal.App.2d 74

TROUSDELL v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

Civ. 12046.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1942.

Rehearing Denied Nov. 18, 1942.

See 130 P.2d 990.

1. Fraud ⇐58(1)

Proof of fraud cannot rest upon conjecture, since there is a presumption against fraud approximating in strength to that of innocence of crime.

2. Appeal and error ⇐931(1)

Where evidence that issuance of life policies containing disability provisions was procured by false representations was so unsatisfactory that trial court may have been justified in viewing it as insufficient to meet test of the burden of proof of actionable fraud, appellate court would not search the record to discover the evidence supporting trial court's finding that disability provisions were not procured by material false representations.

3. Reformation of Instruments ⇐43

Insurer seeking cancellation of disability provisions of life policies on the ground that they were procured by false representations had the burden of proving that representations were false, that insured knew them to be false, and that they were made with intent to deceive and were relied upon by insurer to its injury.

4. Insurance ⇐400

Where life policy as originally issued provided for incontestability after one year and rider providing for disability benefits stated that incontestability provision of policy should not apply to disability provisions whereas a rider granted on same application and attached at the same time providing double indemnity for accidental death contained no exception to the incontestability clause, disability rider was not subject to cancellation after one year for fraud in the application therefor.

5. Insurance ⇐149

Where printed and stamped provisions in life policy conflict, the latter must prevail.

6. Insurance ⇐146(1)

Whether terms of a policy are ambiguous depends, not upon the meaning of such terms to one engaged in the insurance business or one trained in law, but upon what the drafter of the instrument might reasonably anticipate would be the effect of the language used upon an untrained mind.

7. Insurance ⇐146(3)

Ambiguity in the terms of a life policy must be construed most strongly against the insurer.

8. Insurance ⇐400

Where life policy providing for double indemnity and disability benefits provided that, except as to provisions relating to double indemnity and disability, it should be incontestable after one-year and two-year term policy providing the same benefits and issued as part of the same transaction as permanent policy, which was not to be effective until nearly two years after issuance, contained incontestability clause without any exception of disability provisions, indorsement stamped on permanent policy that it should be incontestable as soon as term policy became incontestable rendered terms of insurance contract ambiguous, and disability provision thereof was not subject to cancellation after one year for fraud in procuring issuance of policy.

9. Insurance ⇐516

The test of "total disability" within meaning of life policy providing benefits for total and presumably permanent disability is the ability to engage in any gainful occupation or employment in the ordinary manner as a workman.

See Words and Phrases, Permanent Edition, for all other definitions of "Total Disability".

10. Insurance ⇐665(5)

Evidence that insured's physicians prescribed complete rest and abstinence from any type of work requiring mental or physical activities sustained trial court's finding that insured was "totally disabled" within meaning of life policy provision for disability income in the event of total and presumably permanent disability, notwithstanding testimony of one of the physicians that insured might have been able to sit behind a cigar counter and sell cigars.

11. Insurance ⇐670

Contention that judgment for disability benefits under life policy providing disability income in event of total and permanent disability was excessive in that benefits were allowed from the date of the disability was not sustained by trial court's finding that disability continued for over 11 months, whereas amount awarded covered only 10 months.

12. Insurance ⇐516

Where life policy providing total and permanent disability benefits contained no restriction on provision for payment for the full period of disability, unless the portion of policy headed "Standard Provisions" was intended to affect period of payment, and, if so, policy became so ambiguous in that respect that neither insured nor insurer could have understood it, benefits were properly awarded for the entire period of total disability.

13. Insurance ⇐516

Life policy provision for total and permanent disability benefits fixing the date when payments of benefits should begin at the time when insurer had received proof of the disability did not state the period for which benefits were to be paid but only the time for payment.

14. Insurance ⇐559(2)

Where insurer denied all liability under life policies providing for total and permanent disability benefits on the ground of fraud in procuring issuance of the policies, insurer thereby "waived" policy conditions relating to time of notice and to proof of disability.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Lloyd C. Trousdell against the Equitable Life Assurance Society of the United States, a corporation, to recover total and permanent disability benefits under eight policies of insurance issued by defendant wherein defendant filed cross-complaint seeking cancellation of the disability provisions of six of the policies. Trial to the court sitting without a jury resulted in judgment for plaintiff both on the complaint and cross-complaint, and defendant appeals.

Judgment affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

J. Rainey Hancock, of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff brought this action to recover "total and permanent" disability benefits under eight policies of insurance theretofore issued by defendant. In its cross-complaint defendant sought the cancellation of the disability provisions of six of the policies upon the ground that their issuance had been induced by false representations. The lower court, sitting without a jury, rendered judgment in favor of plaintiff both on the complaint and cross-complaint from which judgment defendant and cross-complainant has prosecuted this appeal. Appellant contends that the judgment is erroneous in three respects: first, that the evidence is insufficient to support the court's findings on the cross-complaint that the disability provisions sought to be cancelled were not procured by material false representations; second, that the evidence is insufficient to support the finding that plaintiff was permanently and totally disabled; and third, that the court improperly construed the provisions of the policies in determining the dates from which payment should have been made.

[1] In his answer to the cross-complaint plaintiff alleged as a special defense that the provisions for disability could not be attacked on the grounds alleged in the cross-complaint because of the incontestability clauses of the several policies. The lower court did not make any finding on this defense, but the lack of a finding is not raised by appellant. Having concluded, for the reasons hereinafter set forth, that the incontestability clauses are applicable to the defense of fraudulent representations in the procurement of the policies, it will not

be necessary to consider at length appellant's contention as to the insufficiency of the evidence to support the findings upon the issue of fraudulent representations. In this connection it is sufficient to state that when respondent made application for insurance in 1930 he failed to disclose that in 1927 he had consulted a physician and was treated for a slight stomach illness by a Dr. Ryan and that X-rays then taken had disclosed that the gall bladder did not function normally. That the condition was not deemed serious, by either the patient or the attending physician, is shown by the fact that no further trouble developed at the time and that no further medical treatment was given. The evidence upon which appellant depended in proof of this issue was not satisfactory, it appearing that Dr. Ryan had died a few weeks before the trial. The testimony of appellant's witnesses tending to prove the materiality of the representations complained of and that they were made falsely and with the intent to deceive was equally unsatisfactory. We refer to this state of the evidence not in criticism of appellant's presentation but as indicative of the failure to meet the test of the proof of actionable fraud. The rule that such proof cannot rest upon mere suspicion or conjecture is well stated in Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26, 29, where it is said: "The presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime; and it should not be deemed overcome, even prima facie, upon a showing so intangible and shadowy."

[2, 3] In accord with this principle an appellate court will not search the record to discover the evidence which supports the finding of the trial court. It is sufficient that the trial court might have viewed the evidence as failing to meet the test of the burden of proof above indicated. In this connection it must be borne in mind that the burden which appellants assumed was to prove that "the representations were false," that respondent "knew (them) to be false," that they were made "with intent to deceive," and that they were "relied upon by appellant" to its injury.

But if we should assume for the purpose of the opinion that the evidence was insufficient to support those findings, we cannot escape the conclusion that it was not a valid defense, because of the incontestability clauses of the policies. For this discussion the policies will be designated 1, 2, 3, 4, 5, 6, 7 and 8 to correspond to the numbers assigned them when introduced as plaintiff's first eight exhibits. Appellant did not seek rescission of policies 2 and 3. Both were issued before the date of the alleged illness which appellant claims was falsely concealed.

Policy 1 was issued on September 14, 1921, but the provisions for disability were not added until March 18, 1930. This was done by the insertion of a rider. The first page of the original policy contains the provisions: "This policy shall be incontestable after one year from its date of issue, provided premiums have been duly paid, subject to the provisions as to age stated on the second page hereof." The rider is designated "page 2A"; included therein is this statement: "The provisions of said policy with respect to Incontestability and Freedom of Travel, Residence and Occupation shall not apply to this Disability provision." At the same time that this rider was attached to the policy there was also attached a rider providing for double indemnity in case of accidental death. This rider did not contain any exception to the incontestability clause. The two additional provisions were granted on a single application. It is certain of the answers contained in this application which are claimed by the company to be untrue. A copy of the application is attached to the policy and includes the provision: "I agree * * * that the foregoing answers shall also become part of any policy contract that may be issued on the strength thereof."

Policies numbered 4 to 8 inclusive, all dated February 27, 1930, are identical and need not be separately considered. On the first page, after providing for a death benefit and double indemnity in case of accidental death, the policy provides: "And further, if the Insured before age 60 becomes totally and presumably permanently disabled as defined in the Total and Permanent Disability provision on the third page hereof, the Society will, subject to the conditions of such provision, waive subsequent premiums and pay to the Insured a disability income. * * *" Attached to the policy is a copy of the application which contains a statement identical to that hereinbefore quoted from policy 1. On the second page of the policy under the heading "Incontestability and Freedom of Travel, Residence and Occupation" there is the statement: "This policy, except as

to the provisions relating to Disability and Double Indemnity, shall be (a) incontestable after it has been in force during the lifetime of the Insured for a period of one year from its date of issue, provided premiums have been duly paid. * * *" The provisions for disability on the third page do not contain any reference to contestability or to procurement by fraud or misrepresentation. Each of these five policies was not to be effective until January 28, 1932. In connection with each there was issued as a part of the same transaction a two-year term insurance policy which in each case is attached to the principal policy. The term policy provided for the same benefits as the permanent policy. It then provided for incontestability after one year without any exception of the disability provisions. On the third page of the permanent policies there is a stamped endorsement which states, among other things, "2. That this policy shall be incontestable as soon as the aforesaid Two Year Term Policy shall be incontestable."

So far as we are aware no appellate court of this state has considered an exception to a disability clause wherein the phraseology was identical to that here involved. Excepting clauses which are somewhat similar have been considered on four occasions and in each case the excepting clause has been held not to permit a contest for fraudulent representations in the procurement of the policies. In Mutual Life Ins. Co. v. Margolis, 11 Cal.App.2d 382, 384, 53 P.2d 1017, 1018, the exception read: "except for the restrictions and provisions applying to the double indemnity and disability benefits, as provided in sections 1 and 3, respectively, this policy shall be incontestable * * *." In Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 70 P.2d 602, the clause was: "This policy shall be incontestable * * * except as to provisions and conditions relating to disability benefits." (Hereinafter referred to as the New York Life clause.) Blair v. New York Life Ins. Co., 40 Cal.App.2d 494, 104 P.2d 1075, and Braun v. New York Life Ins. Co., 46 Cal.App.2d 335, 115 P.2d 880, involved exceptions identical to that in the Coodley case. Whatever may be the rule in other jurisdiction, and there is respectable authority to the contrary, it is apparent that we are bound by these decisions unless the clause here involved can be distinguished.

Appellant relies upon Equitable Life Assur. Soc. v. Deem, 4 Cir., 91 F.2d 569, wherein certiorari was denied 302 U.S. 744, 58 S.Ct. 146, 82 L.Ed. 575, as establishing the distinction. It is true that the Deem case attempts to make the distinction and this same distinction is made in Malloy v. New York Life Ins. Co., 1 Cir., Apr.1939, 103 F.2d 439 wherein the court held the New York Life clause to bar a contest. But in Terry v. New York Life Ins. Co., 8 Cir., June, 1939, 104 F.2d 498 in reaching the opposite result under the New York Life clause the court treats the two clauses as substantially the same. In New York Life Ins. Co. v. Rotman, Iowa, 3 N.W.2d 603, 604, a case involving the New York Life clause in referring to the clause in the Deem case (as well as that in Smith v. Equitable Life Assur. Soc., 169 Tenn. 477, 89 S.W.2d 165, and Greber v. Equitable Life Assur. Soc., 43 Ariz. 1, 28 P.2d 817, both relied upon in the Deem case and hereinafter referred to) the court characterizes them as "Incontestability clauses in form and language substantially the same as that here in question." In Klanian v. New York Life Ins. Co., R.I., 26 A.2d 608, the court treats the Deem case as opposed to its holding that the defense was precluded by the New York Life clause. So, too, in Grauer v. Equitable Life Assur. Soc., Sup., 167 Misc. 30, 3 N.Y.S.2d 564, the two clauses are treated as substantially alike. The Deem case cites and relies upon three cases. (Smith v. Equitable Life Assur. Soc., supra; Greber v. Equitable Life Assur. Soc., supra, and Guardian Life Ins. Co. v. Katz, 243 App. Div. 11, 275 N.Y.S. 743.) The last mentioned of these relies in turn upon two memorandum decisions, from the same jurisdiction, at least one of which (Chambers v. New York Life Ins. Co., 148 Misc. 561, 265 N.Y.S. 217) involved the New York Life clause, and a Mississippi case which in no way involved the point. The Greber case does not cite or discuss any other authorities. The Smith case, which is the only one of the three wherein any considerable attention is given to other decisions, does refer to differences in wording in other clauses but the court then proceeds to cite and rely upon cases involving the New York Life clause in support of its conclusion to such an extent that the court adopts as its own the language of Judge Schoonmaker in New York Life Ins. Co. v. Davis, D.C., 5 F.Supp. 316, which involved the New York Life clause. The de-

cisions upon which the Deem case relies are not based upon the distinction therein sought to be made between the clauses employed in the New York Life and Equitable policies and, with the exception of Malloy v. New York Life, supra, and possibly the case of Isom v. Equitable Life Assur. Soc., 138 Fla. 260, 189 So. 253, the cases which have subsequently cited the Deem case treat the two clauses as substantially the same. In Kiriakides v. Equitable Life Assur. Soc., 174 S.C. 140, 177 S.E. 40, the court reached the opposite result from the Deem case and in so doing employed the same reasoning as that involved in Coodley v. New York Life Ins. Co. Admittedly the decisions in the various jurisdictions are squarely conflicting but this conflict is not to be resolved by fine distinctions in language, the meaning of which is substantially identical. This case is controlled by the decision in Coodley v. New York Life Ins. Co., supra.

[4] We are not inclined to agree with the concession of respondent that the excepting clause in policy 1 is to be given a different construction from those in the permanent policy provisions in policies 4 to 8. As is above noted the language of each is practically identical. Appellant's argument with respect to policies 4 to 8 was based upon the absence of the words "and conditions" following the word "provisions" in the excepting clause, which words were contained in the New York Life clause, but this is equally true of policy 1. Respondent's concession is apparently based upon the relative positions of the excepting clauses in the policies and a misunderstanding of the ratio decidendi of the opinion in Coodley v. New York Life Ins. Co. In policy 1 the exception is contained in the body of the disability provisions but this is for the obvious reason that these provisions were added at a later date. The only representations claimed to be false were contained in the application attached at the same time as the disability provisions but this application was equally applicable to the double indemnity provisions also added at that time. In the Coodley case the court at page 272 of 9 Cal.2d, at page 603 of 70 P.2d, said: "On the other hand, it is respondent's contention that the exception in the incontestable clause 'as to provisions and conditions relating to disability benefits' reserves only unto the insurance company the right to set up as defenses against any claim for disability benefits, the provisions and conditions set forth in the body of the policy, viz., on page headed 'Total and Permanent Disability,' and that fraud not being mentioned as a provision or condition under such heading, and not being excepted in the incontestable clause itself, that, therefore, the defendant and appellant is barred and precluded by the incontestable clause from contesting the policy and any claim thereunder on the grounds of alleged fraud in the application and precluded from attacking the validity of the policy, or any portion or part thereof, for alleged fraud in the application, or in the procuring or inception of said policy." And at page 274 of 9 Cal.2d at page 604 of 70 P.2d, it was said "the great weight of authority supports the position of the respondent in this action." Concluding, as we have, that the excepting clauses here involved are not substantially different from that involved in the Coodley case, that case is equally controlling with respect to policy 1 as to policies 4 to 8.

[5-8] With respect to policies 4 to 8 there is a further reason why the judgment on the cross-complaint must be affirmed. What has been said has referred to the excepting clause of the permanent policies alone, but, as has been noted, the term policies contained an incontestability clause without exception and the stamped endorsement on the permanent policies contained the statement: "2. That this policy shall be Incontestable as soon as the aforesaid Two-Year Term Policy shall be incontestable." It is, of course, axiomatic that if the printed and stamped provisions conflict the latter must prevail. Appellant contends that the stamped provision refers solely to the time when the incontestability clause shall take effect but does not affect its scope. Such might be the understanding of one engaged in the insurance business or one trained in law, but that is not the standard by which the presence or absence of ambiguity is to be determined. The proper test is what the drafter of the instrument might reasonably anticipate to be the effect upon an untrained mind for it is to that class that the instrument is designed to be offered. Viewing together the three provisions, that is, the incontestability clause of the permanent policy with its exception, the unrestricted incontestability clause of the term policy, and scope and effect of the stamped endorsement, and bearing in mind

that the latter had been added to the ordinary policies and would therefore be construed by an insured to be intended to change the usual form in some manner, we cannot say that a lay mind might not construe the endorsement to be an incorporation into the permanent policy of the clause of the term policy in its full scope to the disregard of the printed clause of the permanent policy. The terms, then, being ambiguous within the legal meaning of that word must be construed most strongly against the company. Stroehmann v. Mutual Life Ins. Co., 300 U.S. 435, 57 S. Ct. 607, 81 L.Ed. 732. It necessarily follows that the disability provision of policies 4 to 8 were not contestable on the grounds alleged.

[9, 10] What we have said relates to that portion of the appeal which seeks rescission and cancellation of the policies upon grounds of fraudulent representations in their procurement. Assuming that the incontestability clauses nevertheless permit the insurer to attack the claim of disability as distinguished from the right to attack the insurance contract, appellant argues that the evidence is insufficient to support the finding that respondent was in fact disabled during the period for which payment was allowed. The argument is that since respondent was not covered for "occupational" insurance but only for total disability which "prevents the Insured from engaging in any occupation or performing any work for compensation of financial value," it was incumbent upon respondent to show that he was totally disabled from performing any labor of any character for a compensation. The undisputed evidence is that, during part of the period for which payment was allowed, the respondent was under the care of two physicians and during part of the time was under the care of one, both of whom advised him not to do any work of any kind. He was then suffering from acute gall bladder attacks, a bad nervous and cardiac condition, and was confined frequently to bed. The physicians prescribed complete rest and abstinence from any type of work requiring mental or physical activities. On cross-examination one of those physicians testified that he supposed that the insured might have been able to sit behind a cigar counter and sell cigars, and it is upon this testimony that appellant attacks the finding of total disability. We think the rule is well stated in Wright v. Prudential Ins. Co. of America, 27 Cal.App.2d 195, 216, 80 P.2d 752, 759 which did not involve a policy of "occupational" insurance, but one of indemnity for total disability which rendered the insured unable to "perform any work for any kind of compensation of financial value." "* * * the test of disability," said the court, "is not what the insured actually did in the effort to perform his duties, but what, in the exercise of due prudence he was reasonably able to do. This was a question of fact on which the trial court's determination, in so far as founded on any substantial evidence, is binding upon us." In Hill v. New York Life Insurance Co., 38 Cal.App.2d 627, 633, 101 P.2d 752, 755, the same court gave a fuller definition of the meaning of the disability clause in a case other than that of "occupational" insurance, where it said: "We therefore believe that we should regard the policy as one designed to provide a substitute for earnings when the insured is deprived of his capacity to earn by bodily injury or disease. He must be prevented from performing work and conducting business for compensation or profit. Interpreting the policy in the light of its purpose, the words 'performing any work' mean engaging in any gainful occupation or employment in the customary manner as a workman. The definitions contemplate the substantial doing of those things which are generally regarded as constituting performance of work and conduct of business * * *." For these reasons we find no error in the conclusions of the trial court that the insured was totally disabled within the terms of the policies.

[11-14] The further contention is made that the judgment is excessive in that benefits were allowed from the date of the total disability whereas some of the policies had conflicting provisions as to when such payments should begin. These ambiguities were cured by a rider attached to some of the policies which fixed the date when benefits should be allowed as one month after total disability. This applied to all but two of the policies. One of these two (policy number 2) does not appear to contain any restriction on the provision for payment for the full period of disability but if the provisions contained in that portion of the policy headed "Standard Provisions" were intended to affect the period of payment then it is so ambiguous in that respect that we may assume that neither insured nor insurer understood it. The other (poli-

cy number 3) fixed the date when payments of benefits should begin at the time when the insurer had received proof of the disability, but this provision does not state the period for which benefits are to be paid, but only the time for payment. If the provisions of this policy are not contrary to the construction advanced by appellant they are, to say the least, ambiguous. It is now argued that the judgment is excessive because recovery was allowed from the date of disability, rather than from the date of notice and proof. This does not appear to be the fact. The disability was found to have continued for over eleven months, but the amount awarded, with the exception of policy number 2, covered only ten months. Moreover, this issue was not raised in the trial court. This judgment was entered July 8, 1941, and does not appear on the face to be excessive. The appellant concedes that such notice and proof were in fact received, but argues that they were not given within the prescribed time. The simple answer is that, since the insurer has denied all liability under all the policies, it has waived these conditions relating to time of notice and to proof of the disability. Dietlin v. General American Life Insurance Co., 4 Cal. 2d 336, 350, 49 P.2d 590.

The judgment is affirmed.

STURTEVANT, and SPENCE, JJ., concurred.



55 Cal.App.2d 940

Lloyd C. TROUSDELL, Respondent, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (a Corporation), Appellant.

Civ. 12284.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1942.

Rehearing Denied Nov. 18, 1942.

See 130 P.2d 990.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

J. Rainey Hancock, of San Jose, for respondent.

NOURSE, Presiding Justice.

The appeal in this action involves the same issues as those presented in the case of Trousdell v. Equitable Life Assurance Society, Cal.App., 130 P.2d 173, and decided this day. By stipulation both appeals were submitted on the same reporter's transcript and briefs. For the reasons stated in our opinion in the other appeal the judgment herein is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



55 Cal.App.2d 24

BLENDER v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13803.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1942.

1. Master and servant ⇐341

An employee had a property right in his contract of employment with employer and a right of action against those who may have procured a breach of it otherwise than in the legitimate exercise of their own rights.

2. Costs ⇐107

An action to recover damages for wrongfully inducing plaintiff's discharge from his employment by another, which did not seek damages for loss of reputation, shame, and injury to feelings, and which did not set forth in the complaint the specific words uttered by defendant resulting in the discharge, was not an "action for slander" in which plaintiff was required to furnish bond. Gen.Laws 1937, Act 4317.

See Words and Phrases, Permanent Edition, for all other definitions of "Action for Slander".

3. Master and servant ⇐341

That the language uttered by defendant inducing plaintiff's discharge from his employment by another might be set forth in the complaint in such manner as to form basis for an action for slander did not pre-

vent plaintiff from maintaining an action for the wrongful interference of his contract of employment.

Proceeding in prohibition by Michael Blender against the Superior Court of Los Angeles County to restrain the defendant court from dismissing plaintiff's action for wrongfully inducing the breach of an employment contract, which action was dismissed on ground that it was an action for slander and petitioner failed to file bond required by statute. On defendant's demurrer to the petition.

Demurrer overruled, and issuance of a peremptory writ of prohibition ordered.

Jack Carl Greenburg and Phillip W. Silver, both of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas DeCoster, Deputy Co. Counsel, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Petitioner filed an action in the superior court, which he classifies as an action for wrongfully inducing the breach of an employment contract, and on June 16, 1942, the clerk of the superior court issued summons. The defendants presented a motion in the superior court asking that the action be dismissed on the ground that it is an action for slander, no bond having been filed as required by Stats. 1871–72, p. 533, amended by Stats. 1880, p. 81, Act 4317, Deering's General Laws of California. The superior court on June 30, 1942, granted the motion and ordered that the action be dismissed unless a bond be "posted" by July 10, 1942. Petitioner asserts that the action is not for slander and seeks by this proceeding to prohibit the superior court from dismissing the action.

The defendants in the superior court action are American Utilities Company, a corporation, and Fred R. Silverman. The plaintiff (petitioner herein) alleged in his first cause of action that the defendant Silverman was general manager of the defendant corporation and was acting within the course of his employment; that on or about June 10, 1942, while the plaintiff was employed by Jewel Tea Company, a firm engaged in the sale of household commodities to the public, the defendant Silverman, knowing that the plaintiff was employed by Jewel Tea Company as an outside route salesman, wrongfully induced said Jewel Tea Company to discharge plaintiff by falsely stating to Jewel Tea Company that the plaintiff was a thief and had misappropriated property of the American Utilities Company at a time when the plaintiff was working for the American Utilities Company. The plaintiff further alleged in his first cause of action that as a result of the conduct of the defendant Silverman he was discharged by said Jewel Tea Company and that he had thereby been damaged to an extent then unknown to the plaintiff and that the plaintiff later would ask permission of the court to insert the true amount of the damages. The plaintiff further alleged that the defendants had acted through malice and asked for exemplary damages. In the second cause of action the plaintiff alleged he had been employed by the defendant American Utilities Company as an outside route salesman until February 15, 1942, on which date the defendant terminated his employment; that thereafter the plaintiff sought employment with other firms and was required to disclose his former employment with the American Utilities Company; that on each occasion the prospective employer contacted the defendant American Utilities Company; that the defendants falsely stated to the prospective employers that the plaintiff was a thief and that he had misappropriated property of the American Utilities Company during his employment. That the defendant Silverman made these statements knowing them to be false; that the plaintiff is being prevented from obtaining employment, has suffered great mental anguish and has suffered general damages in the sum of $5,000; that each and every act committed by the defendants was actuated by malice and ill will. The plaintiff asked that exemplary damages be assessed against the defendants in the sum of $5,000, and also asked that the defendants be enjoined from repeating to others the statements complained of and from advising others against employing the plaintiff.

[1-3] Petitioner had a property right in his contract with Jewel Tea Company and as a party to this contract he had a right of action against those who may have procured a breach of it otherwise than in the legitimate exercise of their own rights. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631, 84 A.L.R. 55. Such an action is of a type different and distinct from an action for slander. Especially is this

true of the first cause of action set forth in the complaint, wherein the plaintiff seeks a judgment for damages suffered because of wrongful interference with the plaintiff in his employment with Jewel Tea Company. In this cause of action no damages are sought for loss of reputation, shame and injury to feelings, which are customarily sought in actions for slander; nor are the specific words uttered by the defendant set forth in the complaint. The defamatory language referred to in the complaint, according to the allegations, was uttered in order to bring about the discharge of the plaintiff. The fact that the language uttered by the defendants might be set forth in a complaint in such manner as to form the basis for an action for slander does not prevent the plaintiff from maintaining an action for the wrongful interference with his contract of employment.

The demurrer heretofore presented is overruled and the issuance of a peremptory writ of prohibition is ordered.

MOORE, P. J., and McCOMB, J., concurred.



55 Cal.App.2d 158

PELLETT v. SONOTONE CORPORATION et al.

Civ. 13731.

District Court of Appeal, Second District, Division 2, California.

Oct 27, 1942.

1. Appeal and error ⇐927(3)

In reviewing an appeal from a judgment predicated upon the granting of a motion for nonsuit, the evidence must be viewed in the light most favorable to plaintiff.

2. Limitation of actions ⇐95(1)

If a foreign substance is negligently left in plaintiff's body by defendant, the statute of limitations does not commence to run until the plaintiff has discovered the presence of the foreign substance or through the use of reasonable diligence should have discovered its presence. Code Civ.Proc. § 340, subd. 3.

3. Limitation of actions ⇐95(1)

Where buyer of hearing device did not discover nor through the use of reasonable diligence should he have discovered, that part of the plaster Paris which had been used in making a cast of his ear, had been left in his ear by seller's agent, until about three months before action was brought against the seller and its agents, the action was not barred by one-year statute of limitations though the tort was committed more than one year prior thereto. Code Civ.Proc. § 340, subd. 3.

4. Negligence ⇐134(1)

In action by buyer against seller of hearing device and its agents for damages resulting from defendants' negligence in failing to remove from buyer's ear all plaster Paris used in making a cast of his ear, evidence was sufficient to disclose negligence of defendants.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge pro tem.

Action by Charles S. Pellett against the Sonotone Corporation and others to recover for damages resulting from the alleged negligence of the defendants in failing to remove from plaintiff's ear all plaster Paris used in making a cast of the ear. From a judgment in favor of defendants, the plaintiff appeals.

Judgment reversed.

Joseph D. Taylor and Russell F. Hager, both of Los Angeles for appellant.

G. L. Compton in pro. per., Eugene S. Ives and Leonard Wilson, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury predicated upon the granting of defendants' motions for nonsuits on the grounds that:

(1) Plaintiff's cause of action was barred by the statute of limitations (subd. 3, § 340, Code Civ.Proc.), and

(2) The evidence failed to disclose negligence on the part of defendants or either of them,

plaintiff appeals. The action is one for damages resulting from the alleged negli-

gence of defendants in failing to remove from plaintiff's ear all of the plaster Paris used in making a cast thereof.

[1] Viewing the evidence in the light most favorable to plaintiff (appellant), as we must in reviewing an appeal from a judgment predicated upon the granting of a motion for a nonsuit, the essential facts are:

On or about March 22, 1939, plaintiff agreed to purchase from defendant Sonotone Corporation a hearing device known as an individually moulded "eartip." March 22, 1939, defendant Brown, an agent of his codefendant Sonotone Corporation, arranged with defendant Compton, a dentist, to make a plaster impression of plaintiff's ear, which impression was necessary to properly fit plaintiff with the "eartip" he had agreed to purchase. On the date just mentioned defendant Compton placed plaster Paris in plaintiff's ear for the purpose of making a plaster impression thereof. This was accomplished by placing cotton pellets in plaintiff's ear and thereafter pouring plaster into it. After about five minutes defendant Compton removed the cast from plaintiff's ear. The making of the cast took place in the presence of defendant Brown, to whom it was handed upon removal from plaintiff's ear. Defendant Brown had been instructed by his codefendant the Sonotone Corporation in the method of taking plaster impressions of an ear.

On the way home from defendant Compton's office plaintiff complained to defendant Brown that his ear hurt, but was informed such pain was to be expected. Again in October of 1939 plaintiff complained to defendant Brown that his ear hurt, but was informed that he would get used to the "eartip." February 5, 1940, due to the pain in his ear, plaintiff consulted Dr. Nillson who, upon examination, told him there was a hard substance like stone in his ear, which was subsequently removed and found to be bits of plaster and cotton. The first time plaintiff learned there was a foreign substance in his ear was on February 5, 1940, when Dr. Nillson so informed him.

Dr. Nillson testified that there is an instrument with a light which enables anyone to look into the ear as far as the drum to ascertain if a foreign substance is present. It is conceded that defendant Compton did not use any instrument in examining plaintiff's ear after making the plaster cast to ascertain if he had removed all of the plaster and cotton which he had placed therein. The present action was commenced May 10, 1940.

Plaintiff relies for reversal of the judgment on two propositions, which will be stated and answered hereunder seriatim.

First: In an action to recover damages for negligently failing to remove from a human body a foreign substance which defendant has placed there, the statute of limitations commences to run from the date the plaintiff discovered, or from the use of reasonable diligence should have discovered, that the foreign substance had not been removed, and the statute of limitations does not commence to run from the date the substance is placed in the human body.

[2] This proposition is tenable. It is the general rule that in tort actions the statute of limitations commences to run from the date of the act causing the injury. (Petrucci v. Heidenreich, 43 Cal. App.2d 561, 562, 111 P.2d 421.) There is a recognized exception to this rule in California, which is:

That if a foreign substance is negligently left in the human body by a defendant, the statute of limitations does not commence to run until the plaintiff has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered it. (Ehlen v. Burrows, 51 Cal.App.2d 141, 144, 145, 124 P.2d 82.)

[3] Applying the foregoing rule to the facts of the instant case, it appears that plaintiff did not discover, nor through the use of reasonable diligence should he have discovered, that the plaster Paris had been left in his ear by defendant Compton until February 5, 1940; and, since the present action was commenced May 10, 1940, it was filed within a year of the date plaintiff learned that he had a cause of action against defendants and was thus not barred by the statute of limitations.

Second: There was substantial evidence, assuming the above statement of facts to be true, to support a judgment in favor of plaintiff.

[4] This proposition is tenable. Assuming for the purpose of this appeal only that the above statement of facts is true, we are of the opinion that the trial jury might reasonably have believed that defendant Compton and defendant Brown were agents

of defendant Sonotone Corporation and that defendant Compton and defendant Brown were negligent in not having used an appropriate instrument to examine plaintiff's ear after the plaster cast was made to be certain that none of the plaster or cotton used remained in his ear, and likewise that plaintiff was not dilatory in discovering that some of the plaster and cotton had been negligently left in his ear.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 34

CRUTCHFIELD et al. v. DAVIDSON BRICK CO. et al.

Civ. 13635.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1942.

1. Negligence ⇐138(4)

Where guest passengers sought damages from driver and owner of truck colliding with automobile at intersecting streets, instructions on rights and duties of the two drivers, informing jury that negligence of automobile driver could not defeat passengers' recovery if truck driver's negligence was the proximate cause of passengers' injuries were not improper as "abstract" as to automobile driver, who was not a party, under conflicting evidence that automobile had entered the intersection against the signal at 36 miles per hour.

See Words and Phrases, Permanent Edition, for all other definitions of "Abstract".

2. Appeal and error ⇐882(12)

Where guest passengers sought damages from driver and owner of truck colliding with automobile at intersecting streets, instructions on rights and duties of the two drivers informing jury that negligence of automobile driver could not defeat passengers' recovery if truck driver's negligence was the proximate cause of passengers' injuries were invited by passengers' requested instructions concerning the joint negligence of the drivers precluding complaint on appeal.

3. Appeal and error ⇐1069(3)

Where jury after several hours' deliberation had returned to court room for further instructions, oral instructions referring to main points of previously given instructions without undue emphasis upon the contentions of either party were not prejudicial.

4. Witnesses ⇐27

The practice of paying witnesses sums greater than the statutory fees on the theory that they are being compensated for their time or that they are being prevented from suffering financial loss is not to be commended.

5. Evidence ⇐5(2)

It is common knowledge that litigants having considerable business in the courts customarily take good care of their witnesses.

6. Witnesses ⇐372(2)

If testimony by witnesses who have received extra legal compensation is to be received, liberal cross-examination should be permitted by the trial court on the subject of compensation to enable the jury better to pass on their credibility.

7. New trial ⇐28

Whether plaintiffs were entitled to a new trial because of payment of extra legal compensation by defendants to a defense witness was directed to the sound discretion of the trial court.

8. New trial ⇐28

Where it was not shown that testimony given by a defense witness was untrue, or that any different testimony would be given if new trial were ordered, and only new matter to be expected on new trial would be that witness had received extra legal compensation, trial court did not abuse its discretion in denying plaintiff's motion for new trial.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge pro tem.

Action by Sigrid Crutchfield and another against Davidson Brick Company and another for injuries sustained in an automo-

bile collision. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Nadia Williams, of Glendale, for appellants.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiffs commenced this action to recover a judgment for damages which they suffered when a car driven by Joe Booth, in which they were riding as guests, collided with a truck owned by defendant Davidson Brick Company and driven by its employee, defendant Carillo. They have appealed from a judgment in favor of defendants, entered upon the return of a jury's verdict.

The accident occurred on July 8, 1940, at the intersection of Main and Workman Streets in the city of Los Angeles. Witnesses for plaintiffs testified that Carillo entered the intersection before the "Go" signal was given. This was contradicted by witnesses for defendants, who placed the blame for the accident upon Booth.

[1, 2] Plaintiffs contend that the court erred in giving to the jury "abstract instructions" on the law of negligence as applicable to the conduct of the driver of the car in which they were riding as guests, he not being a party to the action. The instructions of which complaint is made cannot be classified as "abstract." They particularly set forth the code provisions governing the conduct of drivers in intersections and instruct the jury that if Booth violated the code provisions he was guilty of negligence as a matter of law and that if his negligence was the sole proximate cause of the plaintiffs' injuries the verdict should be in favor of defendants. Although the issue for the determination of the jury was whether defendant Carillo was guilty of negligence proximately contributing to plaintiffs' injuries, the jury of necessity was compelled to consider the conduct of the other driver while at and in the intersection, for the conduct of Carillo could depend to some extent at least upon the conduct of Booth. Defendants presented evidence that Booth entered the intersection against the signal and at a speed of 36 or 37 miles per hour. This was denied by witnesses for plaintiffs. In such a conflict in the evidence it cannot be held that plaintiffs were prejudiced by instructions enlightening the jury on the rights and duties of the two drivers. The instructions were very complete on all points involved and particularly informed the jury that the negligence of Booth could not be imputed to plaintiffs and could not defeat plaintiffs' recovery if the negligence of Carillo was a proximate cause of the injuries. Moreover, the criticized instructions were invited by several instructions given at the request of plaintiffs on the subject of the negligence of Booth, one of which is as follows: "You are instructed that the negligence of the driver of the Ford in which the plaintiffs were riding as the guests of Joe Booth, if you find from the evidence that they were guests of Joe Booth, cannot in law be imputed or charged against the plaintiffs, and if you find from the evidence that the plaintiffs Sigrid Crutchfield and Mary Wilson were not guilty of negligence and that the joint negligence of both drivers was the proximate cause of the injuries suffered by the plaintiffs, if any, your verdict should be for the plaintiffs and against defendants." These instructions concerning the "joint negligence of both drivers" having been given at the request of plaintiffs, the court did not err in giving instructions to the jury concerning the legal duties of both Carillo and Booth.

[3] After the jury had deliberated for several hours it returned to the court room for further instructions, and plaintiffs now assert that the oral instructions given on that occasion were confusing. Plaintiffs print in their brief only a part of the transcript of the proceedings at that point, asserting that "no purpose would be served to quote in full the oral instructions. * * *" Defendants have printed in their brief a complete and lengthy statement of the proceedings which took place when the jury returned from its deliberations and we find therefrom that the court made no error in its oral instructions. The court referred to the main points of the instructions which had theretofore been given, without undue emphasis upon the contentions of either party. We find nothing therein which could be held to be confusing or prejudicial.

A more serious question is presented by the denial of plaintiffs' motion for a new trial. A witness for defendants, Mrs. Jerry Mestas, testified at the trial that she was standing at the corner of Workman and Main Streets just before the accident;

that when the signal changed from "Stop" to "Go," she stepped from the curb and proceeded 9 or 12 feet into Main Street, when she heard the crash; that she had not seen the accident. This testimony tended to corroborate the statement of Carillo, who testified that he did not enter the intersection until the signal changed.

In support of their motion for a new trial plaintiffs filed an affidavit by Mrs. Mestas, in which she stated that she had told the attorney for plaintiffs and also the investigator for the insurance carrier of defendants that she had not seen the accident and knew nothing about it; that the investigator told her that if she would say she was waiting to cross the street to board a street car and had to wait for the "Stop" signal to change and as she saw the "Go" signal she proceeded to cross the street and then heard the crash, "it was all that was necessary. * * * He told me it would be worth $20 to the company and that he knew how much good that money would do me. He persuaded me to accept his offer." Plaintiffs also filed an affidavit by Carl Galen in which the affiant stated that Mrs. Mestas had told him that the investigator for the insurance carrier had paid her $10 on the day he first called on her although she informed him she knew nothing about the accident; that the investigator had called on her subsequently and had told her that she could be a witness even if she had not actually seen the accident provided she would give the testimony set forth in the affidavit of Mrs. Mestas.

[4-6] The practice of paying witnesses sums greater than the statutory fees on the theory that they are being compensated for their time or that they are being prevented from suffering financial loss is not to be commended. A deep knowledge of human nature is not necessary in order to draw the conclusion that a witness liberally compensated for his time by the party serving him with a subpoena will be apt to color his testimony, or at least to present it in the light most favorable to the party who compensated him. Witnesses who learn of the practice of paying extra compensation are confronted with the temptation to make terms for their testimony. In such a situation there is opportunity for oppressive and corrupt conduct. The danger of paying witnesses liberally for their services was pointed out in the early case of Dodge v. Stiles, 1857, 26 Conn. 463, where the court said that witness fees should be fixed by court at a moderate sum, "lest poor suitors should be unable to seek redress, and witnesses be tempted to lean toward wealth and power." The court observed that "parties generally find it for their interest to take good care of their witnesses." The practice under consideration has been growing in late years and it is now common knowledge that litigants having considerable business in the courts customarily "take good care of their witnesses." Numerous instances have occurred in the trial courts where public employees subpoenaed to disclose information gained in the discharge of their duties have received extra-legal fees for attendance in court, notwithstanding their salaries were being paid in full from the public treasury. If testimony by witnesses who have received extra-legal compensation is to be received, liberal cross-examination should be permitted by the trial court on the subject of the compensation to enable the jury to better pass upon their credibility.

[7, 8] Counsel for defendants point out that the trial commenced on June 9th and terminated on June 13th and that Mrs. Mestas was the last witness called to testify, and assert that the sum of $20 was not more than reasonable compensation for her time. It is not shown by the affidavits that the testimony given by Mrs. Mestas at the trial was untruthful or that any different testimony would be given if a new trial were ordered. The question whether a new trial should be ordered because of the payment of $10 to the witness on the occasion of the first visit of the investigator and the subsequent payment of the additional sum of $10 was directed to the sound discretion of the trial court. The only new matter to be expected upon a new trial would be from the additional cross-examination of Mrs. Mestas, in which information could be elicited concerning her receipt of $20. The trial judge was in the best position to determine whether a different verdict would be reasonably expected upon the receipt by the jury of the information contained in the affidavits. It cannot be held that the court abused its discretion in deciding this issue adversely to plaintiffs.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

55 Cal.App.2d 13

CARTER v. CARTER et al.

Civ. 12116.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1942.

1. Exemptions ⇐148

Under statute limiting exemption of a judgment debtor's earnings to those received for personal services rendered within 30 days next preceding a levy, judgment debtor has burden to establish his right to the exemption. Code Civ.Proc. § 690.11.

2. Exemptions ⇐148

Where debtor had claimed as exempt a specified sum of a bank account upon which execution had been levied, debtor had burden to prove by a preponderance of evidence that the amount claimed as exempt was received for his services rendered within 30 days next preceding the levy. Code Civ.Proc. § 690.11.

3. Exemptions ⇐148

Evidence was insufficient to meet judgment debtor's burden of proving that amount claimed to be exempt from execution levied upon a bank account had been received for his services rendered within 30 days next preceding the levy so as to entitle debtor to the exemption. Code Civ. Proc. § 690.11.

4. Fraudulent conveyances ⇐57(5)

Where judgment debtor owed $5,404.75 to judgment creditor and owned property amounting to less than $5,000 at time of establishment of joint bank account with wife, judgment debtor was "insolvent" so that deposits in the account were governed by statute declaring void, voluntary transfers by an insolvent party and statute declaring fraudulent, conveyances without fair consideration by an insolvent person. Civ.Code, §§ 3439.04, 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvent".

5. Fraudulent conveyances ⇐300(5)

In execution proceedings against bank account standing in name of debtor and his wife, where debtor and wife sought to avoid effect of statutes declaring void, voluntary transfers by an insolvent party and declaring fraudulent transfers without fair consideration by such person, by contention that wife's interest in the deposit was in consideration of advances to debtor, trial court was justified in disregarding testimony of advances given only in uncertain terms, where no evidence of amount of such advances was introduced. Civ.Code, §§ 3439.04, 3442.

6. Fraudulent conveyances ⇐57(1)

A home exempt from execution could not be included in the "assets" in determining judgment debtor's solvency, so as to avoid effect of statute declaring voluntary transfers by an insolvent party void as to existing creditors. Civ.Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Assets".

7. Fraudulent conveyances ⇐57(1)

One controlling property out of which he may voluntarily pay his debts, but which cannot be reached by process of law, is "insolvent".

8. Execution ⇐192

Under statute requiring a third party claim to be deemed controverted by plaintiff, judgment creditor was not required to plead judgment debtor's insolvency and voluntary gift to third party claimant in answer to third party claim to bank account upon which execution had been levied. Code Civ.Prac. § 689.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Execution proceedings by Edith W. Carter against William L. Carter, wherein Edessa Carter filed a third party claim. From adverse orders, William L. Carter and Edessa Carter appeal.

Affirmed.

Frank J. Baumgarten, of San Francisco, for appellants.

McGuire & Lahanier, of San Francisco, for respondent.

DOOLING, Justice pro tem.

On May 16, 1941, respondent herein caused a writ of execution to be levied upon a bank account standing in the names of appellants, who are husband and wife. The writ of execution was issued upon a judgment against appellant husband. Appellant

husband filed an affidavit claiming the sum of $251.87 to be exempt from execution under section 690.11 of the Code of Civil Procedure. Appellant wife filed a third party claim alleging title to one-half of the amount in the bank account. The two matters were heard together and from an order denying the claim of exemption and adjudging title to the entire bank account to be in appellant husband this appeal was taken.

[1-3] The exemption granted by section 690.11 of the Code of Civil Procedure is limited to "the earnings of the defendant or judgment debtor received for his personal services rendered at any time within thirty days next preceding the levy of attachment or execution." The burden of proof is on the judgment debtor to establish his right to the exemption. Bertozzi v. Swisher, 27 Cal.App.2d 739, 81 P.2d 1016; Petrich v. Francis, 83 Cal.App. 72, 256 P. 444; Murphy v. Harris, 77 Cal. 194, 19 P. 377. It was therefore incumbent upon appellant to prove by a preponderance of evidence that the amount claimed to be exempt from execution was "received for his services rendered * * * within thirty days next preceding the levy." Appellant husband failed to meet this burden.

He testified that he sells drapery and upholstery goods on commission in San Francisco for two New York firms. The practice is for him to forward checks to these firms for goods sold and they in turn mail checks to him for the commissions earned. He did not recall what items made up the amount of $251.87 claimed to be exempt. He merely added up all the deposits made in his account within thirty days of the levy. He keeps no books and had no record of his earnings except his deposits and an informal record that he keeps to enable him to make an income tax return. It is obvious from this summary of his testimony that he failed to prove that any part of the sum as to which he claimed an exemption was for "services rendered within thirty days next preceding the levy." He failed completely in fact to prove when any of such services were actually rendered.

Appellant wife's claim of title to one-half of the bank account was based on the following facts: In 1935 the account was opened by Mr. Carter with a deposit of $250. It was apparently in the form of a joint account in the names of both appellants although the signature card executed by the parties was not produced on the hearing. There was testimony introduced from which the court might have found that Mr. Carter intended to make a gift of one-half of the amount in the account to his wife. Appellants contend, indeed that the evidence compels such a finding. In our view of the case we need not decide this question.

Before the opening of the joint bank account appellant husband had been served with the summons and complaint which resulted in the judgment upon which the execution here in question issued. The judgment in that action was for $5,404.75. The appellant husband gave the following answer to the following question:

"Q. Isn't it a fact at all times since the early part of 1935, up to the present time, all of your assets and property at any one occasion during that entire period amounted to less than $5,000? A. Well, I would say they amounted to less, yes."

[4] It is clear that, with an admitted debt of $5,404.75 to plaintiff and assets and property amounting to less than $5,000, appellant husband was at all times since the establishment of the bank account insolvent. Dixon Lumber Co. v. Peacock, 217 Cal. 415, 19 P.2d 233, Cain v. Richmond, 126 Cal.App. 254, 14 P.2d 546. Being at all times insolvent all deposits in the joint account, until its repeal in 1939, were governed by Civil Code, section 3442, which provided "that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." Lefrooth v. Prentice, 202 Cal. 215, 228, 229, 259 P. 947. The same rule would apply to all deposits thereafter made under Civil Code, section 3439.04.

[5-7] Appellants seek to avoid the effect of these code sections by two contentions: (1) That the gift to the wife of an interest in the deposits was in consideration of advances made by her to the husband; and (2) that the husband did have assets in excess of his debt to plaintiff. As to the first claim no evidence was introduced of the amount of any such advances and the trial court was justified in disregarding testimony of advances given only in vague and uncertain terms. The second claim requires the inclusion of appellant's home among his

assets and he testified that the home was covered by a homestead. A home exempt from execution could not be included in the assets in determining appellant husband's solvency. "A man controlling property out of which he may voluntarily pay his debts, if he will, but which for any reason cannot be reached by process of law, and thus without his consent subjected to such payment, is nevertheless insolvent." Adams v. Prather, 176 Cal. 33, 41, 167 P. 534, 538.

[8] Appellants also point out that plaintiff did not plead the facts of insolvency and voluntary gift in answer to the third party claim. She was not required to do so under Code of Civil Procedure section 689 which provides: "The third party claim * * * shall be deemed controverted by the plaintiff or other person in whose favor the writ runs." Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 213, 155 P. 986.

The orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



54 Cal.App.2d 575

In re BROWN'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. Tum SUDEN

Civ. 12177.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1942.

1. Pleading ⇐418(1)

When a party refuses to stand upon his demurrer, but goes to trial where the alleged deficiencies of the petition are cured by the proof, he cannot thereafter attack the pleadings, unless he has been prejudiced thereby.

2. Pleading ⇐418(2)

Any defect in petition by executor of surviving widow for payment of her one-half community interest in predeceased husband's estate for failure to allege condition of husband's estate as to extent of general indebtedness was "waived" by administrator and parties interested in husband's estate when they proceeded to trial after demurrer to petition was overruled and aided in proof of facts as to condition of estate by stipulation to a submission upon the record. Probate Code, §§ 201, 1000, 1001.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

On petition for rehearing.

Petition for rehearing denied.

For prior opinion, see 129 P.2d 713.

Weinmann, Quayle & Berry and Donald K. Quayle, all of Oakland, and George Olshausen, of San Francisco, for appellants.

Walter K. Olds, and Richard tum Suden, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

In their petition for a rehearing the appellants criticize the portion of the opinion relating to nonapplication of section 1000 of the Probate Code. They say we have misstated the law of inheritance to such extent that a rehearing should be granted and the order reversed. We endeavored to draw a distinction between the language of 201 of the code, which declares that one-half of the community interest "belongs to" the surviving spouse, and the language of that and similar sections which declare that the community interest of the spouse, in absence of testamentary disposition "goes to" the surviving spouse. We expressed the view that the restrictions of section 1000 related to a petition for "distribution" of the estate of the deceased spouse on behalf of an "heir, devisee or legatee", succeeding as such to the community interest of the deceased spouse, rather than to a petition of the surviving spouse for an assignment to her of her own community interest. But we did not intend to enter the controversy over the status of the surviving wife's interest in community property under the code sections arising out of the amendments of 1923 and 1927. We merely endeavored to emphasize the weakness of the contention that sections 1000 and 1001 should be strictly construed.

[1, 2] But, if we were in error in this view of the law, we are unable to perceive how it is material to the decision. The settled rule is that when a party refuses to stand upon his demurrer, but goes to trial

where the alleged deficiencies of the petition are cured by the proof, he will not be permitted to attack the pleading, unless he has been deceived, or prejudiced thereby. 21 Cal.Jur. p. 273. Here the appellants not only waived whatever defects may have been asserted in the petition by reason of sections 1000 and 1001 of the code, but they aided in the proof of those facts by their stipulation.

The petition for rehearing is denied.



55 Cal.App.2d 68

HONSBERGER et al. v. DURFEE.

Civ. 11985.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1942.

Rehearing Denied Nov. 18, 1942.

Hearing Denied Dec. 17, 1942.

1. Trial ⇐397(6)

Where answer alleged many facts of affirmative matter, trial court, in finding all allegations of amended complaint and answer true except as otherwise expressly found, in effect found in favor of defendant as to all affirmative allegations set up in answer not expressly found against defendant.

2. Records ⇐9(13)

Where landowner claimed right of way for surface waters over adjacent land by virtue of recital to that effect in certificate of registration of title issued to adjacent landowner, whether deed of conveyance to adjacent landowner recited such easement was immaterial. Gen.Laws 1937, Act 8589.

3. Records ⇐9(13)

Where defendant's predecessor in title under agreement with adjacent landowner, and in order to drain surface water accumulating on the premises of both, constructed a pipe line along boundary line and across adjacent land and certificate of registration of title subsequently issued to adjacent landowner's successors in title contained an exception of a right of way for storm waters, defendant was entitled to an easement over adjacent land for the maintenance of such drainage pipe.

4. Judgment ⇐256(1)

Judgment, refusing to enjoin defendant from repairing pipe line laid by his predecessor in title under agreement with adjacent landowner along boundary line and across adjacent land to drain surface waters accumulating on the premises of both, was not inconsistent with finding that adjacent land was not by terms of deed conveyed subject to any easement in writing of record in favor of defendant and his predecessor in title, but that certificate of registration of title issued to plaintiffs recited that parcel across which pipe line was constructed was subject to right of way for storm waters. Gen.Laws 1937, Act 8589.

5. Judgment ⇐256(1)

Judgment, refusing to enjoin defendant from repairing pipe line constructed under agreement with adjacent landowner along boundary line and across adjacent land to drain surface waters accumulating on the premises of both, was supported by findings and allegations of answer adopted by court showing pipe line from 1903 to 1939 was used amicably and by claim of right by both parties in the manner for which it was installed, notwithstanding finding that no claim of ownership or interest of or in pipe line was made by defendant or his predecessor in interest in proceedings by plaintiffs to register title to the adjacent land, or thereafter until March, 1939. Gen.Laws 1937, Act 8589.

6. Estoppel ⇐93(7)

Where adjacent landowners agreed that one party should construct a pipe line along boundary line and across the land of the other to drain off surface waters accumulating on the premises of both, after installation of the pipe line each party was "estopped" in any litigation arising out of the use of such line according to the terms of the agreement from claiming that such agreement was invalid because not reduced to writing.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Appeal and error ⇐934(2)

On appeal from judgment refusing to enjoin defendant from repairing pipe line constructed by his predecessor in title un-

der agreement with adjacent landowner along boundary line and across adjacent land to drain off surface waters accumulating on the premises of both, District Court of Appeal must assume in support of judgment that there was evidence that right of way for storm waters mentioned in certificate of registration of title to adjacent land issued to plaintiffs was the identical right of way involved in the action, where nothing to the contrary appeared of record. Gen.Laws 1937, Act 8589.

8. Records ⇐9(13)

Judgment, refusing to enjoin defendant from repairing pipe line constructed by his predecessor in title under agreement with adjacent landowner to construct a pipe line along boundary line and across adjacent land to drain off surface waters accumulating on the premises of both, did not ignore legal effect of decree pursuant to which two certificates of registration of title to adjacent lands were issued to plaintiffs, one of which certificates recited that parcel to which it related, being the parcel on which pipe line was laid, was subject to right of way for storm waters, while the other contained no such exception, but expressly followed such decree. Gen.Laws 1937, Act 8589.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by William Ransom Honsberger and others against J. Ross Durfee to enjoin the maintenance of a nuisance and for other relief. From parts of a judgment entered on findings awarding to plaintiffs certain relief and denying relief as to other matters, plaintiffs appeal.

Judgment affirmed.

J. Vincent Hannon and T. G. Dalton, both of Los Angeles, for appellants.

Franklin B. MacCarthy, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiffs commenced this action to obtain a decree enjoining the maintenance of a nuisance and for other relief. The defendant answered by setting up certain denials and alleging many facts of affirmative matter. The trial court made findings awarding to the plaintiffs certain relief and denying relief as to other matters. From parts of the judgment entered therein the plaintiffs have appealed and have brought up the judgment roll only.

The controversy involves the maintenance of two sets of drainage conduits. The defendant owns Lots 1 and 2 and the plaintiffs own Lot 3 of Block H of the subdivision of Rancho Potrero de Felipe Lugo in Los Angeles County. The two properties are adjacent and are located on the southerly side of Slack Avenue. Both properties are bothered with accumulated surface waters. In 1903 J. D. Durfee, the owner at that time of Lots 1 and 2, and Elizabeth Mulholland, the then owner of Lot 3, entered into an agreement that the former should lay a drainage pipe. He did so. Commencing at Slack Avenue he laid a pipe line 16 inches in diameter extending at right angles upon and along the boundary line between said properties south 10 chains and thence at right angles 20 chains or thereabouts. The head of the line was a catch basin or box located at the surface of the ground. The outlet of the line was exposed at the surface of the ground on the lands of Elizabeth Mulholland. That pipe line has been in use ever since. In 1913 the plaintiffs bought two parcels from Elizabeth Mulholland, each parcel is described in the amended complaint by courses and distances. In the amended complaint there was inserted a map. This court is unable from such data to ascertain what part of the map portrays parcel 1 and what part parcel 2 of plaintiffs' lands. In 1917 the plaintiffs commenced a proceeding, LR-174, to register their lands under the Land Title Law Stats.1915, p. 1932, Deering's Gen.Laws, 1937, Act 8589. There were issued to them two certificates numbered respectively A-3872 and A-3873. The latter covered the land where the first course (hereinabove described) of the said pipe line was located. Said certificate contains an exception: "Subject right of way for storm waters." The other certificate contains no such exception. But the record does not show that the pipe line or any part thereof was laid in, or extended into, any part of the lands described in certificate A-3872.

In 1920 J. D. Durfee died and this defendant inherited from him Lots 1 and 2. In March, 1939, the defendant made certain alterations and repairs to said pipe line. He also constructed two sluices laying parallel with Slack Avenue and a short distance west of it. He connected those sluices with said pipe. By its decree the trial

court enjoined the maintenance of said sluices. From said portion defendant appealed, but he has dismissed his appeal and said portion of the decree need not be further discussed. But the trial court refused to enjoin defendant from making proper repairs to said pipe line. Of that refusal the plaintiffs complain. They contend the findings do not support the judgment.

[1] Before discussing each finding so attacked it is important to note that the first two findings were as follows:

"I. That all of the allegations of the complaint herein filed as amended by the amendments herein filed are true except as hereinafter otherwise expressly found.

"II. That all of the allegations of the defendant's answer herein are true except as hereinafter otherwise expressly found." In view of those findings it follows that every affirmative allegation set up by the defendant which is not expressly found against him is, in effect, found in his favor.

[2, 3] The first finding which the plaintiffs attack is: "VIII. That it is not true that by the terms of the deed by which the plaintiff, William Honsberger, acquired title to said premises, the said title was conveyed subject to any easement or right of way in writing of record across the same, or any part thereof, in favor of said defendant, or his predecessor in interest, or otherwise or at all. It is not true that in the decree of registration of said lands insofar as the first described piece or parcel of land is concerned, and it is not true that in the registrar's certificate issued in pursuance of said decree, the first described piece or parcel of land was made subject to any easement or right of way for storm waters or for any other purpose. It is true that by the terms of said decree and by certificate of the registrar of land titles issued thereon, the second described parcel of land does contain the words: 'Subject, right of way for storm waters.' The court finds that the defendant entered upon the said plaintiff's lands and did certain work thereon over the protest of the said plaintiff and in disregard to the rights of the said plaintiffs, but the same were not done with malicious intent to injure plaintiff but under belief that the defendant had the right to so construct underground flumes and connect the same with the said pipe line, in which said belief defendant was mistaken." As to what was the wording of the deed to William Honsberger we are not concerned. As the plaintiff contends his rights are governed by the recitals in his certificate. Cooper v. Buxton, 186 Cal. 330, 332, 199 P. 6. However, as shown above, certificate A-3873, only, is involved. That certificate contained an exception of a "right of way for storm waters." The trial court, in effect, held such right of way was the identical way for which the defendant contended. It follows that the defendant clearly had an easement.

At all times looking upon the case as presenting solely the rights of a single owner regarding his right to discharge excess flood waters or surface waters, the plaintiffs make said attacks on said findings. But this is not such a case. Prior to 1903 both the owner of Lot 1 and Lot 2, and the owner of Lot 3, were confronted with a problem of disposing of surface waters. Some of such waters accumulated on Lots 1 and 2, some accumulated on Lot 3. It was so alleged by the defendant. The very location of the pipe line shows, and defendant alleged, that drainage was attempted to be accomplished for both properties. The pipe line began on the boundary line of the two properties. It ran 10 chains thereon. Obviously it drained from the right and from the left. In its continuing course it was laid on the lands of Elizabeth Mulholland. In that course it intercepted waters which would have flowed off the Mulholland lands onto the lands of the defendant. As to that matter the record does not speak. The evidence is not before us, and this court is wholly unable to say that any finding is not supported by the evidence or that the findings do not support the judgment.

[4] Reading together the express findings of the trial court (and the allegations of the defendant which the trial court adopted), no inconsistency whatever appears and neither does it appear that the trial court failed to give full force and effect to the decree rendered in the preceding hearing number LR-174, supra.

[5] The plaintiffs further contend that: "Said court further found that no claim of ownership or interest of any kind or nature in or to the said pipe line on the said lands of plaintiffs was made by said defendant or his predecessor in interest in said proceedings, and that no claim was thereafter made by the said defendant or his predecessor in interest in or to the said pipe line or in or for the use thereof, or of any

easement, or right of way, or for the maintenance thereof, over, under or across plaintiffs' lands until during or about the month of March, 1939." Conceding the contention as made, it leads nowhere. The allegations of the pleadings adopted by the learned chancellor, and his express findings made in addition thereto, show that the said pipe line was, from the time it was constructed in 1903, down to 1939, used amicably and by claim of right by both parties in the manner and for the purposes for which it was installed. That was sufficient. Humphreys v. Blasingame, 104 Cal. 40, 42, 37 P. 804. The contentions above recited are not controlling.

[6] Throughout their brief the plaintiffs contend the facts show that the defendant had no easement, that the trial court so found, and therefore the judgment is not sustained by the findings. All of these contentions are based on a failure to comprehend the meaning of the findings when they are fairly construed. The defendant pleaded the facts. The court, with immaterial exceptions, found those facts to be true. Those facts were that the lands now owned by the plaintiffs and the lands now owned by the defendant were bothered by the accumulation of surface waters. Some of those waters flowed from defendant's side. Some flowed from plaintiffs' side. To dispose of all of such waters, Elizabeth Mulholland and J. D. Durfee entered into a bilateral agreement. Elizabeth Mulholland furnished the ground in which to lay a part of the pipe line. Both furnished the ground to lay another part of the line. J. D. Durfee furnished the labor and materials to lay the whole line. The entire agreement was fully executed in 1903. From then to 1939 the pipe line was used by both parties and their successors in interest. By the terms of the agreement each party obtained certain rights adverse to the other and each acquired an interest in the use of said line. After the pipe was installed in 1903 each party was estopped, in any litigation arising out of the use of said line according to the terms of said agreement, from claiming that said agreement was invalid because it was not reduced to writing (Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154, 12 Cal.Jur. 933) and the trial court so held.

[7, 8] The rights of the parties so stood when in 1918 the above mentioned certificate, No. A-3873, was issued in the said proceeding hereinabove mentioned, Number LR-174. In that decree it was held that plaintiffs' said lands were subject to a right of way for flood waters. Nothing to the contrary appearing in this record, we must assume in support of the judgment that there was evidence to the effect that said right of way so enumerated was the identical right of way involved in this action. It follows that the decree under attack did not ignore the legal effect of the decree rendered in the proceeding numbered LR-174 but on the contrary expressly recognized and followed it.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



LOS ANGELES WAREHOUSE CO. v. AMERICAN DISTILLING CO.*

Civ. 12066.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1942.

Rehearing Denied Nov. 16, 1942.

Hearing Granted Dec. 14, 1942.

1. Internal revenue ⇐1272

The fact that government proceeded against internal revenue bonded receiving warehouse on its bond for tax on distilled spirits which were destroyed while in transit from distiller and owner, or the fact that it was the rule of the Internal Revenue Department that all remedies should be exhausted against the bond of the receiving warehouse before proceeding against the distiller, did not determine the rights between the distiller and the receiving warehouse, with respect to the tax. 26 U.S.C.A. Int.Rev.Code, §§ 1 et seq., 2800(a)(1), (c, d), 2879(b, c).

2. Internal revenue ⇐1751

An internal revenue bonded warehouse, which contracted to receive distilled spirits from the distiller and owner for storage, and which was required by the government to pay the tax on the spirits when they were destroyed in transit, in accordance with bond given by warehouse to the government, was entitled to recover the amount

* Subsequent opinion 139 P.2d 641.

of the tax from the distiller and owner. 26 U.S.C.A. Int.Rev.Code, §§ 1 et seq., 2800 (a) (1), (c, d), 2879(b, c).

3. Money paid ⇐1

Where president of distiller and owner distilled spirits suggested to internal revenue bonded warehouse, to which the spirits were being sent for storage when they were destroyed, that the warehouse use every means possible to have the internal revenue department remit or cancel tax on the spirits, and warehouse, in attempting to secure a remission and abatement of the tax, expended $100 for legal fees and $105.93 as premium on bond which it was required to file as part of its claim, but was unable to obtain an abatement, distiller and owner was liable to warehouse for the legal fee and charge for premium.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by the Los Angeles Warehouse Company against the American Distilling Company to recover certain sums of money allegedly paid out by plaintiff for the use and benefit of defendant. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Norman A. Eisner, of San Francisco, for appellant.

Sherman Anderson, of Los Angeles, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover certain sums of money allegedly paid out by plaintiff for the use and benefit of defendant. From a judgment in favor of plaintiff, defendant prosecutes this appeal.

The case was tried on an agreed statement of facts and on evidence introduced by the parties. The essential facts are not in dispute and are as follows:

Plaintiff and defendant are both California corporations. Plaintiff operates an internal revenue bonded warehouse for the storage of distilled spirits in Los Angeles. Defendant is a distiller and operates an internal revenue bonded warehouse at Sausalito, and maintains offices in San Francisco and Los Angeles. Prior to October 11, 1938, the San Angelo Corporation, engaged in Los Angeles in the wholesale liquor business, verbally ordered from defendant twenty-five drums of gin, to be delivered by defendant to plaintiff's warehouse in Los Angeles for storage. Under the law governing the transmission of spirits from one bonded warehouse to another, and as a prerequisite to obtaining permission of the Internal Revenue Department for such transfer, it was necessary for the receiving warehouse (plaintiff) to fill out and file government form No. 236, containing detailed information concerning the shipment and designating the name of the transporting agency. The defendant, the sending warehouse, the distiller-owner of the gin, furnished plaintiff, the receiving warehouse, with the requisite information, and also instructed plaintiff that it should designate the Evans Freight Lines, Inc., a motor carrier, as the transporting agency. The plaintiff filled out and filed the proper form with the Alcohol Tax Unit of the Internal Revenue Department. The law also required warehouses to furnish the government a transportation and warehousing bond to insure payment of all taxes due on the liquor deposited in the warehouse. This bond was also to cover such liability for taxes while the liquor was in transit to the receiving warehouse. Pursuant to this requirement plaintiff was bonded to the United States in the sum of $200,000. That bond provided that it was to cover the obligation of plaintiff to pay the tax imposed by law on all liquor deposited in the warehouse, "and on all distilled spirits now or hereafter in transit thereto from any distillery. * * *"

On October 14, 1938, the Alcohol Tax Unit authorized the transfer of the gin and the Evans Freight Lines, Inc., received the gin from defendant's warehouse in Sausalito consigned to defendant. It is conceded that title to the gin did not pass to San Angelo Corporation but remained in defendant, and that defendant assumed and was liable for all transportation charges. While the gin was in transit and in the physical custody of Evans Freight Lines, Inc., the carrying vehicle collided with another vehicle, and the gin was completely destroyed in the ensuing fire. At the time the gin was destroyed the tax imposed on distilled spirits had not been paid. By the provisions of the Transportation Act of 1920, 41 Stat. 456, and of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code § 1 et seq., it was provided that there was an abatement of the tax on liquor destroyed in transit when such liquor was being trans-

ported by certain designated agencies, but it is admitted that such abatement provisions did not apply to liquor destroyed while being transported by an agency of the type of Evans Freight Lines, Inc. Admittedly, the tax imposed by the United States on such liquor by the provisions of the Internal Revenue Code was due and payable to the United States upon the destruction of the liquor.

After the liquor had been destroyed there was considerable correspondence between defendant and plaintiff as to what should be done. On October 25, 1938, an officer of defendant in San Francisco wrote to the manager of the defendant's Los Angeles office ordering him to "request" plaintiff to file for a remission of the tax. Upon receipt of this "request" plaintiff immediately by letter requested the Alcohol Tax Unit to remit the anticipated tax of $4,708.13. Substantial correspondence was then carried on between plaintiff, defendant, and the Alcohol Tax Unit in an effort to secure a cancellation, abatement or remission of the tax. The Alcohol Tax Unit took the position that the tax was due and must be paid. By letter dated March 30, 1939, plaintiff informed defendant that the collector of internal revenue had denied all requests to abate or remit the tax and had ordered that the tax be paid by plaintiff within ten days of March 29th, and requested defendant to send a check to plaintiff in the required amount. Defendant replied to this letter under date of April 3, 1939, and, among other things, stated: "I suggest you use every means possible to have the Department remit or cancel this charge, and after that is definitely settled and the money is paid then we can go further into the matter." When this letter was sent, defendant had already received a communication from the office of the district supervisor of the Alcohol Tax Unit informing defendant that "no tax will be assessed against The American Distilling Company in this case." On April 7, 1939, plaintiff filed a written claim for abatement of the tax, and as part of such claim was required to post a bond, the premium for which was $105.93. In June of 1939 plaintiff filed a supplemental claim. Plaintiff expended $100 for legal advice reasonably required in the preparation and filing of these claims.

In due course the claim was denied, and on August 3, 1939, plaintiff paid to the collector of internal revenue the sum of $4,809.21—the amount of the tax, plus due interest. Plaintiff immediately demanded that it be reimbursed for these various sums by defendant, and, upon defendant's refusal to pay, instituted this action.

The trial court found that the money so paid out by plaintiff was paid in pursuance to authority given plaintiff by defendant, was paid at defendant's direction, and was paid out in defendant's behalf and for defendant's benefit, and rendered its judgment in favor of plaintiff. On this appeal defendant urges that under the provisions of the law, and the regulations made thereunder, when bonded liquor is damaged or destroyed in transit the primary obligation is upon the receiving warehouse, and that the owner or distiller is not liable, except secondarily, for such tax.

The Internal Revenue Code, and the regulations made thereunder, provide a complete system for the imposition and collection of taxes on distilled spirits. Under the provisions of section 2800(a)(1) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev. Code § 2800(a) (1), it is provided that: "There shall be levied and collected on all distilled spirits (except brandy) in bond or produced in or imported into the United States an internal revenue tax at the rate of $2.25 (and on brandy at the rate of $2.00) on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond." Section 2800(c) provides as follows: "The tax shall attach to distilled spirits * * * as soon as this substance is in existence as such * * *." Section 2800(d) provides as follows: "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

It is to be noted that under these sections, as soon as the distilled spirits come into existence, the law imposes a tax upon the distiller of such liquor. That liability continues until the tax is paid. However, the government recognized that such spirits are frequently kept in bond for several years before sale or resale. It was therefore provided by section 2879(b) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 2879(b), that: "The tax on all distilled spirits hereafter entered for deposit in internal revenue bonded warehouses shall be

due and payable before and at the time the same are withdrawn therefrom and within eight years from the date of the original entry for deposit therein; and warehousing bonds hereafter taken under the provisions of the internal revenue laws shall be conditioned for the payment of the tax on the spirits as specified in the entry before withdrawal from the internal revenue bonded warehouse, and within eight years from the date of said entry." Subdivision (c) provides that: "The Commissioner shall prescribe the form and penal sums of bonds covering distilled spirits in internal revenue bonded warehouses and in transit to and between such warehouses: Provided, That the penal sums of such bonds covering distilled spirits shall not exceed in the aggregate $200,000 for each such warehouse."

It will be noted that under this section the distiller may keep the spirits in bond for eight years before the tax is payable. If it is withdrawn within eight years of original entry the tax is payable on withdrawal. Thus, in the present case, had the gin reached plaintiff's warehouse, plaintiff would have stored the gin until it was withdrawn from bond by San Angelo Corporation. At the time of withdrawal plaintiff would have collected the tax from San Angelo Corporation and paid the same to the government.

[1] Section 2879 above quoted also recognized that liquor might be transferred from one bonded warehouse to another before it was withdrawn from bond, and that the spirits might be injured or destroyed in transit or while so stored. The section therefore authorized the commissioner to prescribe the form of bonds to cover the bonded liquor while in transit to, or in possession of, receiving warehouses. It was pursuant to this provision that the commissioner required as a condition to authorizing bonded liquor to be transferred from one bonded warehouse to another, that all receiving warehouses post a bond to protect the government's right to the tax while the spirits were in transit to, or in possession of, the receiving warehouse. The bond posted by plaintiff expressly guaranteed the payment of the tax to the government by plaintiff in the event the liquor was withdrawn from bond from plaintiff's possession, or was destroyed while in transit to plaintiff. For this reason there can be no doubt, and it is a conceded fact, that under the bond plaintiff was liable to the government for the tax. It is equally apparent that under the provisions of the Internal Revenue Code first above quoted, the distiller has a continuous liability for the payment of the tax from the moment the spirits come into existence until the tax is paid. The fact that as between the government and the taxpayer, the government proceeded against plaintiff on its bond, or the fact that it is the rule of the department that all remedies should be exhausted against the bond of the receiving warehouse before proceeding against the distiller and owner, does not determine the rights between the distiller-owner and the receiving warehouse. The real question presented in this case is not who is liable to the government in the first instance for the tax, but as between persons who are both liable, upon whom, as between themselves, does the ultimate liability rest?

Defendant argues that the primary liability was not upon it to answer for the tax, but upon plaintiff. It points out that the liquor was traveling under plaintiff's bond at the time it was lost, and contends the risk of loss is the normal risk assumed by the receiving warehouse as part of its business. It urges that the receiving warehouse should insure itself against such risk and regulate its charges accordingly.

As already pointed out, there is no escape from the conclusion that, insofar as liability to the government is concerned, plaintiff was directly liable. Under the provisions of its bond plaintiff was clearly liable to the government for the tax on liquor in transit to its warehouse. There also can be no doubt but that the Internal Revenue Department has ruled that, so far as the government is concerned, it will always first proceed against the bond of the receiving warehouse. Defendant treats this as conclusive of the present controversy. We do not think this conclusion follows.

[2] It is apparent from an examination of the entire act that what the act has done is this—it has provided for a tax on the distiller-owner which is imposed upon the distilled spirits the moment they come into existence. That liability continues from that moment until the tax is paid. At no time is the distiller-owner released from that fundamental liability. The act also provides for a pyramiding of the tax liability. As the distilled spirits move from one bonded warehouse to another during the eight-year period, the law requires the receiving warehouse to assume liability to the government for the payment of the tax if

the spirits are removed from bond while in its custody. That provision does not relieve the distiller-owner from the ultimate responsibility. The tax is imposed "on all distilled spirits" (§ 2800(a) (1) of the Internal Revenue Code, supra), not on the mere temporary custodian or upon the privilege of acting as custodian. The mere fact that the law requires the tax to be collected from the custodian is a neutral circumstance in determining the ultimate liability between the distiller-owner and the custodian. The provision requiring the custodian to pay the tax to the government was passed to expedite collection of the tax. In the normal transaction the custodian is the logical person to pay the tax because the buyer of the spirits normally removes them from bond from the possession of the custodian, pays the custodian the tax, and the custodian pays the government. When, as in the present case, the liquor is destroyed in transit to the receiving warehouse, the theory is that while in transit such spirits are in the legal custody of the receiving warehouse, and, by their destruction, have been removed from bond from such custody. Under the terms of section 2879 of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 2879, the tax is payable when the liquor is removed from bond, or, in any event, within eight years from the date of original entry. If defendant is correct in its contention that as between it and the receiving warehouse the primary and ultimate responsibility is upon the receiving warehouse, and it, as between it and the receiving warehouse, is not liable, it would mean that a distiller-owner could store distilled spirits in the bonded warehouse of another and leave it there so stored for over eight years. The receiving warehouse would have to pay the tax at the end of eight years, and thereafter, if defendant is correct, the distiller-owner could remove the spirits from bond without paying or refunding the tax to the custodian warehouse. If defendant is correct, the distiller would be completely and forever free from liability once the spirits passed into the hands of a bonded warehouse. That is not the law. San Angelo, etc., Corp. v. South End W. Co., 19 Cal.App.2d Supp. 749, 61 P.2d 1235; American D. Co. v. Hollywood S. Co., 28 Cal.App.2d 439, 82 P.2d 711.

From the above analysis it follows that as between the receiving warehouse and the distiller the ultimate and fundamental responsibility rests upon the distiller. The tax is not imposed on custody, but on the spirits themselves, and those spirits were distilled by defendant. When plaintiff paid the tax, as it was required to do, it was not paying its debt, but the debt of defendant. Plaintiff's primary responsibility to the government for the tax was simply the result of Congress' attempt to facilitate the administration of the tax provisions, and the collection of the tax. There was no attempt by Congress to regulate the responsibility as between the distiller-owner and the receiving warehouse for the tax. That liability is ultimately imposed on the distiller-owner, and not on the temporary custodian of the liquor.

[3] Defendant makes a separate attack on the inclusion in the judgment of the $100 legal fee and the $105.93 charge for the bond, both reasonably expended by plaintiff in its attempts to secure a remission and abatement of the tax. The record shows that Buck, president of defendant, by letter dated April 3, 1939, addressed to plaintiff, suggested plaintiff "use every means possible to have the Department remit or cancel this charge" and then stated, "after that is definitely settled and the money is paid then we can go further into the matter." The legal advice and bond were secured after that letter was received. It is obvious from that letter and the other correspondence that the parties were not sure who was ultimately responsible for the tax, and that defendant authorized plaintiff to try and get an abatement and to that end to use all reasonable means. Since we have held that the ultimate responsibility rested on defendant, it is obvious that the challenged expenditures were made on defendant's behalf, for its use and benefit, and at its request.

For the foregoing reasons the judgment appealed from is affirmed.

WARD, J., and WAGLER, Justice pro tem., concurred.

55 Cal.App.2d 16

PEOPLE v. SHACK.

Cr. 3591.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1942.

1. Criminal law ⇐633(2)

Defendant was not entitled to reversal of conviction because amended information was not read to jury at trial as required by statute, where court's transcript disclosed that reading of amended information was waived, and reporter's transcript revealed that when case was called for trial, defendant's counsel stated that he waived the reading of the information. Pen.Code, § 1093, subd. 1.

2. Criminal law ⇐1186(4)

Where deputy district attorney persisted in asking immaterial and incompetent questions, but his efforts were successfully thwarted by decisive rulings of trial judge on timely objections interposed by defendant's counsel, and court admonished jury that if any counsel intimated by questions which the court has not permitted to be answered, that certain things are, or are not, true, jury must disregard such questions, and refrain from any inferences based on them, there was no prejudicial "misconduct." Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Criminal law ⇐633(1)

A defendant, whether guilty or innocent, is entitled to be tried according to recognized rules of evidence and procedure.

4. Criminal law ⇐1144(15)

On appeal, District Court of Appeal was required to assume that jury heeded trial court's admonition that if counsel intimated by questions which court had not permitted to be answered, that certain things were, or were not, true, jury must disregard such questions.

5. Criminal law ⇐1170½(1)

Where evidence in statutory rape prosecution was clear and convincing against defendant, if prosecutrix' story was true, and her testimony was corroborated in several respects by witnesses, it was the duty of the District Court of Appeal to affirm the conviction notwithstanding act of deputy district attorney in asking immaterial and incompetent questions. Const. art. 6, § 4½.

6. Criminal law ⇐1170½(3)

Where defendant did not testify, and deputy district attorney by attempted interrogatory asked defendant's wife on cross-examination "Is it not a fact that your husband has been convicted * * *" but before the interrogatory was finished, an objection was interposed and was promptly sustained, defendant was not entitled to reversal of conviction on ground that deputy district attorney brought out that defendant had been previously convicted of a similar offense.

7. Rape ⇐52(1)

Evidence was sufficient to sustain conviction for statutory rape, though examining physician testified that examination of prosecutrix the day after alleged offense was committed disclosed that rupture of hymen had occurred more than 10 days before date of examination, where prosecutrix testified directly and positively to the occurrence of the act with which defendant was charged, and she was corroborated in several respects by witnesses.

8. Criminal law ⇐785(7)

In statutory rape prosecution, wherein examining physician testified that examination of prosecutrix the day after the alleged offense was committed disclosed that the prosecutrix' hymen was ruptured more than 10 days before date of the examination, jury was properly instructed that so far as expert testimony was concerned, jury was not bound to accept the opinion of any expert as conclusive, and that physician's testimony only amounted to an opinion tendered as an expert witness. Pen.Code, § 1127b.

9. Criminal law ⇐1159(3)

Where jury resolved conflict in evidence against defendant in statutory rape prosecution, and there was substantial evidence to support jury's conclusion, jury's conclusion could not be disturbed by the District Court of Appeal.

10. Criminal law ⇐863

The fact that jury, after retiring returned into court with inquiry as to the degree involved in the type of sentence which the jury could return, did not show that jury was without knowledge as to the particular offense with which defendant

was charged, where jury's inquiry went simply to the question of whether imprisonment in the county jail or the state prison was the more severe punishment. Pen. Code, § 264.

11. Criminal law ⇐1202(6)

Where clerk complied with section of Penal Code requiring that clerk in entering judgment must state briefly the offense for which the conviction was had and the fact of prior conviction, if any, there was no necessity for court in orally pronouncing judgment that defendant be imprisoned in the state prison for the term prescribed by law, to include any mention of prior conviction. Pen.Code, § 1207.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

James Shack was convicted of statutory rape, and he appeals.

Judgment affirmed.

James Shack in pro per., for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles County, defendant was accused of the crime of rape, allegedly committed on or about December 28, 1941, with a female person under the age of 18 years. An amended information was filed, which added an allegation charging a prior felony conviction against the defendant. Following entry of a plea of not guilty to the amended information and admission of the prior conviction, the cause proceeded to trial before a jury, which returned a verdict finding the defendant guilty of the offense charged in the amended information and recommended that the punishment be by imprisonment in the state prison. Pen.Code, § 264. A motion for a new trial was denied. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

Briefly, we find in the record evidence that the prosecutrix, a girl of the age of 17 years, lived with her family in Los Angeles on the front part of certain premises, while defendant, his wife and child, occupied the rear portion of same property. The complainant had known the defendant for about six months prior to the 28th of December, 1941. On the morning of the date just mentioned, defendant's wife made mention of an elderly lady who desired to employ a young girl in her household, and suggested that they take the prosecutrix to see the prospective employer. The complainant advised her father as to where she was going, and about 11:30 on the morning of December 28th she departed in the company of defendant. They boarded a street car and went to Glendale, at which point they alighted about 1:30 p. m. The two entered a liquor store, where defendant purchased a bottle of wine, after which defendant and the girl started walking in the direction of the foothills. Arriving there, they left the road and made their way along a path through the brush. They stopped in the midst of some bushes and trees, whereupon defendant stated to the girl that he "wanted to see if I ever had intercourse with anybody." The prosecutrix said nothing, but commenced to cry. She tried to pull away from the defendant, but he dragged her down onto his lap. He then placed his hands on her private parts and removed his overcoat, telling her to lie down upon it. When she tried to get away from him, he forced her down upon the coat, and thereupon accomplished an act of sexual intercourse with her. Soon thereafter the two got up and started down the hillside. On the way down, according to complainant, defendant asked her if she would do him a favor. In answer to her question as to what favor he desired, defendant asked her to write a note for him. He produced some paper, and upon the same she wrote two notes, both of which were introduced in evidence. Without giving the contents of these notes, it is sufficient to say that in one of them she accused her father of lewd and lascivious acts and of outraging her person, while in the other she wrote, "I have been out with Mr. Shack. He never bothered me in any way."

From the testimony of the prosecutrix it appears that upon the day in question it was raining and wet and muddy on the hillside. She identified some clothing with mud upon it, stating that the mud stains got upon the coat at the time of the attack upon her. It is further in evidence that on the way home appellant told the girl that she should tell his wife that they were out to see the lady who was expected to employ her, but that she was not at home and would not return until after Christmas vacation. However, upon returning home, the

girl complained to her father and mother of what had happened to her at the hands of defendant, and she was thereafter examined by an examining physician at Juvenile Hall. A policewoman who met the prosecutrix on the day following the alleged attack went to Glendale in an automobile, and the complainant guided the officer through Griffith Park and into the hills to a place about seventy-five yards from the road, heavy with underbrush. The girl also directed the officer to the liquor store where the wine heretofore mentioned was purchased. An employee of the liquor store testified that defendant and the prosecutrix were in his place of business around 1 or 2 o'clock on a Sunday afternoon about the 28th of December, and that the defendant purchased a bottle of wine, at which time defendant admonished the girl not to "tell her mother about this." Defendant did not testify as a witness in his own behalf.

[1] As a first ground of appeal, it is urged by appellant that the amended information was not read to the jury at the trial, as required by subdivision 1 of section 1093 of the Penal Code, and that the jurors therefore remained uninformed of the charge made against him. This claim is without merit, for the clerk's transcript discloses that "reading of the amended information is waived"; while the reporter's transcript reveals that when the case was called for trial on the information, March 11, 1942, the following transpired:

"The Court: Do you waive the reading of the information?

"Mrs. Root (Defendant's Counsel): We do.

"Mr. Loucks (Deputy District Attorney): The People waive." As the amended information was the only information before the court at the time of the trial, it is evident that a reading thereof was expressly waived by appellant.

Appellant next contends that the district attorney was guilty of prejudicial misconduct. In this regard it appears that during the direct examination of appellant's wife when she appeared as a witness in his behalf, she testified that upon the return of appellant and the prosecutrix to the former's home on the date of the alleged offense, an argument ensued between appellant and the girl's father, during which appellant stated that he was going to call the police because of what the girl had related to him concerning the immoral acts committed by her father upon her person; and further, because of the fact that appellant himself was the father of a minor daughter whom he wanted to protect from similar treatment at the hands of complainant's father. The claimed misconduct of the district attorney occurred during the cross-examination of appellant's wife, wherein the following occurred:

"Q. You stated that Mr. Shack told Mr. ———, the father of * * * (the prosecutrix) * * * that he was going to report Mr. ——— to the police for what he had done to * * * (the prosecutrix) * * * because of his own daughter? A. Yes.

"Q. He had a daughter of his own? A. Yes.

"Q. And he wanted to protect her? A. That is right.

"Q. From any such criminal acts, is that correct? A. That is correct.

"Q. And, I take it, that your husband has always been alert to protect his children? A. That is right.

"Mrs. Root (Defendant's Counsel): We will object to that on the ground that it is argumentative and calling for a conclusion.

"The Court: Perhaps it is.

"Q. By Mr. Loucks: Has your husband ever done that before?

"Mrs. Root: We will object to that on the ground that it is calling for a conclusion.

"Mr. Loucks: I would like to follow up this idea of protection.

"Mrs. Root: You are doing what, then?

"Mr. Loucks: Following up this protecting his daughter.

"Mrs. Root: It is incompetent, irrelevant and immaterial.

"The Court: Be a little more specific.

"Q. By Mr. Loucks: Has your husband had occasion to—to have had occasion to complain of the (family of the prosecutrix) before in order to protect his daughter?

"Mrs. Root: To which we will object, your Honor, as calling for a conclusion.

"The Court: That is a matter of argument, the protection of the daughter.

"Mr. Loucks: She has testified positively that this was done to protect his own daughter, and I am permitted to prove that he is not that type of man.

"Mrs. Root: Just a minute. We will ask that counsel's statement—

"Mr. Loucks: And I think I ought to be permitted to follow it up. It is evidence in the record.

"The Court: It is in the record, that is true, but it is a pure conclusion, and because one conclusion comes in the record there is no reason to fill it with conclusions. Drop it, Mr. Loucks.

"Q. By Mr. Loucks: Is it not a fact that your husband—is it not a fact that your husband was not interested in the moral welfare of your daughter?

"Mrs. Root: To which we object on the ground it is incompetent, irrelevant and immaterial, argumentative, calling for a conclusion.

"The Court: I think the objection is good; sustained.

"Q. By Mr. Loucks: Is it not a fact that your husband has been convicted—

"Mrs. Root: We object to that before it goes any further and call it misconduct on behalf of this District Attorney's deputy; that it is incompetent, irrelevant and immaterial, and certainly has no bearing on this case, and it is calling for a conclusion and it is hearsay.

"Mr. Loucks: I want to rebut the statement that he wants to protect his daughter here. I have got evidence to rebut it. That is their own testimony. I don't see why it should stand in the record. I have evidence that is absolutely contradictory of that.

"Q. By the Court: How old is Mr. Shack's daughter? A. Eight years old.

"Q. How old? A. Eight years old.

"The Court: The objection is sustained."

[2, 3] While we must concede that the deputy district attorney exerted every effort within his power to commit prejudicial misconduct, by his persistence in asking immaterial and incompetent questions, nevertheless his efforts in that regard were successfully thwarted by the prompt and decisive rulings of the trial judge made upon the timely and appropriate objections interposed by defendant's counsel, all of which served to keep out of the record the improper testimony sought to be elicited by the prosecutor's challenged interrogatories. Time and again this court, in common with the other appellate tribunals of this state, has sought to impress upon prosecuting officers the importance of that rule of criminal procedure which declares that, guilty or innocent, a defendant is entitled to be tried according to recognized rules of evidence and procedure; that while a departure from such procedure may result in justice for the particular defendant before the bar, it is nevertheless dangerous to the community and serves only to open the way for the conviction of the innocent.

[4] In the instant case, however, not only did the trial judge constantly guard appellant's right to a fair and impartial trial, but when instructing the jury he admonished them that "* * * if any counsel has intimated by questions, which the court has not permitted to be answered, that certain things are, or are not true, you must disregard such questions and refrain from any inferences based upon them." It must be assumed that the jury heeded this admonition, not only with respect to the precise questions here set forth, but also as to any other questions of doubtful propriety respecting which objections were made and sustained by the court. People v. Burke, 18 Cal.App. 72, 122 P. 435; People v. Fodera, 33 Cal.App. 8, 13, 164 P. 22. While, as heretofore indicated, the questions were improper, the record shows that the court sustained defendant's objections to the same; and the record further shows that only upon one occasion did defendant's counsel assign the acts of the deputy district attorney as misconduct, but at no time was any request made of the court to admonish or instruct the jury to disregard the same. Notwithstanding this, however, the court gave the cautionary instruction heretofore quoted.

[5] While there are cases wherein the misconduct is of such a character that an admonition from the court would not serve to effectually cure the injury and prejudice resulting therefrom, and in such cases a defendant is not required to ask the court to instruct the jury to disregard the questions so asked, the misconduct here set forth is not of that character, and it was therefore incumbent upon defendant to request the trial judge to so admonish the jury, if the district attorney's conduct was considered to be prejudicial. Therefore, the error, if any, must be held to have been cured by the foregoing instruction of the court in its final charge to the jury. Moreover, under section 4½ of article VI of the Constitution, it would be our duty to affirm the judgment of conviction herein.

The evidence in the case was clear and convincing against appellant, if the girl's story was true, and evidently the jury believed it. Furthermore, her testimony was corroborated in several respects by the police officer and the employee of the liquor store.

[6] Appellant zealously argues that by reason of the aforesaid line of questioning by the deputy district attorney it was brought out that the former had been previously convicted of a similar offense. The record does not bear out this claim on the part of appellant, because in that regard it shows that all that was said was contained in the attempted interrogatory propounded by the deputy district attorney as follows: "Is it not a fact that your husband has been convicted. * * *" Before anything further was said in the asking of this question an objection was interposed and promptly sustained.

[7-9] In next asserting that the evidence is insufficient to sustain the judgment, appellant urges that the testimony of the Juvenile Hall examining physician was to the effect that she had examined the girl the day after the alleged offense was committed; that while the hymen of the prosecutrix had been ruptured, it was not a recent rupture, and in the opinion of the physician the rupture had occurred more than ten days before the date of her examination. This testimony, however, simply tended to produce a conflict with the evidence given by the prosecutrix, who testified directly and positively to the occurrence of the act with which appellant was charged. The jury were properly instructed that so far as expert testimony was concerned, they were not bound to accept the opinion of any expert as conclusive, Pen. Code, § 1127b, and the testimony of the physician amounted only to an opinion tendered by her as an expert witness. The jury resolved this conflict against appellant, and their finding in this regard cannot be disturbed upon appeal where there was, as here, substantial evidence to sustain the conclusion arrived at by the triers of fact.

[10] Appellant further contends that the verdict is contrary to law because after the jury had retired they returned into court for further instructions, at which time the jury inquired "as to the degree involved in the type of sentence which we can bring back," to which the court replied, "There is no degree involved." After some further colloquy between members of the jury and the court, the latter said, "Wait, and I will read it to you right out of the law. * * *" Thereupon the court read to the jury section 264 of the Penal Code, which empowers the jury, in cases of the character with which we are here concerned, in the event they find the defendant guilty, to recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison. A reading of the record completely refutes appellant's claim that because the jury made inquiry concerning the punishment, they were without knowledge as to the particular offense with which he was charged. On the contrary, the record clearly discloses that the jury's inquiry went simply to the question of what was the more severe punishment, a county jail or a state prison sentence.

[11] Finally, appellant urges that the judgment entered against him was not the judgment rendered and ordered by the court. In support of this claim it is urged that the oral judgment pronounced by the court was that appellant be imprisoned in the state prison for the term prescribed by law, while the judgment entered by the clerk included the charge of prior conviction and appellant's admission thereof, neither of which were mentioned in the oral judgment of the court. There is no merit to this claim, because section 1207 of the Penal Code requires of the clerk that in entering the judgment he must state "briefly the offense for which the conviction was had and the fact of a prior conviction, if any." The clerk complied with this section, and there was no legal necessity for the court to include any mention of the prior conviction in pronouncing the oral judgment from the bench.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

CARSON ESTATE CO. v. McCOLGAN, Franchise Tax Com'r.

WATSON LAND CO. v. SAME.*

Civ. No. 13697.

District Court of Appeal, Second District, Division 1, California.
Oct. 21, 1942.

Hearing Granted Dec. 17, 1942.

1. Taxation ⇐117

A land company, which to some extent traded in securities in addition to its activities concerned with collection of dividends on stock of a corporation and paying out dividends derived from such income, was not a "holding company" within statute providing that corporation organized to hold stock or bonds of another corporation and engaging in no activities other than receipt and disbursement of dividends from such stock or bonds cannot be considered as a corporation doing business in the state for purposes of Franchise Tax Act. St.1933, p. 693, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Holding Company".

2. Taxation ⇐376(1)

A land company, which to some extent traded in securities in addition to its activities concerning collection of dividends on stock of a corporation and paying out dividends derived from such income, was "actively engaged" in transactions for purpose of financial pecuniary gain and was "doing business" within the state within Franchise Tax Act, so that dividends received by taxpayers from the company were deductible in determining taxpayers' net income for franchise tax purposes. St.1929, p. 19, § 8(h); St.1931, p. 2225, § 5; St.1933, pp. 693, 694, §§ 4, 5; St.1935, pp. 962, 964, §§ 5, 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Actively Engage" and "Doing Business".

3. Taxation ⇐117

Under statute providing that term "doing business" used in Franchise Tax Act means "actively engaged" in any transaction for purpose of financial or pecuniary gain or profit, the word "actively" is used to mean "active" as opposed to "passive" or as opposed to "inactive" and denotes taking an active part in any transaction or actually engaging in any transaction and does not mean "brisk" or "lively". St.1933, p. 694, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Active", "Actively", "Brisk", "Inactive", "Lively" and "Passive".

Appeals from Superior Court, Los Angeles County; James D. Garibaldi, Judge Assigned.

Actions by Carson Estate Company, and by the Watson Land Company, against Charles J. McColgan, as Franchise Tax Commissioner, etc., to recover California state franchise taxes paid under protest, which were consolidated for trial. From an adverse judgment, the plaintiffs appeal. It was stipulated that the appeals might be prosecuted and determined on consolidated record.

Judgment reversed with directions to enter judgment for the plaintiffs.

George G. Witter and Mackay, McGregor & Reynolds, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

DORAN, Justice.

By stipulation the above entitled cases were consolidated for trial. Judgment was entered for the defendant in both actions and the plaintiffs appeal. It was stipulated that the appeals in both cases might be prosecuted and determined upon a consolidated record. The actions in question were brought to recover California state franchise taxes measured by the income of the respective appellants for the calendar years 1932 to 1936, inclusive, in the case of Carson Estate Company, and for the calendar years 1933 to 1935, inclusive, in the case of Watson Land Company. During the years here involved both of the plaintiffs were California corporations and stockholders of Francis Land Company, another California corporation. In each of said income years appellants, respectively, received dividends from Francis Land Company. Said dividends, in turn, were admittedly derived from income of Dominguez Estate Company, wholly earned by that company from business done within the State of Califor-

* Subsequent opinion 133 P.2d 636.

nia and upon which said Dominguez Estate Company paid a franchise tax.

Both appellants filed their franchise tax returns regularly each year, reporting the full gross income earned or received by them, including the dividends from Francis Land Company. They then deducted such dividends from the gross income reported on their returns, in reliance upon the provisions of section 8(h) of the California Franchise Tax Act, Stats.1929, ch. 13, p. 19, as amended, St.1935, p. 964, Deering's Gen.Laws, Act 8488, which, so far as here pertinent, then provided as follows: "§ 8. In computing 'net income' the following deductions shall be allowed: * * * (h) Dividends received during the income year from a bank or corporation doing business in this State declared from income arising out of business done in this State; but if the income out of which the dividends are declared is derived from business done within and without this State, then so much of the dividends shall be allowed as a deduction as the amount of the income from business done within this State bears to the total business done. The provisions of this subdivision shall not apply to dividends received from * * * corporations not taxable under Article XIII of the Constitution of this State. The burden shall be on the taxpayer to show that the amount of dividends claimed as a deduction has been received from income arising out of business done in this State."

The franchise tax commissioner disallowed the deduction of the dividends so received from Francis Land Company on the ground that Francis Land Company was not a "bank or corporation doing business in this State." Appellants paid the resultant deficiencies under protest and filed claims for refund covering such payments. In due time, following the rejection of said claims for refund, these actions were commenced.

The trial court found that the Francis Land Company was not doing business in the years 1933, 1934, 1935 and 1936, or in any of those years; that the Francis Land Company did not actively engage in any transaction for profit in the years 1933, 1934, 1935 and 1936, or in any of those years; and concluded that the dividends received by appellants were not deductible under section 8(h) of the Bank and Corporation Franchise Tax Act (supra) as it read in 1933, 1934, 1935 and 1936, and that appellants did not overpay their franchise taxes for the years mentioned. Appellants and respondent agree that the decisive question here presented is whether Francis Land Company was "doing business" during the years in question, within the meaning of that term as defined by the Bank and Corporation Franchise Tax Act, supra.

Francis Land Company was organized under the laws of California on the first day of August, 1928, with an authorized capital of $500,000. Its principal place of business was Los Angeles, California. It had five directors. Among the purposes stated in its articles of incorporation, are the following: To buy and sell and trade in real estate and in all kinds of personal property, to acquire shares of corporate stock and obligations of other corporations, and to sell or exchange the same for other property. Soon after its organization it acquired substantial holdings in the stock of Dominguez Estate Company. The latter was a California corporation, whose income, as hereinabove noted, was earned wholly from business done within the State of California. Dominguez Estate Company paid a franchise tax on its full income each year to the State of California. Francis Land Company during the years in question occupied offices which were also occupied by Dominguez Estate Company, and its employees were also employees of Dominguez Estate Company. Francis Land Company paid a portion of the salaries of such employees. Dominguez Estate Company paid a larger portion. The Board of Directors of Francis Land Company met once a month, and oftener when occasion required. The record reveals the following transactions entered into by the Francis Land Company. December 14, 1933, said company purchased $20,000 par value Albany & Susquehanna bonds, for a total of $16,643.88, and sold $12,000 par value of said bonds on January 2, 1934, realizing therefor $16,678.88. Certain shares of Continental Can Company stock were purchased on March 20, 1935, and sold on April 1, 1935, realizing a profit of $374.85. A similar purchase of other stock on March 20, 1935, with a sale thereof on April 9, 1935, brought a profit of $88.43. The purchase on April 1, 1935, and the subsequent sale on April 12, 1935, of another block of stock, resulted in a profit of $209.-71. Nine other such purchases were made in 1935, and the stock in each instance was subsequently sold within a relatively short period from the purchase, the profits ranging from around $700 to about $178, with

one loss of $398.13. Two such transactions occurred in 1936, one resulting in a loss of $611.57, the other in a loss of $149.09. The Board of Directors of Francis Land Company appears to have given its officers a general authorization to purchase the securities mentioned. During the years in question, other than the above transactions, the affairs of the Francis Land Company appear to have been concerned with the collection of dividends on stock of Dominguez Estate Company and the paying out of dividends derived from such income. Appellants have offered no other evidence in support of their claim. Appellants contend that the above facts are sufficient to show that the Francis Land Company was "doing business" as that term is defined by the provisions of the Bank and Corporation Franchise Tax Act; and that appellants were therefore entitled to deduct the dividends in question received from the Francis Land Company, in determining the measure of their own franchise tax.

Respondent points to the small proportion the foregoing stock and bond transactions bore to the total assets of the Francis Land Company, and to the small percentage of gain received therefrom in relation to total income; also to the fact that there were no such transactions in 1932. Respondent also contends that when the organizational set-up of the Francis Land Company is considered the conclusion that it was not "doing business" is further strengthened, since, according to respondent, it appears that the corporation had only one paid employee, who received one-seventh of his total compensation from Francis Land Company. However this may be, the status of the Francis Land Company must be determined by the statutory definition of the term "doing business" as contained in the Bank and Corporation Franchise Tax Act during the periods mentioned. Respondent claims that appellants' contention, that the definition of "doing business," contained in section 5 of the act, necessitates a conclusion that the Francis Land Company was "doing business," is clearly contrary to the decision in Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499. Before entering into a discussion of the cited case it is advisable to set forth the pertinent provisions of the Bank and Corporation Franchise Tax Act, supra, in effect during the years here in question.

After amendment, effective August 14, 1931; section 5 of said act, containing definitions of terms used therein, read in part as follows: "The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision 1(c) of section 5219 of the revised statutes of the United States [12 U.S.C.A. § 548, subd. 1(c)]. * * * The term 'doing business,' as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of the state, or by a foreign corporation qualified to do or doing intrastate business in this state, and shall include the right to do business through such incorporation or qualification." Stats.1931, ch. 1066, p. 2225. By amendment in effect May 1, 1933, said portions of section 5, supra, were changed to read as follows: "The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States, and every corporation subject to be taxed pursuant to section 4 hereof. * * * The term 'doing business,' as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Stats.1933, ch. 210, pp. 692, 694.

By amendment in effect May 1, 1933, a new paragraph was added to section 4 of the act in question, reading as follows: "Any corporation organized to hold the stock or bonds of any other corporation or corporations, and not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt and disbursement of dividends from such stock or interest from such bonds, shall not be considered a financial, mercantile, manufacturing or business corporation or a corporation doing business in this State for the purposes of this act." Stats. 1933, ch. 210, pp. 692, 693. Effective June 6, 1935, this paragraph of section 4 was amended to omit reference to "a financial, mercantile, manufacturing or business corporation," so that a holding company, as defined therein, should thereafter merely not be considered a corporation doing business in this state for the purposes of the act in question. Effective on the same date the first paragraph of section 5 was changed to read as follows: "The term 'corpora-

tion,' as herein used, shall include every corporation, other than a bank or banking association, and other than those expressly exempted from the tax by the provisions of this act or the Constitution of the State of California." Stats.1935, ch. 275, pp. 959, 962.

Union Oil Associates v. Johnson, supra, was a case in which the plaintiff, a California corporation, brought an action to recover taxes levied against plaintiff for the year 1931 under the Bank and Corporation Franchise Tax Act. Plaintiff there was a holding company organized under the laws of this state to own and hold stock of an oil company and distribute dividends paid thereon to its own stockholders. At the time of the levy of the tax there in question section 5 of the Bank and Corporation Franchise Tax Act defined the term "doing business" as follows: "The term 'doing business,' as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state." Stats.1929, ch. 13, p. 20, supra. In the cited case the defendant state treasurer demurred to the complaint on the ground that it did not state a cause of action. The court below overruled the demurrer, and upon defendant's failure to answer entered judgment for the plaintiff. The Supreme Court affirmed this judgment, Mr. Justice Thompson dissenting with the concurrence of Mr. Justice Shenk. The basis for the opinion of the majority of the court is revealed by the following quotation from the case (2 Cal.2d at page 733, 43 P.2d at page 294, 98 A.L.R. 1499 et seq.):

"* * * the constitutional amendment approved by the people on November 6, 1928, provided for a tax according to or measured by net income to be paid by banks and by certain corporations doing business within this state.

"Both the constitutional provision and the Bank and Corporation Franchise Tax Act provide that 'financial, mercantile, manufacturing and *business*' corporations '*doing business* within the limits of this state' shall pay the tax. (Italics supplied.) Thus our state constitutional provision and legislation adopt the language of that portion of section 5219, Revised Statutes [United States], by which the validity of a tax upon national banking associations according to or measured by net income is made to depend upon the rate being not 'higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and *business* corporations *doing business* within its limits. * * *' Not only in enumerating the classes of corporations subject to the tax did the Legislature adopt the language of section 5219, but in defining the term 'corporation' it expressly refers to said section 5219. * * * The 'classes referred to in subdivision one (c) of section 5219,' are 'financial corporations' and 'mercantile, manufacturing and *business* corporations *doing business* within its (the state's) limits.' Hence, plaintiff argues, it was the intent of the people and the Legislature that the interpretation placed upon the phrases 'business corporation' and 'doing business' by the federal courts should govern our state provisions, with the result that a holding company is not a 'business corporation.' We are in accord with this contention. * * *

"There can be little doubt that the Supreme Court of the United States in construing the meaning of the terms 'doing business' and 'business corporations' in subdivision 1(c) of section 5219, Revised Statutes, which authorizes a state excise tax upon national banking associations, would follow the definition given by it to those terms as used in the Tax Acts of 1909, 1916, and subsequent years establishing federal excise taxes. It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. [cases cited.] * * *

"In the instant case our constitutional amendment and legislation were enacted to establish a mode of taxation which would comply with the federal permissive statute. The presumption that the adoption of the words of the federal enactment evinces an intent to adopt the federal construction thereof is even stronger than in the ordinary case where legislation of one jurisdiction is merely modeled after that of another. * * *

"In the light of this analysis the purpose of the Legislature in adopting the 1933 amendment to sections 4 and 5 of the act, quoted earlier herein, and providing

that such a holding company as plaintiff shall not be considered a 'business corporation,' was to clarify the legislative intent by expressly declaring the meaning of the words used in the act. * * * We have heretofore held that this state has adopted the federal definition, and that the amendment of 1933 is a clarification and legislative expression of the meaning of existing legislation. Plaintiff, upon the basis of the allegations of its complaint is not a business corporation according to said amendment. It is organized to hold the stock of the Union Oil Company, and does not trade in such stock, and engages in no other activities than the receipt and disbursement of dividends."

It may be seen from the foregoing excerpt that the majority of the Supreme Court arrived at the decision in the case cited by first discovering a legislative intent to adopt a federal definition of the term "doing business" in the Bank and Corporation Franchise Tax Act as it existed prior to 1933 and then concluding that the 1933 amendment was merely an expression of the legislative intent which had previously existed. By this procedure the court found justification for applying the provisions of the 1933 amendment to a situation which arose prior to the adoption of that amendment. In any event, it is reasonably clear that the cited case was decided through an application of the provisions of the Bank and Corporation Franchise Tax Act hereinabove quoted, as amended in 1933. Union Oil Associates v. Johnson, supra, therefore, does not serve to refute the contention of appellants that the definition of "doing business" in section 5 of the act in question necessitates the conclusion that Francis Land Company was "doing business" in the years here involved, since that case itself makes use of the definition contained in the act.

The question has been quite recently presented in the case of Oliver Continuous Filter Co. v. McColgan, 48 Cal.App.2d 800, 120 P.2d 682, 684. That case concerned an appeal from a judgment for the state treasurer, for whom the franchise tax commissioner was substituted, in an action for the recovery of a corporation franchise tax paid under protest in the year 1931. There, plaintiff, organized under the laws of the State of California, was actively engaged in the business of manufacturing and selling filters and allied machinery and equipment. The United Filters, Incorporated, a Delaware corporation, conducted a like business in Pennsylvania. To effect a merger of the two companies, Oliver United Filters, Inc., was incorporated under the laws of the State of Nevada, and immediately qualified to do business in this state. To such company, plaintiff transferred all of its assets, except cash in the sum of $20,000, receiving therefor stock in the new Nevada corporation. The Delaware corporation likewise assigned its assets to the Nevada corporation, and received stock therefor. Plaintiff immediately distributed to its stockholders as dividends part of the stock acquired, retaining, however, a portion thereof, on which it received dividends, disbursing them from time to time to its stockholders. This stock, together with the $20,000 cash retained, as above, constituted plaintiff's only asset, and, although it still retained all powers granted under its articles of incorporation, it did not actively engage further in the business it had previously conducted. The income of plaintiff for the years 1929, 1930 and 1931 consisted of dividends from the stock of the Nevada corporation, and interest on loans made to that corporation by it, also on loans to its own principal stockholder, and to a number of its former employees made to enable them to retain stock of the Nevada corporation for which they had previously subscribed, and which stock the plaintiff held as security. After May, 1928, the plaintiff maintained no offices, and had no salaried employees, its only expense being that for bookkeeping services. Subsequent to the transfer of the assets of plaintiff corporation to the Nevada corporation, the former was kept alive so that stock it so owned could be voted as a unit at meetings of the Nevada corporation. In the year 1931 plaintiff paid the minimum franchise tax of $25 specified by law. Some time thereafter, upon demand, it paid to the commissioner under protest an additional sum of $7,174.88, based upon dividends received from the Nevada corporation on business transacted by that company out of the state, and upon interest received from loans. The additional assessment was made upon the theory that plaintiff was a business corporation actively doing business in California. The appellate court considered the case as one coming under the provisions of section 5 of the Franchise Tax Act as amended by Statutes of 1931, chapter 1066, page 2225, above quoted,

wherein the definition of the term "doing business" included the "right to do business."

The court pointed out the distinction between the case before it and that of Union Oil Associates v. Johnson, supra, stating: "In the Union Oil case, unlike the present, the corporation charter had been amended to limit its functions to those of a holding company. It was held at page 735 of 2 Cal. 2d, at page 295 of 43 P.2d, 98 A.L.R. 1499, that 'the state might have provided that holding companies should be subject to the tax along with other corporations. * * *' "

One of the questions presented to the court in the Oliver Continuous Filter case, supra, was the constitutionality of the provision which required that "doing business" shall "include the right to do business." The court found such an enactment within the scope of authority conferred by constitutional amendment (Const. art. XIII, § 16), pointing out that: "The tax referred to therein was not placed on 'doing business' except to the extent of fixing the amount of such tax as the equivalent to four per cent of net income, which is incidental to the main purpose of the constitutional amendment, namely, that a tax may be levied on the privilege or right of exercising a corporate franchise in this state."

Of the application of the provisions of section 5 of the act, as then amended, to the plaintiff there, the court stated:

"Sections 4 and 5 of the act simply sanction a tax upon a business corporation. The sections provide that the tax shall be fixed upon the basis of net income, and that in any event each such corporation shall pay a minimum tax of twenty-five dollars. In this case plaintiff's articles of incorporation provided that it was organized for the purpose and with the privilege and right, among other things, to buy, sell, transfer, invest and deal in real estate, stocks, bonds and personal property of every kind and character; to lend and borrow money and to engage and carry on the business of manufacturing, constructing and assembling machinery.

"As applied to appellant corporation, if no business should be transacted, or if the net income should be less than a tax thereon justifying twenty-five dollars, the specified minimum is payable, otherwise the tax for the privilege or right to do business is measured by net income for the next preceding fiscal or calendar year, computed at the rate of four per cent. § 4.

"The legislature directed, pursuant to constitutional authorization, that corporations during 1931-1933 incorporated for the purpose of doing business should pay a tax for the right to do business. In the Union Oil case the corporation did not have the right to do business. Appellant herein was organized for the purpose of doing business, and actually engaged therein. Appellant cites cases which are not directly in point. Rose v. Nunnally Inv. Co., 5 Cir., 22 F.2d 102 [cited with approval in the Union Oil case, and also cited by respondent in the case at bar], however is worthy of mention. That case dealt with a reorganized corporation. Transactions similar to those in the present case were held not to be included in the term 'doing business' upon the theory that a tax is based, not upon charter powers, but upon its activities. That rule may not be applied under the provisions of a statute wherein the test is the 'right to do business.' In the latter instance, necessarily the charter powers determine the scope of activity.

"The words 'right to do business' may have given rise to some doubt, and in 1933 reference to the 'right' was eliminated, the definition then reading: 'The term "doing business," as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.' Stats.1933, ch. 210, page 694. It is not necessary to discuss the change. The present case deals solely with the 1931 definition."

The appellate court in the quoted case accordingly affirmed the judgment in favor of the defendant state treasurer. A petition for a hearing by the Supreme Court was denied.

Because of the period of time involved in the case at bar the situation here presented is concerned both with the 1931 amendment considered in Oliver Continuous Filter Co. v. McColgan, supra, and the 1933 amendment to the Franchise Tax Act. The 1933 amendment is specific in its terms, both as to the definition of the term "doing business" (§ 5), and as to corporations "organized to hold the stock or bonds of any other corporation" (§ 4). See Stats.1933, ch. 210, pp. 692, 693, quoted above. There is little room for judicial construction without distorting the plain purport of the language. To hold that Francis Land Com-

pany was not "doing business" is to indulge in such a distortion of the plain meaning of the statute.

[1-3] According to the record presented, Francis Land Company traded in "other securities," at least to the extent shown, and thus engaged in "other activities than the receipt and disbursement of dividends" from stock held by it, within the meaning of section 4 of the act as quoted. Section 4 plainly limits the classification of holding company to corporations which engage in "no other activities" than the receipt and disbursement of dividends from stock or interest from bonds held. The statute as written is absolute in effect and permits no degrees of activity in this respect. Francis Land Company, upon the evidence, cannot be considered a holding company within the meaning of section 4 of the act. Nor may it reasonably be said that Francis Land Company did not "actively [engage] in any transaction" within the meaning of section 5 of the Franchise Tax Act as amended in 1933, supra. As employed in the definition of the phrase "doing business" the adverb "actively" cannot be taken to denote "brisk," "lively," "characterized by frequent activity," as in speaking of an *active* market. If taken in that sense, the statutory definition is virtually rendered meaningless and impossible of any practical application, since the Legislature has therein employed the term "transaction" in the singular. Under the circumstances, "actively" must there be taken to mean "active" as opposed to "passive," or "active" as opposed to "inactive." Thus, "actively" as used in section 5, supra, denotes "taking an active part in any transaction," "actually engaging in any transaction." In this sense, the adverb "actively" takes on a distinct meaning and gives significance to the definition set forth in the statute. It is in this sense that the word "actively" must be construed as employed in the definition of "doing business" contained in section 5 of the Franchise Tax Act as amended in 1933; and in this sense Francis Land Company was "doing business" when it engaged in the transactions shown by the record. It does not appear that Francis Land Company engaged in the transactions mentioned for any other purpose than that of financial or pecuniary gain or profit; and profit therefrom was shown. The construction placed upon the 1931 amendment by Oliver Continuous Filter Co. v. McColgan, supra, requires a holding that under that amendment the Francis Land Company was a corporation "doing business." As appears from the provisions of its charter the Francis Land Company clearly had the right to do business. It might be pointed out that franchise tax returns of that corporation, filed herein as exhibits, indicate that the Francis Land Company, for the years in question, paid a franchise tax on the basis of a corporation "doing business."

It follows that, upon the facts presented, the trial court was not warranted in finding that the Francis Land Company was not doing business in the years mentioned. None of the findings and conclusions of the trial court are supported by the evidence. Upon the facts presented, only one conclusion is possible under the governing provisions of the Franchise Tax Act, namely, that the Francis Land Company was a corporation doing business in this state for the purposes of the act and within the meaning of the term as defined by the act.

The judgment is reversed with directions to the trial court to enter judgment in favor of appellants for the tax refunds as prayed.

YORK, P. J., and WHITE, J., concurred.



55 Cal.App.2d 97

DUNLAP v. HOOD et al.

Civ. 6815.

District Court of Appeal, Third District, California.

Oct. 20, 1942.

Hearing Denied Dec. 17, 1942.

I. Fraudulent conveyances ⇐297, 298(1), 300(1)

Evidence was insufficient to sustain findings in action to set aside conveyances that conveyances were not made with intent to defraud creditors, that grantor was not rendered insolvent, and that there was a sufficient consideration passing to grantor from grantee. Civ.Code, §§ 3439.01, 3439.02(a), 3439.03(a, b), 3439.04, 3439.05, 3439.09(a) (1, 2), 3440.

2. Exemptions ⇐45

Garage tools, machinery and equipment conveyed by conveyance of garage allegedly in fraud of grantor's creditors, were exempt from execution, if they were the tools or implements necessary to carry on trade or garageman. Civ.Code, § 3440.

3. Fraudulent conveyances ⇐221

Where divorced husband was rendered insolvent by conveyances of his property, conveyances were made with intent to defraud creditors, and there was not sufficient consideration passing to grantee, divorced wife, to whom divorced husband owed alimony, was entitled to have the conveyances set aside as fraudulent and to have judgment for alimony declared a lien on the property. Civ.Code, §§ 3439.01, 3439.02(a), 3439.03(a, b), 3439.04, 3439.05, 3439.09(a)(1, 2), 3440.

4. Fraudulent conveyances ⇐225

Former wife was not "estopped" by terms of separation agreement specifying that former husband should have the right to make such disposition of his property after the date of the agreement as if the parties had never been married, from acquiring a lien for accrued alimony on former husband's property which he had conveyed allegedly in fraud of creditors, particularly where the separation agreement, as well as divorce decree, obligated former husband to pay former wife alimony for support of their child.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Margaret M. Dunlap against Frank R. Hood and others to set aside conveyances allegedly made to defraud creditors. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

C. W. Pearson, of Placerville, for appellant.

Snyder & Snyder, Chas. P. Snyder, and Geo. F. Snyder, all of San Andreas, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action to set aside conveyances alleged to have been made to defraud creditors.

Plaintiff's complaint alleged that she was the divorced wife of defendant Frank Hood, that by the decree in the divorce action she was awarded the sum of $30 per month for support of the minor child of the parties, that the sum of $558.92 was unpaid on account thereof and that an execution issued on said judgment had been returned wholly unsatisfied; that at the time said decree was rendered Hood owned certain described real property and personal property consisting of the equipment, appliances, tools, machinery and book accounts of a garage, welding works and machine shop operated by him and located upon one of the described parcels of real property, but that thereafter Hood, intending thereby to put the property out of the reach of his creditors, had conveyed same to defendant Verna Hood by deed, but that said conveyance was made wholly without consideration and with intent to delay and defraud the creditors of said defendant Frank Hood, including the plaintiff, and that defendant Verna Hood had accepted said conveyance with knowledge of the fraudulent intent, and with intent to assist Frank Hood; that the latter had been rendered insolvent by said conveyance and was then insolvent, and that there was a balance of $420.58 due to plaintiff from said defendant Frank Hood. She prayed that the real property be subjected to a lien of the judgment and said property sold to satisfy amounts due her.

Defendants answering denied that Hood intended to put the property described out of the reach of his creditors by the conveyances alleged in the complaint, denied that he was rendered insolvent, or that the conveyance to Verna Hood was without consideration and with intent to delay or defraud creditors, or that Verna Hood accepted the conveyance with knowledge of the intent alleged. As separate defenses they alleged that plaintiff was estopped to claim any interest in or lien upon the property described because of the terms of a separation agreement entered into between them (a copy of which agreement was annexed to the answer), and also that the conveyance alleged in the complaint was made for a "good consideration."

Evidence educed at the trial showed that defendant Verna Hood was the first divorced wife of Frank Hood and that she

had remarried him after his divorce from plaintiff, and about a month after the conveyances under consideration were made. Called as a witness under section 2055 of the Code of Civil Procedure, Frank Hood testified as follows:

"Q. You formerly owned Lots 22, 23, 24, and 25 in Block B of the Townsite of Valley Springs? A. Well, I didn't own all of them—there was a bank mortgage.

"Q. Well, you held the title to them? A. I believe so.

"Q. And your shop is located on those lots? A. That is right.

"Q. You are now conducting that shop? A. I am operating it, yes. * * *

"Q. You have always conducted the shop? A. Yes. * * *

"Q. What consideration was paid you? A. I would have to go into detail to explain that—things were pretty tough when Margaret left; there were a lot of bills to be paid, open accounts, bills, one thing another—and as soon as companies I owed money to, heard that I had a divorce, they figured things would blow up and they all wanted their money right now. They all jumped me. I knew if the business was run right, if they give me time, I would work out. A fellow can't operate without cash—they would attach the bank account—I was pretty badly off. I decided to let the whole works go, sell everything I had—if it paid out, all right. I was pretty badly broke up over it. My daughter was over one day, and she says, 'Why don't you go over and see Mama?' I says, 'She is sore at me; I don't know whether it would do any good.' A couple of days later, they come past the shop, and I had a talk with Verna. I told her I was going to throw up the works and get out of there—she talked to me—she said, 'Well, you and I were in debt one time, and together we worked it out and made money.' And she said, 'We could do it again.' She said 'Don't throw the place away.' I said, 'I can't raise money—I can't borrow any, the loan has been going too long at the bank without interest.' 'I can't get any money,' I said, 'I will just throw it all up.' She says, 'How about giving it to me and you and I work this thing out together?' And she says, 'I am sure we can make it go.' And I says, 'Well,' I says, 'There is times when these outfits close in on me.' And she said, 'I might be able to get some money.' That is the way it has been worked out. There was some twenty-five hundred or three thousand dollars out at the time, and she agreed, before she took any money out of the shop to use for herself, that all those bills would be paid—every bill I owed would be paid, and she has not taken any money out, and she has put some of her own in.

"Mr. Pearson: Q. Now I show you (hands document to witness) if you look at this deed, the consideration for this deed is less than one hundred dollars—that is true—that is put on that deed? A. Gee whiz, I figured the place was not worth anything.

"Q. And on the second deed, the consideration was and is less than one hundred dollars? A. There was back taxes on that, and I was going to lose the whole works. * * *

"Q. You had nothing left after you made those deeds, is that correct? A. I had an old Chevie truck, that's all."

Produced as a defense witness, Verna Hood testified:

"A. Well, after Frank turned the property over to me, all the bills, all the money that was made from the shop over the expenses, why, I turned over and was paying on these accumulated bills he had against him at the time he transferred the property to me. I agreed to pay these bills at the time he turned the property over and we caught up on quite a few of the bills. I took my own personal money and paid the back taxes on everything and interest on the notes.

"Q. The way you agreed to pay those bills was out of the revenue derived from the shop and the property? A. Yes.

"Q. You did not undertake to pay them from your own money? A. No, I did not make enough. * * * A. Yes, we have been paying her [Margaret] $15.00 per month.

"Q. That came out of the business too? A. Yes."

On cross-examination she testified that her husband continued in possession of the business and worked in the shop the same as before, that he was to pay her rent, that when he conveyed the property to her she was to take all the money they received from the shop after the bills were paid, and pay back bills that he owed at the time; that the money came in and she paid the bills; that she knew of the divorce decree at the time of his divorce from plaintiff and that it provided for the payment of

$30 per month; that she saw it in the newspapers; that she had put about $200 of her own money into the payment of back taxes on the property after she owned it.

The final decree in the divorce action between Frank and Margaret Hood dated April 27, 1940, and two deeds from Frank to Verna dated May 21, 1940, were introduced in evidence. The deeds each recited a consideration of $10. One conveyed certain described lots, "together with the Garage and all other buildings and improvements thereon, and together with Garage equipment and appliances, tools and machinery, book accounts, chattels of every description connected with or used in the operation of the Garage, welding works and machine works operated by the party of the first part on said lots. * * *" The other described a 40-acre parcel of land by metes and bounds. No revenue stamps were attached to either deed.

On the foregoing evidence the trial court found that Hood did not intend to put the property described in the complaint out of the reach of his creditors by the conveyances mentioned, that it was untrue that said conveyances were without consideration or that they were received by defendant Verna Hood with knowledge of a fraudulent intent on the part of Frank Hood, and that it was not true that Frank Hood was rendered insolvent by said conveyances of his property. It was also found that the allegations of defendants' separate defenses were true; and that at the time of the filing of plaintiff's complaint Hood owed plaintiff $420.68 under the divorce decree. Judgment for defendants was rendered, and plaintiff appeals.

Under section 3439.01 of the Civil Code "debt" includes any legal liability, whether matured or immatured, liquidated or unliquidated, absolute, fixed or contingent. Section 3439.02(a) provides that a person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

Section 3439.03 states that fair consideration is given for property, or obligation:

"(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

"(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

Under section 3439.04 every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

And under section 3439.05: "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

And section 3439.09 provides that:

"(a) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser or encumbrancer for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser or encumbrancer:

"(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

"(2) Disregard the conveyance and attach or levy execution upon the property conveyed."

Section 3440 of the Civil Code provides that personal property transfers (with exceptions not pertinent here) are conclusively presumed to be fraudulent if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery and followed by an actual and continued change of possession, against those who are his creditors while he remains in possession, and the successors in interest of such creditors. It is provided however that the provisions of the section do not apply to certain transfers including the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, restaurant owner, garage owner, machinist, etc., if notice as prescribed by the section is given and published.

[1] In view of the foregoing facts and the law applicable to the case it must be held that the findings of the trial court that Hood was not rendered insolvent, that the conveyances were not made with intent to defraud creditors, and that there was a sufficient consideration passing to him from his grantee, are not supported by the evidence. That appellant was a creditor of Hood when the conveyance was made, and that he had other creditors to whom he was indebted in large amounts is admitted by him; it is also admitted that after the conveyance he had nothing left but a Chevrolet truck, the fair salable value of which clearly could not have been sufficient to pay his admitted liabilities. There was no fair consideration given for the conveyances, for nothing was given to him by his grantee, and no antecedent debt was satisfied. The only thing the grantee claims to have paid was about $200 for taxes, and that was paid after the conveyances were made.

That the personal property conveyed consisted of a garage and its equipment appears from the terms of the deed itself; there was no change of possession or control of the property, and no showing was made that the provisions of section 3440, supra, as to recording of notice, etc., were complied with by either of the defendants.

[2] As to the contention of defendants that the personal property involved is exempt from execution, while it is true that the tools or implements of a mechanic or artisan necessary to carry on his trade are exempt from execution, no attempt was made by defendants to show what part, if any, of the personal property conveyed, comes within that category. Such as does will, of course, continue to be exempt from execution.

[3] The case of Daugherty v. Daugherty, 104 Cal. 221, 37 P. 889, is practically on all fours with the present case, and plaintiff has a right to set aside the fraudulent conveyances and to have her judgment declared a lien upon the property. Jenner v. Murphy, 6 Cal.App. 434, 92 P. 405.

Respondents make some contention that marriage was one of the considerations of the transfers, but there is no evidence whatsoever to support it, as no mention of marriage was made at the time of the conveyances, nor does it appear that it was even contemplated at that time.

[4] One other finding of the trial court calls for examination, and that is that plaintiff was estopped by the terms of the separation agreement from acquiring a lien on Hood's property because that agreement specified that Hood should have the right to make such disposition of his property after the date of the agreement, as if the parties had never married. The answer to this seems to be that had the parties never married, Hood would not, under the law, have been entitled to dispose of his property in fraud of creditors. Also that agreement, as well as the divorce decree, obligated Hood to pay to plaintiff $30 per month for the support of their child, and there is nothing therein which bound plaintiff not to resort to the property of Hood for the collection of same, should he fail to keep his part of the bargain.

The judgment is reversed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concurred.



PAVAROFF v. PAVAROFF.

Civ. 13565.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1942.

Hearing Granted Dec. 7, 1942.

1. Trial ⇦1

Testimony must be given in open court or by deposition with right of cross-examination to sustain a cause of action, a defense thereto, or any other issuable controverted fact.

2. Affidavits ⇦18

The Legislature possesses no power to substitute, for a hearing in open court with a right of cross-examination, a proceeding for a hearing by affidavits and counter affidavits except on matters distinctly ancillary or provisional. Code Civ.Proc. § 2009.

3. Divorce ⇦312

In proceeding to modify divorce decree as to custody of minor children, trial

court committed prejudicial error in admitting affidavits as to character of parents, their fitness to have custody of children, and welfare of the children, and in denying husband the right to cross-examine affiants. CodeCiv.Proc. § 2009.

4. Affidavits ⇐18

Where statute providing for the use of affidavits upon a motion enumerated the circumstances in which affidavits could be used, it was intended to exclude their use in other situations, and it was not intended that any contested fact issue could be determined upon affidavits without the necessity of calling witnesses. Code Civ.Proc. § 2009.

5. Divorce ⇐312

In proceeding to modify divorce decree as to custody of minor children, error of trial court in admitting into evidence affidavits submitted on issue of right to custody and in denying husband right of cross-examination, together with other errors, was so prejudicial as to require reversal as resulting under the Constitution in a "miscarriage of justice". Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Anna McKenna Pavaroff against Edward Pavaroff. From an order refusing to modify a divorce decree as to custody of minor children, defendant appeals.

Reversed.

Caryl Warner and Francis Gabel, both of Los Angeles, for appellant.

Wood, Crump & Rogers and John Perry Wood, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

Resting its decision not only on the oral testimony of witnesses but on some eighteen affidavits which it had received in evidence over objection, the trial court held that the evidence did not warrant a modification of a provision of a decree of divorce which had awarded to respondent, as plaintiff therein, the custody of the minor children of the parties. The affidavits offered and received were directed to the basic fact issues in controversy before the court: that of the character of the parents, their fitness to have the custody of the children and the welfare of the children. Not only did the trial court hold that the affidavits touching these matters were admissible, but it ruled that appellant was not entitled to an order of court requiring respondent to produce her affiants for cross-examination.

As we agree with appellant that the trial court committed prejudicial error in admitting the affidavits in evidence and resting its decision in part upon them, we deem it unnecessary—as we assume the trial judge will not wish to rehear the case—to set forth or consider the numerous other rulings which appellant assigns as error.

[1] It is elemental that the issue below, pertaining as it did solely to the custody of minor children, could not have been tried wholly or in part on affidavits in the original divorce proceeding, over objection. This for the reason that evidence by way of affidavit on controverted issues of fact is an inappropriate link in the chain of proof. From time immemorial it has been a fundamental precept of the common law that testimony to sustain a cause of action, a defense thereto or any other issuable controverted fact must be given in open court or by deposition with cross-examination then and there accorded. Where cross-examination was not accorded, not only was the testimony classed as being hearsay but it was considered too uncertain and unreliable to be considered in the investigation of controverted facts, and should therefore not be received as evidence. As an affidavit is but the ex parte sworn statement or testimony of the affiant, it was accordingly inadmissible at the common law on a controverted issue of fact. The only exception which the common law recognized was in permitting a party to a cause, who was by reason of that fact incompetent to testify as a witness, to show by his affidavit the loss of an original document so as to permit the use of a copy. In short, the common law, accepting the experience of ages, regarded cross-examination of a witness or affiant as to his relation to the case or parties, his motives, if any, his means of knowledge and opportunities for information, his powers of observation and tenacity of memory as of prime importance to test the credibility and accuracy of his statements, so as to render reliance thereon safe.

[2, 3] Respondent, however, contends that as section 2009 of our Code of Civil Procedure[1] expressly provides that an affidavit may be used upon a motion, and, as the fact issue before the court in this case was initiated by a motion, that the court rightly received the affidavits and was entitled to rest its decision wholly or in part thereon.

The contention is without merit. Not only does it ignore basic and accepted rules of evidence, but it is rested alone on the literal language of the statute without regard to the legislative purpose as disclosed by its context and its history. Moreover, the contention takes no note of the fact that the Legislature possesses no power to substitute for a hearing in open court, with a right of cross-examination, a proceeding for a hearing by affidavits and counteraffidavits, except on matters distinctly ancillary or provisional. The proceeding below was neither ancillary nor provisional. To construe the statute as contended for by respondent would be to render it unconstitutional. If the position of respondent that affidavits may always be received in support of a motion were sound, it would follow that any contested fact issue could be determined upon affidavits without the necessity of calling witnesses. All that would be necessary for a plaintiff, after the court had obtained jurisdiction of the defendant, would be to make a motion for judgment on the merits based upon affidavits annexed. And, by the same token, a defendant could procure a dismissal of the action by a like procedure. Such short cuts do not accord with due process.

[4] The statute enumerates the only circumstances in which an affidavit may be used, i. e., as (1) a verification or (2) to prove service of certain documents; (3) to obtain certain provisional remedies and (4) to serve as evidence in certain uncontested probate matters and in guardianships after a guardian has been named; (5) upon motions and (6) in any case where the code expressly so provides. By this enumeration it is clear that the Legislature intended to exclude the use of affidavits in any other situations. Moreover, it is plain from the language used in the statute that an affidavit could not be used in a contested probate proceeding even though it was merely in support of a motion therein. That being true, it seems obvious that the statute must be limited in like manner in other contested proceedings. Cf. In re Estate of Paulsen, 35 Cal.App. 654, 170 P. 855.

A most casual reading of the statute serves to make clear that it was enacted to obviate oral testimony on certain incidental matters only "where serious and frequent inconvenience would be caused by requiring the calling of witnesses in court and where under the special circumstances there is little reason to fear false testimony and little need for the searching process of cross-examination." Wigmore on Evidence, vol. VI, §§ 1709, 1710. No court, so far as we are advised, has ever assumed, much less held, that under statutes such as section 2009 of our Code of Civil Procedure basic and controlling issues of fact could be tried by affidavits, in whole or in part. Statutes substantially similar to section 2009 are in force in the Canal Zone, Idaho, Kansas, Kentucky, Montana, Nevada, Oklahoma, Oregon, Philippine Islands, Puerto Rico, South Dakota and Texas, but in none of the decisions construing these statutes is there the semblance of a thought favoring the view expressed by respondent. On the contrary, the Supreme Court of Idaho, in Cornelison v. Cornelison, 53 Idaho 266, 23 P.2d 252, 253, involving the identical question before us and the construction of a statute identical with ours, reversed the trial court for basing its decision on affidavits, with instructions that the question of a change of custody be rested "upon the testimony of witnesses in open court, tested by cross-examination." For similar holdings see Wolfe v. Wolfe, 242 Ky. 162, 45 S.W.2d 1043; Passantino v. Passantino, 255 App.Div. 713, 5 N.Y.S.2d 697, and Rizzo v. Rizzo, 246 App.Div. 838, 284 N.Y.S. 853.

Moreover, we are not without controlling

[1] Section 2009 of the Code of Civil Procedure reads as follows: "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, as evidence in an uncontested probate proceeding, including a proceeding relating to the administration of the estate of a decedent, also a proceeding relating to the administration of the estate of a minor or incompetent person after a guardian has been appointed therein, or upon a motion, and in any other case expressly permitted by some other provision of this code."

authority in this state to sustain the construction placed by us upon the statute, although the case was not cited to us in the briefs. In Lacrabere v. Wise, 141 Cal. 554, 75 P. 185, 186, one of the issuable facts in the detainer proceeding there involved was whether service had been made of a three days' notice. This the court held could not be shown by the affidavits of service despite the provisions of section 2009 of the Code of Civil Procedure, but had to be proved by testimony as any other disputed fact in the case. Speaking to the point the court said:

"Counsel for respondent relies solely upon the construction he places on section 2009 of the Code of Civil Procedure to support the method of proof adopted by him. That section provides that: 'An affidavit may be used * * * to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain provisional remedy, the examination of a witness, or a stay of proceedings, etc.'; and he insists therefrom that, as an action for unlawful detainer is a special proceeding, and the notice in question is one pertaining to a special proceeding, that service of the notice on the hearing of such proceeding could be proven by affidavit under the section.

"But this section has no application to the proof of facts which are directly in controversy in an action. It was not intended to have the effect of changing the general rules of evidence by substituting voluntary ex parte affidavits for the testimony of witnesses. The section only applies to matters of procedure,—matters collateral, ancillary, or incidental to an action or proceeding,—and has no relation to proof of facts the existence of which are made issues in the case, and which it is necessary to establish to sustain a cause of action."

[5] The only remaining question is whether the errors mentioned, along with others not here discussed, are so prejudicial as to require a reversal in view of the provisions of article VI, section 4½ of the Constitution. A reading of the record has convinced us that it cannot be said "that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice." Herbert v. Lankershim, 9 Cal.2d 409, 476, 71 P.2d 220, 253.

For the reasons stated the order is reversed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.



55 Cal.App.2d 39

ROSENBAUM et al. v. TOBIAS' ESTATE et al.

Civ. 11971.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1942.

Rehearing Denied Nov. 16, 1942.

Hearing Denied Dec. 14, 1942.

1. Executors and administrators ⇐221(4)

In testamentary trust beneficiaries' action to recover amount paid in satisfaction of physician's claim against testator's estate from claimant's estate after his death, evidence *held* sufficient to sustain court's finding that filing of such claim constituted "fraud" on testator's estate and heirs to extent that amount of claim exceeded reasonable value of professional services rendered by claimant to testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Executors and administrators ⇐241

Ordinarily, approval of claim against testator's estate by executors, heirs, minor legatees' guardians, and court is sufficient in law, unless there is substantial showing of extrinsic fraud, not merely falsity of claim, in equitable proceeding.

3. Judgment ⇐443(3)

Where judgment is obtained by fraud in matters outside issues to be adjudicated, as by preventing party having meritorious valid defense from appearing and contesting issue, equity will interfere to right the wrong.

4. Judgment ⇐435, 443(3)

Fraud or mistake, whereby judgment is obtained, is "extrinsic", so as to warrant equitable interference, when it deprives

unsuccessful party of opportunity to present his case to court.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud or Mistake".

5. Judgment ⇐443(3)

Where party fails to defend action after being given opportunity by proper notice, fraud, if any, in obtaining judgment against him, is usually held to be "intrinsic", so as to preclude equitable interference.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

6. Judgment ⇐443(3)

Where a person holding confidential relationship with and charged with duty to another person, induces him not to protect his interests in a legal proceeding for first person's own gain, with result that judgment is rendered against such other person, invocation of equity to right such wrong is warranted.

7. Trusts ⇐102(2)

The mere filing of false claim against testator's estate for excessive amount was "intrinsic fraud", not warranting equitable relief, but claimant's acts, as executor and trustee under will, in willfully suppressing material evidence and using undue influence on testator's minor heirs, named as trust beneficiaries, not to protect their rights, thereby depriving them of estate assets, constituted "extrinsic fraud" warranting imposition of trust for them in their subsequent independent action against deceased claimant's estate for amount received in payment of claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

8. Executors and administrators ⇐453(2)

Ordinarily, a personal judgment may not be entered against representative of decedent's estate as an individual on a liability of decedent.

9. Pleading ⇐212

Defendants' failure to have demurrer to complaint placed on calendar for hearing in superior court and filing of answers instead after amendment of complaint and transfer of action to such court from municipal court for want of jurisdiction constituted "waiver" of ground of demurrer, not distinctly specified therein, that complaint did not state cause of action against administratrix as individual, except so far as jurisdiction was concerned. Code Civ.Proc. § 431.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

10. Trusts ⇐347

If administratrix of estate of decedent, to whom money was paid during his lifetime on fraudulent claim against a testator's estate, received such money individually as claimant's heir through ratable distribution of assets of his estate, with her knowledge, notwithstanding her duty to retain it in such estate at least until determination of its ownership, beneficiaries of trust created by testator's will should be permitted to follow money and enforce trust.

11. Judgment ⇐443(3)

One prevented by extrinsic factors from presenting his case to court in action to which he is party may bring independent action in equity for relief from judgment entered against him.

12. Limitation of actions ⇐195(3)

In action for amount paid in satisfaction of fraudulent claim against decedent's estate, defendants' election to raise question of statute of limitations by answer in separate and distinct defense, instead of by special demurrer to complaint, cast burden on them to prove such special defense. Civil Code, § 1607; Code Civ.Proc. § 338, subd. 4; § 339, subd. 1; § 431; Probate Code, § 714.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Gladys Rosenbaum and another against the estate of Elliott B. Tobias, deceased, and Sylvia Wenger, individually and as administratrix of the estate, to recover an amount received in payment of deceased's claim against the estate of Philip Wenger, deceased. Judgment for plaintiffs, and defendants appeal.

Affirmed.

William Klein and William F. Herron, both of San Francisco, for appellants.

Edward B. Dienstag and Marcel E. Cerf, Robinson & Leland, all of San Francisco, for respondents.

WARD, Justice.

This appeal is from a judgment in a suit attacking a certain probate proceeding—on the ground that the filing therein of a creditor's claim by one Dr. Elliott B. Tobias was affected with extrinsic fraud. By the judgment the court directed that Sylvia Wenger, individually and as administratrix of the estate of said Tobias, deceased, pay and restore to the Wells Fargo Bank & Union Trust Company, as trustee under the last will and testament of Philip Wenger, deceased, the amount received in payment of such claim, together with interest; and if such amount cannot be recovered from the estate of said Tobias "that plaintiffs have and recover from defendant, individually and as such administratrix, for the benefit of said trust estate, the sum of Twenty-five Hundred Dollars ($2500.00) * * * to be held and disbursed pursuant to the terms of said trust."

The facts out of which the present action arose are as follows: The defendant Sylvia Wenger is the sister of Elliott B. Tobias and the administratrix of his estate. Dr. Tobias attended Philip Wenger, a widower, professionally during his lifetime, and in conjunction with the Wells Fargo Bank & Union Trust Company, was named as executor and trustee of his estate. Sylvia Wenger, in addition to being the sister of Dr. Tobias, is the wife of Philip Wenger's brother, Sam. Gladys Wenger Rosenbaum and Leland Wenger, plaintiffs herein, are the two children of Philip Wenger, who were at the time of his death aged eighteen and nine years old respectively; Gladys Wenger was at the time of her father's death unmarried. Philip Wenger's estate was left to his two children in equal shares, a trust instrument providing for payment to each of them quarterly of the income on his or her half of the estate. The trust was to terminate as to each child when he or she reached the age of thirty-five years, at which time the corpus belonging to such child was to be distributed.

On September 27, 1932, the day following Philip Wenger's death, Dr. Tobias verified a petition for letters of guardianship as to the two children, which was filed on September 28th. He alleged that he had been a friend of the minors for a long time; that his sister had married their uncle; that the children were more or less directly under his care and control and that Gladys had nominated him as her guardian. Sam Wenger, the uncle of the children, was appointed the guardian of Leland; Gladys having married during the month after her father's death, no guardian was appointed for her.

On the day after Philip Wenger's funeral Dr. Tobias talked with Gladys Wenger and Harry Rosenbaum (who subsequently married Miss Wenger), stating to them that he should be paid a couple of hundred dollars for professional services rendered Gladys' father, but suggested that he put in a claim against the estate for $2,000 which would take care of professional services by him to Leland and Gladys for the remainder of their lives. Rosenbaum testified in this connection: "* * * he also cautioned me not to discuss this or mention it to anyone because, he said, if it got back to the bank, they wouldn't appreciate the services or the attitude he was taking, and he said they might interpret it in a different way. He said, 'This way I am saving you a lot of court expenses, rigmarole and red tape.'" The next day Tobias informed Gladys and her fiance that some extraordinary services might be required of him in caring for the former and her brother Leland "and it would be best if it were $3000 because then I would feel I was being compensated for my services and wouldn't feel like slighting the kids." A claim was filed in this amount, the itemization of which, attached thereto, showed office, home, hospital and emergency calls, etc., for Philip Wenger, his deceased wife and his two children aggregating the sum of $3,367.50, which amount was ostensibly reduced to the $3,000. Dr. Tobias represented to his co-executor that the claim was "fair, true and correct," and the bank finally agreed to approve the same if it met with the approval of Gladys, then Mrs. Rosenbaum, and Sam Wenger, the guardian of Leland. There is testimony in the record that Tobias told Rosenbaum: "'The claim is going to be presented to you kids for signature, and I would suggest signing it,' he says, 'Don't pay any attention to the form in which it is written up because the agreement that you and I have cannot be shown in the claim.'" The claim was finally approved by the bank and Tobias, as executors, and paid.

Dr. Tobias died in 1939, and Gladys Rosenbaum and Leland Wenger filed a claim against his estate based upon the aforesaid payment of the doctor's claim against their father's estate. The claim was rejected by the administratrix Sylvia

Wenger, and the present action was brought. Subsequently Sylvia Wenger filed a petition for ratable distribution of her brother's estate covering the major portion thereof. In the petition she set forth among various other matters, certain suits which had been brought against her on promissory notes executed by her and her husband; that she "had no defense thereto, in consequence of which, and with the knowledge and consent of said Phil W. Tobias, [her brother and the only other heir to the estate], the said Sylvia Wenger settled the said suits." She further set out in part the terms of an agreement between her brother and herself with reference to the distribution of the estate and stated that the claim of Gladys Rosenbaum and Leland Wenger was rejected. The bulk of the estate, consisting of real property, shares of stock in various corporations, personal property and cash, was thereupon distributed. Sylvia Wenger then succeeded in having her bond as administratrix reduced from $40,000 to $5,000, her petition in that regard stating "that suit [the present] has been filed upon said claim [Rosenbaum and Wenger] and said suit is now pending and undetermined." All of the above proceedings took place with the knowledge of Sylvia Wenger as administratrix of her brother's estate.

[1] There is ample evidence herein to sustain the finding that the filing of the claim by Tobias comprised a fraud upon the Philip Wenger estate and the heirs thereof "to the extent and in the amount that said claim exceeded the reasonable value of the services actually rendered by said Elliott B. Tobias, as set forth in said complaint; that said claim was excessive in the sum of Twenty-six hundred Dollars ($2600.00)." The evidence shows that the services rendered Philip Wenger by Tobias were only a minor fraction of those enumerated in this claim; this was also the case with regard to services purportedly rendered Mrs. Wenger, who had been almost exclusively under the care of another physician. The claim showed a charge for professional services to Gladys and Leland of only $30.

[2] The law requires something more than that a claim is false. Ordinarily the approval by executors, heirs, guardians and the court is sufficient in law, unless in an equitable proceeding there is a substantial showing of extrinsic fraud.

[3-6] If a judgment is obtained by fraud in matters outside the issues to be adjudicated—as by preventing a party who has a meritorious valid defense from appearing and contesting the issue—equity will interfere to right the wrong. Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328. As stated in Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107: "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court [citing cases]." If an opportunity is given by proper notice, and a party fails to defend, the fraud, if any, usually is held to be intrinsic. Olivera v. Grace, supra. The invocation of equity is warranted where one, holding a confidential relationship with a person and charged with a duty to him, for his own gain induces him not to protect his interests in a legal proceeding. Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Bankers' Trust Co. v. Patton, 1 Cal.2d 172, 33 P.2d 1019; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976; Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

In Hewett v. Linstead, 49 Cal.App.2d 607, 122 P.2d 352, an action to impress a trust on property distributed to heirs on the ground that the decree of distribution was procured through mistake and extrinsic fraud, this court, citing and discussing a number of cases, said (pages 613, 615 of 49 Cal.App.2d, page 355 of 122 P.2d): "Although there is some confusion in the cases, we agree with plaintiffs that the better rule is that where a legatee knows of the existence of other heirs, and, for the purpose of defrauding such heirs and benefiting himself, fails to notify the court of the existence of such heirs, and knowingly files false petitions with the court representing there are no such heirs, he is guilty of extrinsic fraud warranting the imposition of a trust on the fraudulent distributee's interest. * * * These cases establish that, where the executor or heir knowingly suppresses evidence of the existence of other heirs with intent to defraud them, the fraud is extrinsic warranting the equity court in granting relief, but where the executor or heir acts in good faith the decree is final and conclusive and equity is without power to impose a trust."

[7] The mere filing of the false claim in the Wenger estate was intrinsic fraud (United States v. Throckmorton, 98 U.S.

61, 25 L.Ed. 93), but there was a wilful suppression of material evidence by the executor and trustee holding a confidential relationship as advisor to two heirs, and use of undue influence upon them not to protect their rights, which resulted to them in deprivation of assets of their father's estate, to which they were entitled. Under such circumstances, the acts of Dr. Tobias constituted extrinsic fraud, and a trust was properly imposed in the present independent action (Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194) upon the estate of Dr. Tobias. Zaremba v. Woods, supra; Bankers' Trust Co. v. Patton, supra; Purinton v. Dyson, supra.

[8, 9] Appellants contend that the complaint fails to state a cause of action against Sylvia Wenger individually. Ordinarily a personal judgment may not be entered against an individual representative, as such, of an estate of a deceased on a liability of the decedent. The complaint, naming Sylvia Wenger individually and as administratrix, alleged her to be the duly and regularly appointed administratrix of the estate of Elliott B. Tobias, and prays for judgment against her in each capacity. A demurrer was filed by "the defendants" which contained the objection "That the said complaint and each count thereof, does not state facts sufficient to constitute a cause of action against either defendant." There is nothing in the record by way of citation or otherwise indicating that the demurrer "distinctly" specified (Code Civ. Proc. § 431) the particular ground now urged on appeal. It is shown that at a hearing on the demurrer in the municipal court the complaint was amended on its face at the request of plaintiffs, and the action, not being within the jurisdiction of that court, was transferred to the superior court. But, so far as the record on appeal shows, defendants failed to have the demurrer placed on the calendar for hearing in the superior court, and instead filed answers. This appears to be a waiver of the ground of demurrer, except insofar as jurisdiction is concerned. During the trial, on motion for a nonsuit, it was stated "that Sylvia Wenger in her individual capacity has had no dealings with the plaintiffs." This is the nearest approach to the point now urged on appeal.

[10] The record discloses that the administratrix, as an heir of decedent Tobias, received individually a portion of his estate on partial distribution. The court found that the bank, cotrustee in the Wenger estate, was entitled to have returned to the trust estate, to be held and disbursed as part thereof, the amounts specified, with interest, and rendered judgment that the sums be paid from the estate of Tobias, and "that if the specific money above referred to or any part thereof cannot be recovered, that plaintiffs * * * for the benefit of said trust estate" recover from the defendant "individually and as such administratrix" the specified sums. The judgment is qualified; the personal judgment is limited and secondary to the judgment against Tobias' estate. Under the circumstances above narrated, if it should develop that, through the ratable distribution of assets in the Tobias estate, money belonging to the Wenger trust had been permitted to find its way to Sylvia Wenger individually, with her knowledge and in the face of a duty to retain it in the estate of Tobias at least until determination of its ownership, the beneficiaries should be permitted to follow the property and enforce the trust. Back v. Farnsworth, 25 Cal.App.2d 212, 77 P.2d 295; Swanson v. Siem, 124 Cal.App. 519, 12 P.2d 1053.

Appellants contend the complaint shows on its face that the action is barred by the statute of limitations. The bar of the statute is pleaded in the answer of Sylvia Wenger as administratrix—wherein are cited Probate Code, section 714; Code of Civil Procedure, sections 338, subdivision 4, and 339, subdivision 1, and Civil Code, section 1607. In appellants' opening brief —the only one filed by them—no mention is made of Civil Code, section 1607. The statute of limitations is not raised by demurrer, but, as stated, by answer, and then only in that of Sylvia Wenger as administratrix of her brother's estate; not in the answer filed by her individually.

[11] The claim filed in the estate of Tobias purports to be a claim for breach of contract or breach of trust; it is not specifically based upon fraud. In the complaint herein, the gist of the first cause of action appears in paragraph nine of the complaint as follows: "Plaintiffs consented orally to said proposal [that of Tobias to file a creditor's claim against their father's estate in the amount suggested by him], but at the time of said consent plaintiffs, and each of them, were minors and were in a state of shock and indecision caused by the death

of their father, the said Philip Wenger; that at said time, and for many years prior thereto, said Elliott B. Tobias was related to plaintiffs by marriage; that at the time of the said consent, a relationship of trust and confidence existed between said minors and Elliott B. Tobias, and relied upon his advice and suggestion in giving such consent" and there was proof that Dr. Tobias prevented the children from presenting the true facts to the probate court in the Estate of Wenger. Presumably all of the facts that warranted the filing of the present complaint were not known at the time plaintiffs filed their claim against the Tobias estate. The present action, though similar, is not based upon the identical facts as set forth in the claim. In Olivera v. Grace, supra, wherein the rights of an incompetent person are considered, the court said (pages 575, 576 of 19 Cal. 2d, page 567 of 122 P.2d, 140 A.L.R. 1328): "One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him. Caldwell v. Taylor, supra [218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194]; Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 27 Am.St. Rep. 143, 16 L.R.A. 361. * * * In determining whether the complaint in the present proceeding states a cause of action, therefore, we may consider those cases in which equitable relief has been granted in favor of an incompetent defendant, whether the jurisdiction of equity was invoked by motion before a court of general jurisdiction or by an independent action in equity."

[12] The complaint in the present action is silent relative to the date of the discovery of the fraud. It could have been attacked in that regard by special demurrer, but the defendants elected to raise any question of the statute of limitations by answer in a separate and distinct defense, which cast the proof of such special defense upon them. Incidentally, it should be mentioned that appellants direct their attack under the provisions of Code of Civil Procedure, section 338, subdivision 4, and section 339, subdivision 1, against Gladys Wenger Rosenbaum, and not against Leland Wenger. The record as a whole indicates that the fraud was not discovered until after the filing of the claim in the Tobias estate. The present complaint was filed within the same year. No further consideration need be given the statute of limitations as appellants in their brief have stated: "This suit is filed on the very last day permitted by the statute."

The judgment is affirmed.

PETERS, P. J., and WAGLER, Justice pro tem., concurred.



55 Cal.App.2d 116

WOOD v. PEFFER.

Civ. 6701.

District Court of Appeal, Third District, California.

Oct. 26, 1942.

1. Trade-marks and trade-names and unfair competition ⇐93(3)

In action by administratrix of estate of deceased refrigerator dealer for unfair competition, evidence that following death of decedent plaintiff continued to operate the business under court order, that at the time instant action was commenced plaintiff was so operating such business and attempting to sell the stock on hand, and still had on hand several refrigerators, sustained finding that plaintiff was in business and hence could maintain action, though such sale was being conducted through an agent. Civ. Code, § 3369.

2. Trade-marks and trade-names and unfair competition ⇐68(1)

The doctrine of "unfair competition" is not confined to cases of actual market competition between similar products of the parties, but extends to all cases in which one party fraudulently seeks to sell his goods as those of another and does not necessarily involve unfair competition in sale of goods, but the unfair appropriation and use of a competitor's mark, with the intention to profit in the sale of goods of a related character.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

3. Trade-marks and trade-names and unfair competition ⇐68(1)

In an action for unfair competition, it is not necessary, so far as injunctive relief is concerned, that the parties be in actual competition if confusion and deceit will result from the acts of the defendant.

4. Evidence ⇐14

It is common knowledge that shoppers, especially those in search of expensive articles, such as electric refrigerators, are accustomed in recent years to travel considerable distances to secure the best bargains, especially in fields where sales are widely and aggressively advertised and where merchants are offering reduced prices and exceptional terms.

5. Trade-marks and trade-names and unfair competition ⇐93(3)

In action between two refrigerator dealers for unfair competition, evidence that the parties maintained their places of business in cities only fifty miles apart, and that defendant, while plaintiff was endeavoring to dispose of her refrigerators, stated over radio, in effect, that plaintiff had no refrigerators to sell, that defendant had purchased plaintiff's entire stock, that defendant was selling such refrigerators at a reduced price with special premiums, and that defendant would make free deliveries within a distance of 200 miles of his store, justified grant of injunction to plaintiff on ground of "actual competition" by defendant with plaintiff. Civ.Code, § 3369.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Competition".

6. Trade-marks and trade-names and unfair competition ⇐68(1)

Unfair competition is a "question of fact," and question in each case is whether the public is likely to be deceived. Civ. Code § 3369.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

7. Trade-marks and trade-names and unfair competition ⇐79

Injunction is a proper remedy in cases of unfair competition, and to justify relief, it is not necessary to prove that defendant's conduct was fraudulent. Civ.Code, § 3369.

8. Trade-marks and trade-names and unfair competition ⇐97

In action between two refrigerator dealers for unfair competition, wherein plaintiff prayed for an injunction, fact that defendant at time judgment was rendered against him still had three refrigerators in his possession negatived defendant's claim that transaction was necessarily completed and that hence injunction could not be granted. Civ.Code, § 3369.

9. Evidence ⇐20(1)
Trade-marks and trade-names and unfair competition ⇐93(3)

In action between two refrigerator dealers for unfair competition consisting of radio advertising by defendant, plaintiff's failure to introduce evidence that defendant's broadcasting station was sufficiently powerful to be heard in city where plaintiff was doing business did not deprive plaintiff of right to prevail, where defendant's broadcast contained an offer to make free deliveries within 200 miles of defendant's place of business, since it is common knowledge that a refrigerator business does not necessarily draw all its patronage from within the city where it is located. Civ. Code, § 3369.

10. Trade-marks and trade-names and unfair competition ⇐98

Rule that, entirely apart from the question of actual damage, the owner of a trade-mark is entitled to recover from an infringer the profits realized by the latter from sales under the simulated trade-mark, applies also to cases of unfair competition. Civ.Code, § 3369.

11. Trade-marks and trade-names and unfair competition ⇐98

In action for unfair competition, equity will refuse, in the absence of a fraudulent intent, the prayer for an accounting of profits, notwithstanding plaintiff's right to an injunction. Civ.Code, § 3369.

12. Trade-marks and trade-names and unfair competition ⇐98

An accounting will not be ordered in action for unfair competition where the infringing party acted innocently and in ignorance of the plaintiff's right, provided such party stops his illegal practice after he discovers the truth. Civ.Code, § 3369.

13. Trade-marks and trade-names and unfair competition ⇐98

In action between two refrigerator dealers for unfair competition, plaintiff was not entitled to recover damages for diversion of profits, where plaintiff was not operating a business in the ordinary sense but was merely selling out, as administratrix, the stock of her deceased husband, and had only four refrigerators, approximately, left, and plaintiff failed to show that she was unable to sell such refrigerators or that she had suffered any loss of profit on their sale or that defendant had any fraudulent intent or deliberate design to injure plaintiff's business because of the acts of unfair competition. Civ.Code, § 3369.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Bertha Wood, as administratrix of the estate of H. L. Wood, against Edward Peffer for an injunction and to recover damages for unfair competition. Judgment for plaintiff, and defendant appeals.

Affirmed in part and reversed in part.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Johnson & Curtright, P. H. Johnson, and C. K. Curtright, all of Sacramento, and John R. Cronin, of Stockton, for respondent.

PAULSEN, Justice pro tem.

Unfair competition. Plaintiff recovered judgment for $923.61, because of profits diverted from her business, and was granted an injunction. Defendant prosecutes this appeal from said judgment. For convenience, the parties will be referred to herein as plaintiff and defendant.

There is practically no conflict in the evidence, and the facts may be summarized as follows:

The plaintiff, Bertha Wood, ever since the 17th day of April, 1939, has been the administratrix of the estate of her late husband, H. L. Wood, who, during his lifetime, conducted, at 2947—35th Street, in the city of Sacramento, a profitable household and electric appliance business. After the death of H. L. Wood on April 2, 1939, plaintiff applied for letters of administration of his estate, and secured an order of the court authorizing her to conduct the business of the decedent as a part of her duties as administratrix.

Included in the assets of the estate were sixty-four Hotpoint electric refrigerators. Of this number, thirty-two were held under a trust receipt, upon which General Electric Contracts Corporation was the legal owner. Some of the refrigerators were "on the floor" of decedent's place of business, but most of the thirty-two owned by General Electric Contracts Corporation were stored in a warehouse in Sacramento. For reasons that need not be recited here, General Electric Contracts Corporation exercised its right to possession of the refrigerators under its trust receipt, and they thus passed from the control of the Wood Estate, and never thereafter returned to its control or possession.

On June 10, 1939, the administratrix terminated her lease of the store premises, but left some of the stock, including several refrigerators, with the new occupants, to be sold for the estate. She then continued to dispose of the remaining stock from her home in Sacramento.

On the 24th day of June, 1939, the defendant was, and for a number of years prior thereto had been, conducting a general household furnishing business in the city of Stockton, selling, among other things, electric refrigerators. He also owned and operated, in connection with his business, a radio broadcasting station.

On the 22nd day of June, 1939, representatives of the Electric Kitchen Appliance Company of San Francisco, which had gained control of twenty-seven Hotpoint Electric Refrigerators, repossessed from the stock belonging to the estate of H. L. Wood, deceased, sold that number to defendant. The salesman for Electric Kitchen Appliance Company informed defendant that the refrigerators, thus sold constituted the entire stock of Hotpoint electric refrigerators of the late H. L. Wood of Sacramento, and defendant made no investigation whatever to determine the correctness of that statement.

On the 24th day of June, 1939, defendant caused to be broadcast over his radio station the following announcement: "Big Sacramento stock Hotpoint refrigerators sacrificed to Peffer. Entire stock late W. L. Wood, Sacramento dealer. The entire Hotpoint electric refrigerator stock of the late W. L. Wood of Sacramento was sacrificed to Peffer this week. The Wood Company

in Sacramento has sold hundreds of Hotpoints. Wood was one of Hotpoint's best dealers, with always large stocks. The offer came to Peffer this week—and Peffer cash quickly closed the deal. Hotpoint electric refrigerators are all new, all 1939 styles, all sizes, and the deal is so good that Peffer can sell while they last the family-sized Hotpoints at just $124.50; larger sizes at corresponding price cuts. Standard and DeLuxe Hotpoints in this deal just in time for opening week of great Peffer summer sales, but they won't last long even though there are many in this Peffer deal, because Hotpoints have never before been at such bargain prices. And as with all new electric refrigerators, Peffer is giving Emerson Room Coolers, and Royal Electric Fans absolutely free. Pick any Hotpoint, pay $9.50 down, then as low as $1.25 weekly. No interest, no finance cost, no carrying charges. All Hotpoint electric refrigerators covered by factory and Peffer five-year protection plan. To any home by Peffer in 200 miles."

Said advertisement was announced over the radio not more than three times during the latter part of June, and was never repeated thereafter. Defendant testified that the name "W. L. Wood," as used in the broadcast, was a mistake, and that he intended to refer to the decedent.

The defendant sold twenty-four of said refrigerators between the 22nd day of June and some date in the early part of September, 1939. The other three were retained by him, and, according to his testimony, were used on his ranch. No sales were made in the city of Sacramento.

Plaintiff instituted this action upon the theory of unfair or unlawful competition in business, basing her claim entirely upon the fact that defendant caused said announcements to be made over his radio broadcasting station.

Defendant's first contention is that the record shows without doubt that plaintiff was not actually engaged in business, and is therefore in no position to maintain such an action.

The court found that the "plaintiff has been, and now is conducting, carrying on, and operating the said business of said decedent; that plaintiff, as administratrix as aforesaid, has possession of the stock of goods and other assets of said business of said decedent, and has exposed and offered, and is exposing and offering the said stock of goods for sale at retail in the City of Sacramento, County of Sacramento, State of California." The court further found that the plaintiff, as administratrix, did have on hand and in her possession Hotpoint electric refrigerators of, or belonging to the estate of said decedent which she was then offering and exposing for sale at retail.

Defendant contends that such findings are not supported by the evidence. Plaintiff testified that subsequent to the death of her husband she continued to operate the business under the order of the court; that at the time of the filing of the complaint herein, she was so operating the business and was attempting to sell the stock on hand; that she still had several of the refrigerators on hand; that she was not running the business from the store, but was still trying to sell the stock. She testified on cross examination: "I think I operated it personally, myself, until the 10th day of June; after that I rent-leased or rented the building that we were occupying to another party who was going into business, and with the arrangements that they were to handle my merchandise until it was all sold." There was a conflict in the evidence as to the exact number of refrigerators remaining for sale, the lowest estimate of plaintiff being "four or more."

[1] The record fails to disclose the exact circumstances under which plaintiff left the refrigerators with her lessee for sale, but it is apparent that she did not remain at the former place of business to supervise sales, and that the premises were operated, in part at least, for the benefit of the lessee. However, the testimony shows clearly that four or more refrigerators of the decedent were still being offered for sale, and in our opinion it is immaterial whether or not the sale was being personally conducted by plaintiff, or through an agent or employee, or whether or not plaintiff was attempting to dispose of the assets of said estate at the former place of business of her husband, or from her home. She was still in a position to suffer from any act of unfair competition in the sale of such assets, and the public could still be deceived concerning the ownership thereof. The evidence amply supports the findings of the trial court in these particulars.

Defendant further asserts that in order for plaintiff to prevail in this action it was

incumbent upon her to allege and prove actual business competition between her and defendant. It is argued that there is nothing in the record to indicate that the plaintiff or her husband, in his lifetime, had ever sold, or attempted to sell, merchandise of any kind in or near the city of Stockton, or that the defendant had ever sold any merchandise of any kind in or near the city of Sacramento. Further, that notwithstanding the defendant's broadcast, there was no evidence to show that he actually made any sales in the city of Sacramento.

It is true that the complaint contained no allegation of actual business competition between the parties. However, defendant did not demur upon that ground, and at the trial made no objection to evidence which, as hereinafter stated, clearly proved the existence of such competition.

In support of his contention defendant cites Beech-Nut Packing Co. v. P. Lorillard Co., 3 Cir., 7 F.2d 967; Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., D.C., 231 F. 550; Good Housekeeping Shop v. Smitter, 254 Mich. 592, 236 N.W. 872; National Grocery Co. v. National Stores Corp., 95 N.J.Eq. 588, 123 A. 740.

In some respects these cases represent the minority opinion in the United States, and at least one of them recognizes the rule that it is not always necessary to prove actual market competition where the purpose of the action is to secure injunctive relief. The Beech-Nut Packing Company case, supra, is directly opposed to defendant's contentions. The court there said [7 F.2d 970]: "We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word 'unfair,' rather than 'competition.' If by unfair and fraudulent means the plaintiff is injured and the public deceived, equity will enjoin, whether the injury comes through competition or in some other way."

[2, 3] The foregoing quotation is a recognition of the majority view set forth more fully in 63 C.J. 389, as follows: "* * * it has been held, that there must be actual competition before there can be any unfair competition, and that there cannot be competition unless there is something to compete with. However, the tendency of the courts has been to widen the scope of protection in the field of unfair competition. They have held that there is no fetish in the word 'competition,' and that the invocation of equity rests more vitally on the element of unfairness. Accordingly, it is now held that the doctrine of unfair competition is not confined to cases of actual market competition between similar products of the parties, but that it extends to all cases in which one party fraudulently seeks to sell his goods as those of another; that it does not necessarily involve unfair competition in the sale of goods, but the unfair appropriation and use of a competitor's mark, with the intention to profit in the sale of goods of a related character. So without regard as to whether there is actual market competition between the parties for the same trade, it is sufficient if the unfair practices of the one will injure the other. * * *" And in line with the foregoing statement, our own Supreme Court has held that so far as injunctive relief is concerned, it is not necessary that the parties be in actual competition if confusion and deceit will result from the acts of the defendant. Academy of Motion Picture, etc., v. Benson, 15 Cal.2d 685, 104 P.2d 650.

[4, 5] We are of the opinion, moreover, that actual competition was proved. It was shown by the evidence that the cities of Sacramento and Stockton are about fifty miles apart, and it is a matter of common knowledge that shoppers, especially those in search of expensive articles, such as electric refrigerators, are accustomed in recent years to travel considerable distances to secure the best bargains, especially in fields where sales are widely and aggressively advertised, and where merchants are offering reduced prices and exceptional terms. The record discloses that at the time plaintiff was seeking to dispose of her refrigerators, defendant's broadcast stated, in effect, that plaintiff had no refrigerators to sell; that he had purchased her entire stock; that he was selling them at a reduced price with special premiums; that he would make free deliveries within a distance of two hundred miles of his store; and this, of course, included the whole city of Sacramento and its environs, a distance at least one hundred fifty miles in any direction from the place where plaintiff was attempting to dispose of the stock. This constituted the keenest and most unfair kind of competition.

It is further argued that the court was not justified in granting an injunction because there was no proof of fraud, and that inasmuch as defendant had testified that all the refrigerators had already been sold, the

transaction was competed before the injunction was granted.

Section 3369 of the Civil Code declares that unfair competition includes, among other things, "unfair or fraudulent business practice and unfair, untrue or misleading advertising."

[6] In Pohl v. Anderson, 13 Cal.App.2d 241, 56 P.2d 992, the court quotes with approval the following extract from 63 C.J. 414: "No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. * * * The universal test question is whether the public is likely to be deceived."

So far as injunctive relief is concerned, it was not necessary to prove that the conduct of defendant was fraudulent. It will be noted that while the Beech-Nut Packing Company case, supra, and some of the other cases, speak of "unfair and fraudulent" competition, section 3369, supra, mentions these elements in the disjunctive, thus providing for injunctive relief where the conduct is unfair, even though there is no element of fraud. See, also, Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879; Hoover Co. v. Groger, 12 Cal.App. 2d 417, 55 P.2d 529; Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 6 Cir., 119 F.2d 316.

[7, 8] That injunction is a proper remedy in cases of this kind is beyond dispute. Civil Code, sec. 3369; Morton v. Morton, 148 Cal. 142, 82 P. 664, 1 L.R.A.N.S. 660; Dodge Stationery Co. v. Dodge, supra; Weinstock-Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St. Rep. 57. The record shows that three refrigerators remained in defendant's possession at the time judgment was rendered. This fact alone negatives the argument that the transaction was necessarily completed, and that defendant no longer possessed the means of continuing in his course of conduct. Where a guilty party retains the means of so continuing his transgressions, a court is not required to accept his statement that he no longer intends to do so.

[9] It is next argued that plaintiff was not entitled to prevail because there was no evidence to prove that defendant's broadcasting station was sufficiently powerful to be heard in Sacramento, and therefore no proof that the broadcasts could have injured plaintiff. We have already expressed the view that a business such as that conducted by plaintiff does not necessarily draw its patronage from the area within the limits of the city where it is located, and the wording of defendant's broadcast clearly indicated that defendant regarded his field of operations as including the city of Sacramento and the area for many miles around it. He expressly offered to make free deliveries within two hundred miles of his place of business. It is inconceivable that defendant would have included such terms in his broadcast if his station had been too weak to be heard by the persons within the area included in his offer. It is a logical inference from these facts that the broadcast could have been heard in the area served by plaintiff.

The court awarded plaintiff the sum of $923.61—the amount of the profits realized by defendant from the sale of the refrigerators. In so doing it followed the rule prescribed in Modesto Creamery Co. v. Stanislaus Creamery Co., 168 Cal. 289, 142 P. 845, and Banzhaf v. Chase, 150 Cal. 180, 88 P. 704. Defendant now contends that profits were not recoverable under the circumstances of this case, and that there was no evidence to justify the allowance of this amount as an award of damages.

It is said in the last mentioned cases, with reference to trademarks, that: "In contemplation of law, such profits are diverted from plaintiff, being obtained through the improper invasion of plaintiff's trade rights. Entirely apart from the question of actual damage, the owner of a trade-mark is entitled to recover from an infringer the profits realized by the latter from sales under the simulated trademark." [168 Cal. 289, 142 P. 847].

[10-12] It is then held that the rule thus announced applies also to cases of unfair competition. In each of those cases, and others of similar import, there was proof of actual fraud or intent to divert the business of plaintiff by the unlawful means employed. The parties to those actions were going concerns that carried on a continuing business with constantly replenished stocks of merchandise. In the instant case there is no evidence of a deliberate design to injure the business of plaintiff, or of a fraudulent intent upon the part of defendant. He was informed by the salesman with whom he negotiated for the purchase of the refrigerators that they constituted the entire stock of the Wood estate, and there is no evidence that he persisted in

his broadcasts when the true facts became known to him. It is said in McLean v. Fleming, 96 U.S. 245, 24 L.Ed. 828, that equity constantly refuses, for want of fraudulent intent, the prayer for an accounting of profits, although the right to an injunction against the infringer is acknowledged. In Nims on Unfair Competition and Trade-marks, page 1078, the rule is laid down that "an accounting will not be ordered where the infringing party acted innocently and in ignorance of the plaintiff's rights, provided such party stops his illegal practice after he discovers the truth." See, also, Liberty Oil Corp. v. Crowley M. & Co., 270 Mich. 187, 258 N. W. 241, 96 A.L.R. 645, and Annotation, 96 A.L.R. 651.

[13] The defendant's argument against the allowance of profits is further fortified by the fact that obvious inequities would result from such a rule if applied to cases of this peculiar nature. Plaintiff was not operating a business in the ordinary sense of that term. She had about four refrigerators to sell before closing out that line, and she could not possibly have suffered a diversion of profits equal to those realized by defendant. She did not show that she had been unable to sell the refrigerators which she had on hand, or that any loss of profit on their sale had been suffered. In this respect the instant case differs materially from the cases in which profits have been deemed to be diverted. In Straus v. Notaseme Co., 240 U.S. 179, 36 S.Ct. 288, 60 L.Ed. 590, the court held that in unfair competition cases the defendant is not always chargeable with profits as a matter of right, and that the analogy between these cases and those growing out of trade-mark infringements is not always complete, and the same rules cannot always be applied. In J. C. Penney Co. v. H. D. Lee Mercantile Co., 8 Cir., 120 F.2d 949, it is declared that in a case of unfair competition the court should endeavor to adapt its relief to the general equities of the situation as nearly as is possible under the circumstances, but no evidence of damage, other than defendant's profits, was offered in the case.

The part of the judgment granting an injunction is affirmed, and the part thereof awarding profits to plaintiff is reversed, costs of appeal to be borne by each party.

ADAMS, P. J., and THOMPSON, J., concurred.

55 Cal.App.2d 310

HARDISON et al. v. CORBETT et al.

Civ. 13596.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1942.

Hearing Denied Dec. 28, 1942.

1. Trusts ⇐17(2)

A valid trust in personal property may be created even by parol.

2. Trusts ⇐25(1)

A valid trust in personal property may be created, as to trustor and beneficiary, by any words or acts of trustor indicating with reasonable certainty his intention to create trust and subject, purpose and beneficiary of trust. Civ.Code, § 2221.

3. Trusts ⇐25(1)

The term "trust" or "trustee" need not be used to create trust in personal property.

4. Trusts ⇐371(1)

In action against executors to quiet plaintiffs' title, as beneficiaries of alleged trust created by testator, to shares of corporation's stock acquired by testator after execution of will, it was not necessary to make allegations in complaint as to chain of title through which plaintiffs derived ownership of stock.

5. Trusts ⇐44(1)

In action against executors to quiet plaintiffs' title, as beneficiaries alleged trust created by testator's will, to shares of corporation's stock acquired by testator after execution of will, evidence *held* sufficient to warrant trial court's findings that stock certificates were endorsed and assigned by testator for transfer to plaintiffs, with intent and purpose to assign and transfer to them all of his interest and ownership in certificates, subject only to his right to receive dividends on such stock during his lifetime.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Aura D. Hardison and another against Hiram S. Corbett, and another, as executors of the will of Leonard White Corbett, deceased, to quiet title to shares of stock of the Union Oil Company. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Robert M. Clarke and Dixie Dunnigan, both of Los Angeles, and Knapp, Boyle & Thompson, of Tucson, Ariz., for appellants.

Rogers & Rogers, of Ventura, for respondents.

PARKER WOOD, Justice.

Defendants appeal from a judgment quieting plaintiffs' title to 1,168 shares of stock of the Union Oil Company. The complaint alleged that plaintiffs were the owners of said property, that defendants claimed ownership thereof but did not own the same or have any interest therein. The answer alleged that defendants were owners of the stock.

The facts were either admitted or established by uncontradicted evidence. Leonard W. Corbett died on May 24, 1940, leaving an estate of the value of approximately $200,000. The plaintiffs are daughter and son of a brother of Ida Hardison Corbett, the deceased wife of Leonard W. Corbett. The defendants are the executors of the will of Leonard W. Corbett.

By the decree of distribution in the estate of Ida Hardison Corbett, deceased, the plaintiffs were awarded interests of 5/8 and 3/8, respectively, in 877 shares of Union Oil Company stock, subject to a life estate in Leonard W. Corbett. That life estate had been terminated and the ownership of said 877 shares is not involved herein, but this reference to those shares is made in order that there may be a proper understanding of statements concerning them which appear in certain letters hereinafter mentioned.

On August 25, 1938, Leonard W. Corbett signed his name in the presence of a witness on the back of each of the thirteen certificates (representing in the aggregate the 1168 shares of stock) at the place provided in the printed blank form on the back thereof for assignment and transfer of the shares of stock. On each of said certificates, in said printed blank form on the back thereof, at the place designated for the name of the assignee, the names of the plaintiffs appeared in typewriting. On each of said certificates the following appeared: "For Value received, I hereby sell, assign and transfer unto Aura D. and Harvey C. Hardison ——— Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint ——— Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises. Dated, Aug. 25th 1938. Leonard. W. Corbett In Presence of Fred Brown."

After endorsing said certificates in such manner, Leonard W. Corbett put them in an envelope and wrote on the envelope in his handwriting "Aura D. and Harvey C. Hardison," and placed such envelope in his safe deposit box in a bank, where it with the enclosed certificates was found after his death.

Leonard W. Corbett was known to the plaintiffs as "Uncle Len." He wrote 6 letters in his handwriting to plaintiffs which, in the parts essential to the question involved herein, were as follows:

(1). "May 11th/38 My dear Aura—after getting entirely out of debt last fall—and I am sure happy to say so; I began picking up Union Oil shares, when I though– the price was O K for you and Harvey after I go—

"I also looked into the matter of how to go about it, without paying big Lawyers fees, so I came to the conclusion that an endorsement of the back of the certificate was the best and leaving it in the Box in the Bank—Today the number of shares is *1500*—The last I bought amounted to nearly $13,000. * * *

"This was all done without consulting any one, and if it does not meet with your approval—just let me know. Hope you wont think I am getting ready to die—No I hope to be here for a few more years. * * * Uncle *Len.*"

(2). "May 11/38 My dear Harvey. * * * You know I don't write with a pen & ink much so one gets out of practice. All done now by stenographers, but don't like for her to know all my personal affairs —I wrote to Aura about this matter—

"Last fall I got out of debt entirely and I have quit speculating so with my surplus I began buying Union Oil for you and Aura after I go. * * *

"I put out nearly $13000 and added to what you folks have now—makes 1500 shares to start on & I hope to keep this up till I go.

"These certificates I bought recently will be endorsed to you & Aura & will be in my deposit box in the Bank of America—*No* one can use it but you folks—

"Now if this scheme does not meet with your approval let me know—I want you to know that this was not taken up by no one

as I consider it too personal to fool with expensive Lawyers and I feel they have proven troublesome & a darn nuisance on several occasions. * * * Uncle Len"

"May 27/38 This letter was sent to the wrong state hence it was returned to writer. I guess Ive lived so long in California—(52 yrs) that I have it on my mind—Aura wrote me to know how the certificates of stock read—I answered 877—Estate—⅝ hers & ⅜ yours according to Court decree, but the
623 I voluntary bought for you was 50/50
1500
LWC"

(3). "May 23/38 My dear Aura—I delayed answering your letter of May 16/38 till I could check up on the U stock—number of shares and the number from the estate and the number Ive been buying for you & Harvey—There is an old adage—'Words that are spoken may be forgotten, but things that are written become a record' which is very true; so I think if you will refer to the Decree you will find I am correct—It is as follows—877 shares from the Estate and 623 " Ive bought
1500 total

"Those certificates from the Estate reads Leonard White Corbett with Life Interest in accordance with D/D in the Estate of Ida Hardison Corbett, Dec'd—According to the decree (which you should have a copy) ⅝ go to you and ⅜ to go Harvey—but the stock I have for you & Harvey and which I hope to buy in the future will be ½ for you & ½ for Harvey—You may have to pay a state inheritance on it unless the present law is changed—I am not sure about *Taxes* of any sort these days—*They* are *awful* and they are getting worse. * * *

"I do hope that your Uncle Fred will remember you and Harvey in his will * * * I have willed you & Harvey all of the S. P. [meaning Santa Paula] property, as you will have to look after the old Corbett Home which is already your—and an agent can take care of the rents if you & Harvey don't want to bother with it. * * * Uncle Len"

(4). On July 7, 1938, he wrote: "My dear Aura * * * At last I have the last certificate of Union Stock I scraped up enough money to buy at 18:00—today it is 21/3/4 but while I could sell & make quite a nice profit, I did not buy it for that purpose—I bought it for the Dividends while I am living & then it goes 50–50 for Aura & Harvey—is that plain enough?

"This is a voluntary act on my part and I hope to buy some more when prices pick up, but at present—Lemon & Orange prices are very bad & acres & acres are being put out. * * * Uncle Len"

(5). "Aug 25/38 Dear Aura I think I have fixed the Union Oil Co stock I am leaving for you and Harvey the best and only way after looking into the matter from every angle—

"It was necessary to have each certificate witnessed, so I thought your Uncle Fred was nearer to you than any one, so I called him over the phone & told him I had a *confidential* matter to take up with him, and he said 'OK' come in—

"When I told him what it was and told him why I wanted him, but told him to think it over and if he declined I would get some other one of the family—He was very nice about it and we signed them all and the next morning I put them in a big envelope & marked them Aura D. & Harvey C. Hardison and put them in a SD Box in the Bank. Altogether there is 204 shares.

"The Lemon & Orange business looks bad and I don't know what the future will be, but if it comes back, I may buy some more Union Oil Stock.

"Fixing this matter up this way does not mean that I expect to die very soon, for while I am crippled up some what, I feel pretty good. * * * Uncle Len"

(6). "Oct. 1st/38 My dear Harvey Have been wanting to write you for some time, but have been too busy, and what I want to say will keep—

"In case Aura did not send you my letter or write you about it, I will proceed.

"After I sent you $500 apiece and after Aura wrote me thanking me, but sent it back, saying she did not need it, I commenced to buy Union Oil with what profit I could take from the business, and then the next question arose was, how to fix it to make sure you would get it with as little expense as possible, so after taking it up with the Union Secy and others, I came to the conclusion that the simple & safe way was to Endorse it over to Aura D. & Harvey C. Hardison, then the sure way was to have a witness.

"After looking over the relatives nearest to you to witness these certificates, I decided Fred was the man, as he related to

you in two ways—I called him over the phone and told him I was coming in to see him.

"After I explained it to him, he said he would be glad to, so we fixed up the certificates and they are now in my Box in the Bank of America at Ventura. I hope to add to them when the citrus business picks up, it is nearly Red Ink for 38—

"There is in the box stock as follows—

877 shares left by your dear Aunt Ida
623 " " " " " "
545 " Bought in 37–38 by LWC—
2045 Total I hold a life Int only

"This is the longest letter I have written for a long time and I hope you can read & understand it—

"I might mention, that you folks get all of the SP real estate. * * * Uncle Len"

Mr. Corbett made a will on April 2, 1936 (about 2 years prior to writing the letters above mentioned concerning the Union Oil stock), in which he devised certain real property to respondents. The stock involved here was acquired after the will was made.

All of the dividends paid on the stock from the time of purchase to the time of the death of Mr. Corbett were received by him and credited to him in his books of account. At the time of his death the certificates of stock were in Mr. Corbett's safe deposit box in the Bank of America at Ventura. A key to the box was in a safe at the home of Mr. Corbett and another key to the box was in his pocketbook, at the time of his death.

The above letters, the special endorsements of the certificates assigning them to plaintiffs, and the conduct of Mr. Corbett show clearly that it was his intention that the plaintiffs have the stock. Appellants concede that such was Mr. Corbett's intention. They assert, however, that more than an intention was required; that there must have been such positive intention and statement as to effect a present transfer of title; that Mr. Corbett did not constitute himself trustee for plaintiffs; that the transaction was an imperfect gift, and equity will not give effect to an imperfect gift by enforcing it as a trust, since to do so would be to give effect to an intention not contemplated by the maker of the alleged gift; and that the language of the letters did not constitute a present declaration of trust, but shows a contrary purpose.

In support of the assertion that Mr. Corbett did not consider that he had placed the certificates out of or beyond his power to retain them for himself, appellants rely on language in the letters as follows: that he bought the stock "for you and Harvey after I go"; that he bought the stock at 18 and the price increased to 21¾ "and while I could sell and make quite a nice profit I did not buy it for that purpose"; and "You may have to pay a state inheritance on it unless the present law is changed."

The statement that he bought the stock for plaintiffs "after I go" is consistent with an intention to retain a life estate in the stock and receive the dividends therefrom. The words that he "could sell and make quite a nice profit," standing alone, do indicate that he considered that it was within his power to sell the stock. When those words are considered, however, with the remainder of that sentence, "I did not buy it for that purpose," and when considered with the two sentences next following, "I bought it for dividends while I am living and then it goes 50–50 to Aura and Harvey. Is that plain enough?", the whole context is consistent with an intention to retain only a life estate, and is apt language to emphasize an intention not to sell the stock but to hold it for plaintiffs. The statement relative to inheritance tax is consistent also with an intention to retain only a life estate.

Contrary to the assertion of appellants, and as a part of the evidence that Mr. Corbett did consider that he had transferred all of the title to the certificates, except a life estate, it is to be noted also that in one of the letters (Oct. 1st) he listed all of the stock and, immediately following the figures designating the total number of shares, he wrote in his handwriting, "I hold a life Int only," and underscored some of the words.

Further, and as a part of the evidence that Mr. Corbett did consider that he had placed the certificates beyond his power to retain them for himself, it is to be noted that in one of the letters (May 11, to Harvey), after stating the amount he had paid for the stock then on hand, he wrote in his handwriting, "These certificates I bought recently will be Endorsed to

you & Aura & will be in my Deposit Box in the Bank of America—No one can use it but you folks," and he underscored the word "No." In one of the letters (Oct. 1st) he stated, "then the next question arose was, how to fix it to make sure you would get it with as little expense as possible, so after taking it up with the Union Secy and others, I came to the conclusion that the simple & safe way was to Endorse it over to Aura D. & Harvey C. Hardison, then the sure way was to have a witness." He did endorse the certificates specifically naming plaintiffs as assignees and did cause his said endorsements to be witnessed by a person who signed his name on the back of the certificates as such witness.

The situation here is not that which occurs frequently when property is left with a custodian upon oral directions to deliver the same at a certain time, or on some contingency, leaving uncertainty as to the intent and purpose of the donor. Mr. Corbett stated at length in his handwriting what his intention was, the estate he retained for himself, and the estate he created for plaintiffs.

[1-3] A valid trust in personal property may be created even by parol; such trust may be created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty: (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose and beneficiary of the trust. Civ.Code, § 2221; Noble v. Learned, 1908, 153 Cal. 245, 250, 94 P. 1047. It is not necessary that the terms "trust" or "trustee" be used. Cahlan v. Bank of Lassen County, 1909, 11 Cal.App. 533, 540, 105 P. 765, 766.

The case of Cahlan v. Bank of Lassen County, supra, is similar to the present case. Plaintiffs therein alleged ownership and possession of certificates representing bank stock; that the certificates were issued to one Scholl and assigned and delivered to plaintiffs; that Scholl died and the executors of his will claimed an interest in the shares of stock. The prayer of the complaint was that it be decreed that the executors had no interest in the stock. Judgment for plaintiffs was affirmed. Scholl had been for several years a partner of the father of the two plaintiffs. Scholl owned 2 certificates representing 20 shares of stock of the Bank of Lassen County. He left the certificates in a locked tin box which was in the bank vault. The certificates bore assignments in blank signed by Scholl which were witnessed by the cashier of the bank. The envelope, in which the certificates were enclosed, was endorsed in the handwriting of the bank cashier as follows: "In case of my death to go to Lena and Neva Cahlan." Plaintiffs' mother testified that Scholl told her he had given the girls each ten shares of stock and had put it in his box at the bank, and that he further said, "As long as I am kicking, * * * I will hold this and receive the dividends." She testified further as to other parol statements made by Scholl concerning the stock. Scholl had stated to other persons that he had given the stock to plaintiffs. (After Scholl's death the executors delivered the certificates to plaintiffs, thinking it was their duty to do so.) The court said at page 538 of 11 Cal.App., at page 766 of 105 P.: "The evidence leaves no doubt of his intention to do this [referring to the giving of the stock to plaintiffs], and that he did everything to accomplish it except to deliver the certificates to the donees, and the evidence was sufficient to warrant the inference * * * that he retained possession for the donees and for the purpose only of collecting the dividends while he lived—in short, that he constituted himself their trustee for the purposes stated." The court said further at page 539 of 11 Cal. App., at page 767 of 105 P.: "The facts thus disclosed showed that Mr. Scholl held these certificates as trustee for plaintiffs. His only interest in the shares of stock was in the dividends paid during his lifetime." On page 540 of 11 Cal.App., on page 767 of 105 P. it was stated further: "It was competent for Scholl to become the trustee of the trust created by himself. * * * Any words which indicate with sufficient certainty an intention or purpose to create a trust will be effective in so doing, without the use of the words 'trust' or 'trustee.' * * * The circumstance that Mr. Scholl retained the power to receive the dividends on the stock did not affect the validity of the trust. * * * It does not appear that Scholl indorsed the certificates 'to the plaintiffs,' using that language. The indorsement was in blank; but the evidence clearly showed that his intention was to indorse them to plaintiffs, and his act had that effect. Nor did it appear that he ever said in words that 'he held the same in trust for them'; but his declarations and acts showed beyond doubt that he did in fact so hold them and so intended." On

page 541 of 11 Cal.App., on page 767 of 105 P., it was stated further: "It is true, as claimed by appellants, that an ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was contemplated (Noble v. Learned, supra [153 Cal. 245, 94 P. 1047]); but here the evidence is in every way consistent with the view taken by the trial court that a trust was contemplated, and its findings must stand. * * *"

The evidence in the present case was stronger in support of the trust than the evidence was in the Cahlan case, supra.

In the Cahlan case the statements relative to the trust were oral; the endosements on the two certificates were in blank; the writing on the envelope containing the certificates was in the handwriting of the bank cashier; and the time for termination of the trust was "in case of my death," as written on the envelope.

In the present case the statements relative to the trust were in six letters in the handwriting of Mr. Corbett; the endorsements on the thirteen certificates specifically stated the names of plaintiffs as the assignees; the writing on the envelope containing the certificates was in the handwriting of Mr. Corbett; and the time for the termination of the trust was "after I go," as written in some of his letters.

The case of Randall v. Bank of America N. T. & S. Ass'n, 1941, 48 Cal.App.2d 249, 119 P.2d 754, 755, was an action to quiet title to an investment certificate which was issued in the names of "George Ward or Thomas B. Randall under a trust agreement." One provision in the agreement was, "And on his death [referring to Ward], all unpaid principal and interest, shall vest in Thomas B. Randall." Randall had no knowledge of the transaction. Ward retained possession of the certificate and after his death the defendant executor had possession of it. The executor contended there was no valid trust. The court in affirming the judgment quieting title said, at page 254 of 48 Cal.App.2d, at page 757 of 119 P.2d, "It is well to allude again to the question of vesting, in the light of Ward's declaration that 'on his (Ward's) death all unpaid principal and interest shall vest in Thomas B. Randall'. It is not inconsistent with a present transfer of interest that the words 'shall vest' are used."

In Savelli v. Simon, 1938, 25 Cal.App.2d 365, at page 368, 77 P.2d 486, at page 487, it was said: "It is likewise settled that the intention of the alleged donor is a question of fact to be determined by the trial court from all of the evidence in the case * * * and that where different conclusions may be reasonably drawn from the evidence by different minds the trial court's findings of fact will not be disturbed on appeal."

[4] Appellants contend that the complaint does not state facts sufficient to constitute a cause of action to establish a trust. Their argument is that the complaint is in the customary quiet title form alleging ownership in plaintiffs; that there was nothing therein to indicate the theory upon which plaintiffs were proceeding; that the general rule is that an action to quiet title is inconsistent with the establishment of an equitable interest and that in seeking the latter relief the facts relied upon should have been pleaded. In support of such contention appellants rely principally upon the case of Bryan v. Tormey, 1890, 84 Cal. 126, 24 P. 319, 320. That was an action to quiet title to real property. The complaint was in the usual quiet title form. The judgment was for plaintiff. In reversing the judgment it was held that "the case proved and found is not the case made by the complaint," in that plaintiff was the owner of the equitable title and that defendant held the legal title in trust for plaintiff, and that the complaint should have been "amended at the trial so as to conform to the proofs, and to correspond with the findings." Other cases cited by appellants in support of such contention were likewise to establish equitable interests or trusts in real property which then stood in the names of persons other than the plaintiffs, rather than to establish ownership in the plaintiffs. In the present case the complaint alleged ownership in the plaintiffs, and the findings and judgment were that the plaintiffs were owners of the stock and that defendants had no interest therein. In order to establish ownership, however, evidence was produced concerning the life estate of Mr. Corbett in the stock and the termination thereof. It was not necessary to make allegations relative to the chain of title through which plaintiffs derived ownership. In Cahlan v. Bank of Lassen County, supra, 11 Cal.App. at page 539, 105 P. at page 767, it was said: "The point seems to be that as the complaint alleges ownership and possession of the bank stock, and does not allege the

trust to establish which the evidence was admitted, it was not competent to prove ownership by this means. * * * The primary object of the action is to establish ownership of these certificates of stock. * * * Proof of ownership made necessary a disclosure of all the facts out of which was to appear the ultimate fact of ownership. * * * In the case of Booth v. Bank of Oakland, 122 Cal. 19, 54 P. 370, a case quite similar to this, the trusteeship in the bank was shown to establish ownership. The court said: 'The ownership of the plaintiff is all that is material to be alleged.' * * *" See Randall v. Bank of America, 1941, 48 Cal.App.2d 249, 119 P. 2d 754.

[5] The evidence was sufficient to warrant the findings of the trial court that said certificates were endorsed and assigned by Leonard W. Corbett for transfer to plaintiffs with the intent and purpose of assigning and transferring to plaintiffs all of his interest and ownership in them, subject only to the right in himself to receive the dividends during his lifetime.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.



GORDON et al. v. SANTA CRUZ PORTLAND CEMENT CO. et al.

Civ. 12171.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1942.

Hearing Granted Dec. 14, 1942.

Dismissed Jan. 2, 1943.

1. Judgment ⇐256(1)

Where pleadings in action for trespass on lands of lime company and removal of limestone therefrom contained no allegations as to location of main tunnel, use of tunnels and drifts and value thereof, and amount of limestone removed, findings of fact as to such matters were not necessary to support judgment denying relief on the ground that entries were made and limestone removed under leases.

2. Judgment ⇐256(1)

Where pleadings in action for trespass to land and removal of limestone contained no allegations as to existence of leases between landowners and trespassers, but leases were introduced in evidence as part of proof of the trespassers, judgment denying relief did not lack support in the findings of fact for failure of trial court to find what, if any, leases existed between the parties.

3. Corporations ⇐190

In minority stockholder's action for trespass to land against corporation owning majority of stock in plaintiff corporation and having a common directorship, evidence sustained finding that defendant corporation never exercised any control over directors of subsidiary corporation in its interest as against interest of subsidiary and that leases under which entries were made were fair and reasonable so as not to be void or voidable because of the common directorship. Civ.Code, § 311(c).

4. Corporations ⇐190

In determining whether lease of land containing limestone deposit to corporation owning majority of stock in corporate lessor and having a common directorship therewith was just and reasonable so as not to be void or voidable on account of such common directorship and financial interest, the testimony of witnesses, who were informed as to nature, accessibility, and other factors concerning lime deposits in general, testifying as to reasonableness of rental provided for in lease was entitled to credence. Civ.Code, § 311(c).

5. Corporations ⇐190

Where court found in action for trespass to realty that limestone was removed under just and reasonable leases not voidable on account of common directorship of lessee and lessor corporations and that where doubt existed as to ownership of limestone taken, it was assumed that it belonged to lessor and was paid for in accordance with lease, the location on the ground of boundary line between lessor's land and that of lessee was immaterial. Civ.Code, § 311(c).

6. Trial ⇐396(1)

Where defendants in action for trespass to lands pleaded the statute of limitations, trial court's findings on such issue following the allegations of the answer

were sufficient. Code Civ.Proc. § 338, subds. 2–4, § 458.

7. Limitation of actions ⇐197(3)

Evidence of an agreement to arbitrate dispute, without showing that such agreement was ever acted upon, was insufficient to toll the three-year statute of limitations. Code Civ.Proc. § 338, subds. 2–4.

8. Corporations ⇐190

In minority stockholders' action for trespass to realty by corporation owning majority of stock in corporate owner and having a common directorship therewith, wherein defendant corporation relied on leases of the land in question, plaintiff stockholders had the burden of proving noncompliance with statutory provisions that would make a lease between such corporations not void or voidable under certain circumstances. Civ.Code, § 311.

9. Trusts ⇐262

If trustee obtains any advantage from beneficiary during existence of trust, such transaction, it is presumed, was entered into by beneficiary without sufficient consideration and under undue influence, and burden rests on trustee to prove that its dealings with beneficiaries were in the utmost good faith and unaffected by influence of confidential relation.

10. Appeal and error ⇐901

District Court of Appeal is under no duty to search record for error not pointed out in briefs.

11. Appeal and error ⇐925(2)

In minority stockholders' action for trespass to realty by corporation owning majority of stock in corporate owner and having a common directorship therewith, wherein trial court found that defendant corporation as trustee with respect to interests of minority stockholders acted in the utmost good faith, in the absence of any showing to the contrary, it must be assumed in support of judgment denying relief that defendant corporation assumed the burden of proving that dealings with minority stockholders' interests were in the utmost good faith and unaffected by influence of the confidential relation.

12. Appeal and error ⇐1033(1)

Appellants could not complain of trial court's rulings that were more favorable to them than they were entitled to.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Mackenzie Gordon and others against Santa Cruz Portland Cement Company and others for damages for trespass and for injunctive relief. From a judgment denying them relief, plaintiffs appeal.

Judgment affirmed.

Hearing granted; EDMONDS, J., not participating.

W. H. Metson, P. H. McCarthy, Jr., and E. B. Mering, all of San Francisco, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark, Herbert W. Clark, and Boice Gross, all of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs have appealed from a judgment denying them relief in an action based on a charge of acts of purported trespass and a prayer asking for damages and injunctive relief. The plaintiffs framed their complaint in seven separate counts. For many reasons it will be necessary to discuss the counts separately.

Since about the year 1907 the Santa Cruz Portland Cement Company, hereinafter called the Cement Company, and the Santa Cruz Lime Company, hereinafter called the Lime Company, have owned opposite sides of San Vicente Canyon which consists of a deposit of lime rock located in Santa Cruz County, California. The canyon was presumably formed by the action of San Vicente Creek and the original deeds described the line of the bed of that creek as a part of the boundary line separating the adjoining properties. In the first count the plaintiffs alleged that without compensating the Lime Company, the Cement Company entered the lands of the former and appropriated limestone, took large quantities of the corpus of the Lime Company's property, constructed railroad tracks on said property, enlarged the tunnel on said property, excavated additional tunnels on said property, extended other tunnels on said property, made excavations on said property, diverted the course of San Vicente Creek and Kelly Creek, destroyed certain easements on the property, and obliterated and destroyed a portion of the boundary line on said property.

In the second count the plaintiffs alleged facts showing that the action was brought by the plaintiffs as stockholders of the Lime Company for the reason that the Cement

Company is a party to and approves the wrongs committed by the Cement Company. Otherwise, except as to the amount of the damages, said count repeats the alleged wrongs contained in the first count.

In the third count the plaintiffs alleged that the directors of the Lime Company have exercised and continue to exercise their power and authority as directors of the Lime Company in the interest of the Cement Company and against the best interest of the minority stockholders of the Lime Company. The plaintiffs then alleged the commission by the defendants of the same acts hereinabove set forth. In connection with the allegations contained in the third count, the plaintiffs stress the fact that they alleged that the Lime Company has 500 shares of stock issued and outstanding and that 362 shares or 72.4 per cent thereof is owned by the Cement Company, and that the plaintiffs together own only 26.8 per cent of the capital stock of the Lime Company. They further alleged that certain persons are officers of the Lime Company, that certain persons are directors of the Lime Company, and that the same persons are directors and officers of the Cement Company. Calling attention to the foregoing facts, the plaintiffs contend that the Cement Company wrongfully exercised power over the Lime Company. The difference between counts three and four is in the third count it is alleged that the directors of the Lime Company "* * * have exercised and continue to exercise their power and authority as directors of the said Lime Company in the interest of the said Cement Company," whereas, in the fourth count, the allegation is that the directors of said Lime Company "have refused to protect the rights and interests of the Lime Company" in its property. In the fifth count it is alleged "that the said Cement Company has refused and continues to refuse through its officers, agents and its dummies and directors, officers and agents of the Lime Company, to market, sell or possess the limestone * * * on the property of the Lime Company." In the sixth count the plaintiffs alleged that the refusal just mentioned "is the reesult of a conspiracy entered into by and between the officers and directors and agents of the Cement Company and their agents, towit: the directors, officers and agents of the Lime Company in order to confiscate and absorb the limestone on said property of said Lime Company for its own operations." The seventh count is based on a set of facts quite different from the other counts. It is alleged "upon information and belief the said Lime Company has a surplus of over $25,000 at the present time far in excess of the needs of said Lime Company for taxes, reserves or any other corporate expense or reason." It is followed by a prayer that the court order the directors to declare a dividend which shall be meet and proper under the circumstances.

In their answers the defendants denied all of the material allegations contained in plaintiffs' complaint. On the trial they admitted an entry on the property of the plaintiffs but claimed such entry was made pursuant to the provisions of leases duly executed in 1907, 1916, 1921, 1933 and 1938. As to officers and directors the defendants admitted that at times the Lime Company and the Cement Company had officers and directors in common but they vigorously contended that such officers and directors at all times and in all matters acted with the utmost fidelity to both corporations. The defendants pleaded the statute of limitations and laches of the plaintiffs. On all said issues the trial court made findings in favor of the defendants and against the plaintiffs. Each and all of said findings is and are sustained by the evidence. Nevertheless as will hereinafter be noted the plaintiffs contend that certain findings are not sustained by the evidence.

[1] The plaintiffs complain that the court failed to find facts sufficient to support its judgment. In this connection they stress the fact that it did not make a finding locating San Vicente Creek. As will hereinafter appear, that fact was immaterial. Again they contend that the defendants did not plead or prove, and the trial court made no finding, bringing defendants within the protection of section 311 of the Civil Code. That contention is not sustained by the record. The defendants introduced an abundance of proof on the subject and in finding IX the court found the facts in their favor. In this same connection the plaintiffs contend the court failed to find on the issue of the location of the main tunnel and of the use of tunnels and drifts and the value of the tunnels and drifts, and that it failed to find the amount of limestone removed from Lime Company property. It is a sufficient answer to state that in the pleadings no allegation was made thereon.

[2] The plaintiffs contend that the findings of fact made by the court do not support the judgment. They claim that the court did not find what, if any, contracts or leases existed between the Lime Company and the Cement Company. The pleadings contained no allegations on the subject. The leases were introduced in evidence as a part of the proof of the defendants. Again it is claimed that the court did not find what portion of the property of the Lime Company said leases covered. That statement is not sustained by the record. A direct finding was made thereon. Further they contend that finding IX, which is to the effect that the leases were just and reasonable, was not a compliance with the provisions of section 311, subdivision (c) of the Civil Code because the finding did not expressly refer to the Lime Company. That criticism is not sound. The finding complained of did expressly refer to and was directly applicable to the Lime Company.

[3] The first part of finding IX is to the effect that none of the officers or directors of the Lime Company are under the control of the Cement Company, that the latter has never controlled, directly or indirectly, the said officers or directors; that the Cement Company has never exercised any control in its interest as against the interest of the Lime Company, that the officers and directors of the Lime Company have always acted for its just interests and that the provisions of the leases were fair and reasonable. The plaintiffs contend that said findings are not supported by the evidence. The point has no merit. There was much evidence on the subject and the most that can be said would be to the effect that the evidence was conflicting. However we do not mean to intimate that there was any conflict.

[4] Among the contested issues was the claim of the plaintiffs that the plaintiffs were overreached in setting the amount of the rental at $2,000 per year. The evidence thereon was conflicting. The plaintiffs contend that the testimony of the witnesses of the defendants was not worthy of credence. We find no merit in the contention. Said witnesses were informed as to the nature, accessibility, and other factors concerning lime deposits in general in this state and the testimony of such witnesses was entitled to credence.

In paragraph XIII of the plaintiffs' complaint, which is by reference made a part of counts two to six inclusive, the plaintiffs alleged a description of their lands by metes and bounds. One call is: "thence continuing down said San Vicente Creek on the easterly boundary of said San Vicente Rancho about 61.00 chains to the northeasterly corner of the lands conveyed by Fairbanks to Laird as aforesaid; * * *." The plaintiffs call attention to the fact that the Cement Company in planning its quarry made excavations which changed the course of said creek, that defendants did not set up monuments indicating the former course of said stream, and that the plaintiffs were prejudiced as to their rights on each count, one to six inclusive. They further assert the trial court made no finding on said paragraph XIII and therefore the findings do not support the judgment. We think there is no merit in that assertion. Before the action was submitted the plaintiffs filed an amended and supplemental complaint. It amended said paragraph XIII. The trial court made a finding directly responsive thereto.

Moreover the defendants make the following contention: "The exact location on the ground of this boundary line is immaterial in this case. It is worth while to reflect here that in essence this action is one by appellants for alleged trespasses by the Cement Company on lands belonging to the Lime Company. No discussion is necessary to establish that one claiming a trespass must show his ownership. Appellants alleged that the Lime Company was the owner of certain real property as described in certain deeds. The court agreed with the appellants and found the ownership of the Lime Company was as alleged. But the court also found that, regardless of ownership of lands, regardless of where on the surface of the earth the boundary line lay, the entries upon and the use of the land of the Lime Company by the Cement Company were not wrongful but were made under fair and reasonable leases, and that the Cement Company had made fair, just, adequate and reasonable payment to the Lime Company for such use as it made of any of the Lime Company's land and for such of the Lime Company's rock as it took or used.

[5] "It is patent that a finding as to where on the surface of the earth the exact line of the boundary lies, is immaterial. It is unnecessary to place the exact boundary line of the property in order to determine whether an entry was lawful or not.

There was no issue in this case as to whether or not there had been entry. That was admitted. The issue was only whether the entry was rightful or wrongful. If the leases were valid, that issue was determined in favor of the defendants. The leases here in evidence gave the Cement Company the right to cross the boundary line of the Lime Company's property wherever on the earth's surface it lay. The leases also gave the Cement Company the right to take lime rock from the Lime Company's side of San Vicente Canyon. The maps of the canyon in evidence, the photographs introduced by plaintiffs at the trial and the evidence introduced by the defendants, show not only the payment of the minimum rental each year but that wherever there was any question as to whose lime rock was being taken, it was assumed by the Cement Company that it belonged to the Lime Company and the Cement Company paid for it at the rate of 3c per ton set in the various leases." That contention we think is unanswerable. The location of the boundary line on the ground was, under such facts, wholly immaterial.

[6, 7] The defendants pleaded the statute of limitations. Code Civ.Proc. § 338, subds. 2, 3, and 4. It is not contended their pleading was defective. The trial court made findings on those issues in favor of the defendants. The findings follow the allegations of the answers of the defendants. The plaintiffs now contend the findings are insufficient. We think the plaintiffs are mistaken. The form used has frequently been approved. 16 Cal.Jur. 633. In support of their position the plaintiffs quote from section 458 of the Code of Civil Procedure as follows: "* * * and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." That proposition the defendants admit, but they claim, and the record supports them, that they did, on the trial, establish said facts. Continuing the plaintiffs claim that the statute was tolled by an agreement made by the defendants to arbitrate. There was some evidence that such an agreement was made but no evidence that it was ever acted upon. Such showing was insufficient to toll the statute. Hornblower v. George Washington University, 31 App.D.C. 64, 14 Ann.Cas. 696. In the cited case, at page 75 of 31 App.D.C., at page 699, of 14 Ann.Cas., the District of Columbia Court of Appeals said: "If however, after the agreement was made to submit to arbitration, plaintiffs took no steps toward having the matter submitted, and did not insist upon the defendant's submission of the matter, such an agreement, we think, cannot be held to stop the running of the statute." See, also, Curtis v. City of Sacramento, 70 Cal. 412, 414, 415, 11 P. 748; Taylor v. Harmon, 120 Okl. 145, 250 P. 887, 889.

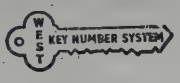
[8-11] Regarding the burden of proof on the issue of fair dealing the briefs contain many discussions. The issues are clearly two separate ones. Whether defendants complied with the provisions of Civil Code, section 311 was one issue. The burden of showing noncompliance therewith rested on the plaintiffs. San Diego, etc., R. Co. v. Pacific Beach Co., 112 Cal. 53, 44 P. 333, 33 L.R.A. 788. As to whether the Cement Company discharged its duty as trustee to its beneficiaries was distinctly different issue. If, as claimed, the trustee obtained any advantage from its beneficiary during the existence of the trust such transaction, it is presumed, was entered into by the beneficiary without sufficient consideration and under undue influence and the burden rested on the trustee to prove that its dealings with the beneficiaries were in the utmost good faith and unaffected by the influence of the confidential relation. 25 Cal.Jur. 127. But the record does not show that the Cement Company did not make that showing, nor does it show that it refused or neglected to do so. The trial court found the trustee acted in the utmost good faith and in the absence of any showing to the contrary we must assume the Cement Company duly assumed the burden of proof resting on it. The briefs do not show any failure on the part of the defendants to take up the burden of proof. The record is very long and this court is under no duty to search it to find error. However we have made such search and we find nothing showing or tending to show that the defendants neglected to introduce proof that the transactions in question were as to the beneficiaries just, fair, and reasonable, and that the consideration for the leases above mentioned was adequate.

[12] The last point made by the plaintiffs is that the trial court's rulings constitute and are reversible error. It is an omnibus assignment. The plaintiffs enumerate over seventy rulings of the trial court and claim each one was error. Over

thirty of said rulings were with reference to the location of the above mentioned boundary line. But, as we have shown, the location of said line on the ground was an immaterial matter. The other rulings were on questions regarding value. The rule on that subject is stated in City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378. The plaintiffs on many occasions sought to apply a different rule. The defendants objected. In some instances their objections were overruled and in other instances they were sustained. Said rulings were more favorable to the plaintiffs than they were entitled to. They may not complain.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



55 Cal.App.2d 147

PEOPLE ex rel. BAGSHAW v. THOMPSON.

Civ. 12057.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1942.

Rehearing Denied Nov. 25, 1942.

Hearing Denied Dec. 24, 1942.

1. Officers ⇐30

"Public policy" requires that, when the duties of two offices are repugnant or overlap so that their exercise may require contradictory or inconsistent action to the detriment of the public interest, their discharge by one person is incompatible with that interest, and, in determining incompatibility the permanency of the position, the powers granted and the functions actually performed should be considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Officers ⇐30

The office of Director of the Golden Gate Bridge and Highway District and the office of Supervisor of Marin County, one of the six counties constituting such bridge and highway district, were "incompatible" and could not be held at the same time by one person, in view of power of directors to collect tolls, charges, rentals, and other rates of income and dispose of surplus to counties within the district and of obligation of counties to bear their share of expenses ascertained by district directors. Gen.Laws 1937, Act 936, § 10, subd. 6, and § 21(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatible Office".

3. Officers ⇐30

It is not the performance nor the prospective right of performance of inconsistent duties only that gives rise to "incompatibility of offices", but the acceptance of the functions and obligations growing out of the two offices.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatibility of Offices".

4. Officers ⇐103

The right to perform duties does not exist until there is at least tenure or term of office, since "tenure of office" refers generally to the right to hold office subject to its termination by some contingency such as age, limitations, resignation, death, removal, etc., and "tenure" is sometimes held to be synonymous with "term of office" which ordinarily refers to a fixed period.

See Words and Phrases, Permanent Edition, for all other definitions of "Term of Office", "Tenure" and "Tenure of Office".

5. Officers ⇐30

Until "tenure" in the sense of "term of office" exists, there can be no "incompatibility of official duty" because there is no right and duty invested by law to perform a public function for public benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatibility of Official Duty".

6. Officers ⇐66

One term of an office is separate and distinct from other terms of the same office, and a proceeding for the removal of an officer cannot be maintained after the accused has ceased to hold his office nor for a violation of his duty while serving in another office or in another term of the same office.

7. Officers ⇐66

To be removed from office, the officer must not only have qualified but must be acting.

8. Officers ⇐55(1)

A "vacancy in office" may occur by failure to comply with charter provisions of statutes, but it does not occur until the tenure or term begins. Pol.Code §§ 907, 947, 996.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacancy in Office".

9. Officers ⇐30

Qualifying for an office by taking and filing the oath or filing a bond before the term of office actually commences is but a preliminary step to the final assumption of duties, but the preliminary performance of statutory requirements cannot vest one with the immediate right to perform the duties of the office, and, until there is an authority to discharge the duties as an incumbent, there can be no "incompatibility of office".

10. Officers ⇐55(2)

Where an individual is an incumbent of a public office and during such incumbency is appointed or elected to another public office and enters upon the duties of the latter, the first office becomes as one "vacant" if the two are incompatible.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacant".

11. Officers ⇐55(2)

Where one elected to office of supervisor for one of the counties comprising Golden Gate Bridge and Highway District for a term to commence on January 2, 1939, took the oath of office and filed the bond in September, 1938, and was appointed to the office of Bridge Director on November 14, 1938, for a term to commence on November 24, 1938, and took the oath and assumed duties of such office on last-mentioned date, his assumption of the duties of the office of supervisor on January 2, 1939, terminated the "incompatible office" of director as effectively as a resignation. Gen.Laws 1937, Act 936; Pol.Code §§ 907, 947, 996.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatible Office".

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge Assigned.

Action in quo warranto by the People, on the relation of A. E. Bagshaw, against R. A. Thompson to remove the defendant from the office of Director of the Golden Gate Bridge and Highway District on the ground that such office is incompatible with that of Supervisor of Marin County also held by him. From a judgment for defendant, the plaintiff appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Earl Warren, Atty. Gen., James H. Oakley, Deputy Atty. Gen., and A. E. Bagshaw, of San Rafael, in pro. per., for appellant.

Natalie J. Holly, of San Rafael, for respondent.

WARD, Justice.

This is an action in quo warranto brought by plaintiff under the provisions of section 803, Code of Civil Procedure, to remove the defendant from the office of Director of the Golden Gate Bridge and Highway District on the ground that such office is incompatible with that of Supervisor of Marin County also held by him.

The Golden Gate Bridge and Highway District, a public corporation, is comprised of six contiguous counties, of which Marin is one, and was organized primarily for the acquisition and construction of bridges, approaches thereto, etc. Deering's Gen.Laws, Act. 936; Stats.1923, ch. 228, p. 452. The act creating it also provides for the issuance and retirement of bonds, the levying of taxes and the collection of tolls. The directors of the district are appointed by the boards of supervisors of the counties comprising the district, their number being based upon the population of the respective counties.

Defendant Thompson was elected to the office of supervisor for the county of Marin on the 30th day of August, 1938, for a term to commence on January 2, 1939. Unless a different time is specially prescribed, the oath of office must be taken, and a bond (if required) filed, within thirty days after notice of election. Pol.Code, §§ 907, 947. Thompson complied with these requirements by taking and filing the oath on September 21, 1938, and filing the bond on September 24, 1938. On November 14, 1938, the Board of Supervisors of the County of Marin appointed him to the office of Bridge Director for a term to commence on November 24, 1938. He took the oath and assumed the duties of such office on the same date. Thereafter, on January 2, 1939, he entered upon his duties as supervisor.

The trial court held that the two offices are incompatible; that Thompson be-

came the legal holder of the office of supervisor on the 24th of September, 1938, when he qualified therefor, the term to commence in the future; that by thereafter qualifying for and accepting the office of director, he forfeited that of supervisor for the term not yet commenced. The trial court concluded that he was not usurping the office of director, as contended by plaintiff, but that he was legally entitled to such office, and, inasmuch as the complaint questioned his right to the office of director only, ordered judgment for him and against plaintiff. From this judgment the plaintiff appeals.

Appellant contends, as the court found, that the two offices are incompatible; that by entering upon the duties of the office of supervisor on January 2, 1939, respondent vacated and forfeited that of director. Respondent's position is that the two offices are not incompatible, but is in accord with appellant that, if they are, the office vacated is that of director.

[1] Public policy requires that when the duties of two offices are repugnant or overlap so that their exercise may require contradictory or inconsistent action, to the detriment of the public interest, their discharge by one person is incompatible with that interest. In determining incompatibility, the permanency of the position, the power granted and the functions actually performed should be considered. People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388, and cited cases. In the Rapsey case, quoting from 46 Corpus Juris, 941, the court (page 642 of 16 Cal.2d, page 391 of 107 P.2d) said: "'At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible.'" The court further said: "'If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.'" The same principle has received approval in People v. Garrett, 72 Cal.App. 452, 237 P. 829.

In People ex rel. Moody v. Carter, 12 Cal.App.2d 105, 54 P.2d 1139, relied upon strongly by respondent, it was held that William H. Carter, the mayor and commissioner of public safety of the city of Santa Monica was eligible as representative thereof to the directorate of the Metropolitan Water District, of which the city was a part, upon the theory that the positions were not incompatible. Such holding was based primarily upon the decision in McDonnell v. Improvement District, 97 Ark. 334, 133 S.W. 1126, referring to which the court in the Carter case states [12 Cal.App.2d 105, 54 P.2d 1141]: "The eligibility of Cunningham to act on the board was attacked squarely on the ground that the city council could not appoint one of its own members to the board." The parties to this appeal do not raise the question of whether, regardless of the compatibility or incompatibility of the two offices, public policy prohibits a board having power of appointment to another office to exercise that power by appointing one of their own members. In so far as the Carter case is concerned we may say that the dictum above quoted is not in harmony with the weight of later authority.

In Commonwealth v. Major, 343 Pa. 355, 22 A.2d 686, 688, 689, the court said: "We have no difficulty in reaching our conclusion, and are unanimously of opinion that well-established public policy prohibits respondent and his colleagues from using their official appointing power as councilmen of the City of Beaver Falls to appoint themselves members of the Board of the Authority. This court said, as early as 1803, in Commonwealth v. Douglass, 1 Bin. 77, 84: 'One having a discretionary authority to appoint a fit person to a public office appointing himself seems a solecism in terms; and it cannot be deemed the fulfilment of his duty.' For this reason, if for no other, the learned court below properly ousted respondent and the other three councilmen from membership on the Board of the Authority. * * * In this connection, we said, in Commonwealth v. Raudenbush, 249 Pa. 86, 88, 89, 94 A. 555, Ann.Cas. 1917C, 517: 'A member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interest. 20 Am. & Eng. Ency. of Law (2 Ed.) 1214. * * * It is against public policy for a representative of a municipality to vote in its legislative body on any matter which affects him individually. * * * A councilman cannot vote on any contract or measure in which he is pecuniarily interested. This was the rule of

the common law and statutes have been enacted in most jurisdictions forbidding such voting. A councilman cannot act for the municipality and at the same time act for himself individually. He cannot serve two masters at the same time. He is a trustee for the municipality and he may not deal with himself in any matter which concerns it.' [Citing cases.]" (See California Law Review, vol. 30, p. 686.) In view of the fact that we have concluded the two offices are incompatible, we do not find it necessary to pass upon the question of public policy raised in the above cited case.

[2] In the present case the court, as stated, found the two positions to be incompatible. It is not necessary to go further than to quote the following passage from the "Memorandum of Decision and Order for Findings" herein (In re Yorba's Estate, 176 Cal. 166, 167 P. 854; Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273), relating solely to the subject of taxation, to affirm such finding:

"In raising taxes for the district the directors fix a rate which is certified to the Board of Supervisors of each county uniting, and which the supervisors levy upon the property in the county, the tax being collected by the tax officials of the county.

"Subdivision 6 of Section 10 of the Act of 1923 empowers the directors to fix and collect tolls, charges, rentals, and other rates of income for the purpose of meeting the obligations of the district and repaying the same and disposing of the surplus to the various counties within the district. Subdivision (e) of Section 21 provides that 'such surplus shall be divided by the board of directors and apportioned to each county or city and county within the district in the proportion which the assessed value of property within such county, city and county, or part of a county within the district bears to the total assessed value of property within the district.'

"Conversely, any county in the district may demand its share of a surplus of district funds. While the power to make an audit is not expressly given to the respective counties forming the district, the right to its share of any surplus implies the right in a county to ascertain and determine the existence of such surplus. It is needless to say that the duty of protecting and enforcing this right rests upon the governing body of the county, the Board of Supervisors.

"Generally speaking, the directors are the agents of the county from which they are appointed, and the persons through whom the county acts in the affairs of the district. As pointed out, each county uniting in the district bears its share of the expenses of the district according to a rate ascertained by the directors and levied by the supervisors upon the property in the county. This rate, obviously, is based upon the amount of expense incurred by the directors. Should the directors operate the district at a profit, each county is entitled to share in the profit, or surplus as it is called. * * * In all district matters the county acts through its Board of Supervisors, and it is to the Board of Supervisors of his county that each director is held responsible by the terms of the Act."

That the above finding indicating incompatibility is supported by authority, see People ex rel. Chapman v. Rapsey, supra, and citations therein. See, also, Thomas v. Abernathy County, etc., School Dist., Tex. Com.App., 290 S.W. 152; Wells v. State ex rel. Peden, 175 Ind. 380, 94 N.E. 321, Ann. Cas.1913C, 86; Cotton v. Phillips, 56 N.H. 220; State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648; State v. Buttz, 9 S. C. 156; Attorney General ex rel. Moreland v. Common Council of Detroit, 112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211; State ex rel Sanders v. Blakemore, 104 Mo. 340, 15 S.W. 960; State of Ohio, etc., v. McCollister, 11 Ohio 46; Taylor v. Johnson, 148 Ky. 649, 147 S.W. 375; Kelly v. Woodlee, 175 Tenn. 181, 133 S.W.2d 473, 135 S.W.2d 649.

Respondent contends that the board of supervisors' power to remove a director does not render the offices in question incompatible, and cites cases to that effect. He also contends that the Legislature's failure to exclude certain classes of persons from appointment as directors indicates no manifest intent to restrict appointees to persons not members of the board of supervisors. In view of our conclusion that the duties of the two offices are incompatible in the matter of fixing tax rates and the disposition of moneys so procured, wherein a detriment to the public interest might result, it is not necessary to consider additional questions.

[3-5] The question for determination is, which of the two offices respondent

forfeited. It is not the performance, nor the prospective right of performance, of inconsistent duties only, that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices. "'"* * * a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit."'" People ex rel. Chapman v. Rapsey, supra, 12 Cal.2d at page 640, 107 P.2d at page 390. The right to perform duties does not exist until there is at least tenure or term of office; that is, the right to perform the duties incidental thereto; tenure of office refers generally to the right to hold office subject to its termination by some contingency such as age limitation, resignation, death, removal, etc. "Tenure" is sometimes held to be synonymous with "term of office" (Hunt v. Superior Court, 178 Cal. 470, 173 P. 1097), which ordinarily refers to a fixed period. 62 Corpus Juris, 714. Until tenure in the sense of term of office exists, there can be no incompatibility of official duty for the simple reason that there is no "'right * * * and duty * * * invested [by law] * * * to perform a public function for public benefit.'" People ex rel. Chapman v. Rapsey, supra.

[6-10] One term of an office is separate and distinct from other terms of the same office. A proceeding for the removal of an officer cannot be maintained after the accused has ceased to hold his office, nor for a violation of his duty while serving in another office, or in another term of the same office. Thurston v. Clark, 107 Cal. 285, 40 P. 435. To be removed the officer must not only have qualified, but must be "acting." Edson v. Superior Court, 98 Cal.App. 367, 277 P. 194. A vacancy in office may occur by failure to comply with charter provisions of statutes, Pol.Code, §§ 907, 947, 996, but it does not occur until the tenure or term begins. Qualifying for an office by taking and filing the oath or filing a bond before the term of office actually commences is but a preliminary, although sometimes necessary, step to the final assumption of duties. The purpose of such mandatory provisions need not be discussed here. The preliminary performance of statutory requirements cannot vest one with the immediate right to perform the duties of the office, and until there is an authority to discharge the duties as an incumbent there can be no incompatibility of office. In People v. Garrett, supra, 72 Cal. App. at page 455, 237 P. at page 830, the court said: "The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed or elected to another public office, and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible (Mechem, Public Officers, § 419; 22 R.C.L., tit. 'Public Officers,' § 63)." See, also, Thurston v. Clark, supra; People ex rel. Chapman v. Rapsey, supra; McQuillan Municipal Corporations (2d ed.) Revised vol. 2, § 469, p. 140.

[11] A statement appears in one of the briefs that Thompson at the time of his appointment as director was in fact supervisor under a previous term of office. The incompatibility of the two offices at that time is not raised on this appeal. We are concerned only with the office of director assumed by respondent on the 24th day of November, 1938, and the office of supervisor assumed on January 2, 1939. In consonance with the views expressed herein, the assumption of the office of supervisor terminated the incompatible office of director "as effectively as a resignation." People ex rel. Chapman v. Rapsey, supra, 12 Cal.2d at page 644, 107 P.2d at page 393.

The judgment is reversed.

PETERS, P. J., and WAGLER, Justice pro tem., concurred.

55 Cal.App.2d 940

PEOPLE ex rel. BAGSHAW v. BAGSHAW.

Civ. 12058.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1942.

1. Officers ⇐30

The office of supervisor of one of the counties constituting the Golden Gate Bridge and Highway District and the office of director of such bridge and highway district are "incompatible offices" and may not be held by one person at the same time.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatible Office".

2. Officers ⇐55(2)

One assuming the functions and duties of the office of supervisor for one of the counties constituting the Golden Gate Bridge and Highway District thereby relinquished all right to that of a director of such bridge and highway district.

Appeals from Superior Court, Marin County; Benjamin C. Jones, Judge Assigned.

Action in quo warranto by the People, on the relation of A. E. Bagshaw, against T. F. Bagshaw, to remove the defendant from office. From the judgment rendered, both parties appeal.

Judgment reversed.

Earl Warren, Atty. Gen., James H. Oakley, Deputy Atty. Gen., and A. E. Bagshaw, of San Rafael, in pro. per., for plaintiff and appellant.

Thomas C. Nelson, of San Francisco, for defendant and appellant.

WARD, Justice.

This appeal involves the same questions of law, and, with the exception of dates, approximately the same factual background as that of People ex rel. Bagshaw v. Thompson, 130 P.2d 237, filed this date.

In the present case, both plaintiff and defendant have appealed; plaintiff, from the decision that defendant T. F. Bagshaw is legally and properly holding the office of bridge director; defendant, from that portion of the judgment which declares the offices of bridge director and supervisor incompatible. The latter appeal seems to have been taken out of an abundance of caution in order to obtain a review of the finding adverse to defendant on the subject of "incompatibility." Subsequently plaintiff filed a motion to dismiss defendant's appeal on the ground that the judgment was in defendant's favor, and that the question of incompatibility could be considered on plaintiff's appeal. The motion was denied.

[1] As stated, a comparable situation to that in the Thompson case exists herein with reference to the offices involved, defendant's election and appointment thereto, his compliance with statutory requirements, assumption of duties, etc. So far as defendant Bagshaw's appeal on the question of incompatibility is concerned, the additional authorities cited by him have not changed our views, and so, on the authority of People ex rel. Bagshaw (the district attorney of the county of Marin) v. Thompson, supra, his appeal must fail.

[2] In defendant and appellant's closing brief, the following statement appears: "Defendant is of the opinion that if this Court reaches the conclusion that the two offices are incompatible, it should find that the office of Bridge Director and not that of Supervisor is vacant. On this question defendant concurs in the views expressed by plaintiff and appellant in his opening brief." Further consideration of plaintiff's appeal is unnecessary. In assuming the functions and duties of the office of supervisor, T. F. Bagshaw relinquished all right to that of bridge director.

The judgment is reversed; plaintiff to recover costs on both appeals.

PETERS, P. J., and WAGLER, Justice pro tem., concurred.

55 Cal.App.2d 155

PEOPLE ex rel. KRAEMER v. BAGSHAW.

Civ. 12060.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1942.

1. Municipal corporations ⇐142

The office of city councilman of a municipal corporation of the sixth class without charter and the office of county supervisor of the county within which the municipality is located are "incompatible", in view of power of supervisors to declare any highway within a city to be a county highway, to levy taxes for expense of work, power of city council to contract with supervisors for fire protection and other contractual relations between city and county and powers and duties of supervisors and councilmen. St.1935, pp. 347, 348, §§ 1700–1702, 1705; St.1933, pp. 1331, 1332; St.1935, p. 2069; St.1937, pp. 540, 699.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatible Office".

2. Municipal corporations ⇐149(1)

Where the office of city councilman and the office of county supervisor were incompatible, the office of city councilman became "vacant", not at the time of the filing of either or both the oath and bond, but upon the actual assumption of the duties of the office of county supervisor.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacant".

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge Assigned.

Action in quo warranto by the People, on the relation of L. S. Kraemer, against T. Frederick Bagshaw, to remove him from office. From a judgment for plaintiff, the defendant appeals.

Modified and as modified affirmed.

John L. McNab, of San Francisco, for appellant.

Earl Warren, Atty. Gen., James H. Oakley, Deputy Atty. Gen., and Douglas A. Nye, of San Francisco, for respondent.

WARD, Justice.

This appeal by defendant presents legal questions similar to those of People ex rel. Bagshaw v. Thompson, 130 P.2d 237, and People ex rel. Bagshaw v. Bagshaw, 130 P.2d 242, but based upon a different factual background. The issue herein may be stated as follows: "Are the duties of City Councilman of a municipal corporation of the sixth class, without charter, incompatible with the duties of County Supervisor of the County within which the municipality is located" when imposed on one and the same person?

The trial court found the duties of such offices to be incompatible, and that appellant, since the filing of the oath and of the bond for the office of supervisor, "has unlawfully usurped and unlawfully held the said office of City Councilman." In a "Memorandum of Decision and Order for Findings" in People ex rel. Bagshaw v. Thompson, supra, involving, as stated, a similar issue, the trial judge stated: "Having accepted the office of director of the bridge district, after having qualified as supervisor, he now holds the office of director to the exclusion of the other two." Incompatibility in the duties of city councilman and bridge director is not an issue raised by the pleadings, and we therefore refrain from expressing an opinion on that subject.

The findings disclose that prior to the 18th day of April, 1938, defendant was elected to the office of city councilman of the City of Mill Valley, county of Marin, and that on or about said date, having complied with all of the requirements incident thereto, he "was legally possessed of, and ever since * * * has been and is now enjoying the immunities and privileges appertaining to said office"; that on August 27, 1940, he was elected supervisor of the same county for a term commencing on the 6th day of January, 1941; that he filed the required oath and a sufficient bond during the month of October, 1940, and was legally possessed and is now exercising the powers, etc., of the office of supervisor.

[1] The finding that the duties of the two offices are incompatible as to function and obligation must be upheld. The Streets and Highways Code of this state, division 2, chapter 9, article 3, St.1935, pp. 347, 348, provides that a board of supervisors may, by resolution adopted by a four-fifths vote

of its members, declare any highway in the county lying in whole or in part within a city to be a county highway, § 1700, whereupon a copy of the resolution is forwarded to the governing body of such city, and, upon its consent thereto, § 1701, the board of supervisors provides for the expense of the work by levying a special tax or from the proceeds of a bond issue, § 1702, following which, the chief executive of the city and the county supervisor by agreement designate the course of the highway, § 1705. It is possible that the chief executive and the county supervisor in whose district the proposed highway is to be located, may not agree as to the route, in which event the chairman of the board of supervisors shall designate the streets to be used. Any member of the city council may become the chief executive of the municipality.

If, as above found, the two offices are held by the same person, the electors of the city and those of the county are deprived of undivided allegiance to their interests as citizens and electors. In the building of roads, "A", as supervisor, might be motivated by considerations of convenience and the best interests of the entire county, but, as city councilman, he might be swerved from such considerations by the interests of the majority of the municipal property owners. In the same way, honest and well-intentioned conflicts of interest in the performance of duties as city councilman and county supervisor could arise in the allocation of road funds. As a city of the sixth class, the city council may contract with the county supervisors for fire protection within or without the municipal limits. St.1935, p. 2069; St.1937, p. 540. Demands for payments against the city are required "to be audited by the city council." St.1933, p. 1331. Any person violating a city ordinance may be confined to the county jail, whereupon the county through its board of supervisors may make a claim against the city for the expense of such imprisonment. St.1933, p. 1332. The city may adopt a retirement or pension system for city employees, and the city council may contract with the county boards of supervisors for the investment, care and administration of such funds and for services. St. 1937, p. 699.

It appears that an auditing power exists not only in the supervisors over the council, but in the council over the supervisors. The existence of this power, the right to vote, to affirm, deny, correct or modify the official actions of the other official body, in which the same official took part, or had the right to do so, results in incompatibility of the offices. In a word, it is the existence of a right of one person to contract on behalf of the city and another distinct entity—the county—as the representative of each body. People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388; People ex rel. Bagshaw v. Thompson, 130 P.2d 237, and cases cited in both.

[2] The offices being incompatible, the first office, that of city councilman, became vacant, not at the time of the filing of either or both the oath and bond, but upon the actual assumption of the duties of the second office. People ex rel. Bagshaw v. Thompson, supra.

The findings, conclusions and judgment are modified by striking therefrom the date of October 10, 1940, in referring to the vacation of the position of city councilman, and in lieu thereof inserting the date of January 6, 1941. As so modified the judgment is affirmed, respondent to recover costs on this appeal.

PETERS, P. J., and WAGLER, Justice pro tem., concurred.



55 Cal.App.2d 1

PARTCH v. ADAMS et al.

Civ. 12023.

District Court of Appeal, First District, Division 1, California.

Oct. 14, 1942.

Hearing Denied Dec. 7, 1942.

I. Attachment ⇐56
Execution ⇐29
Taxation ⇐278

For many purposes, such as taxation, stock in a corporation follows the domicile of its owner, but, for the purposes of attachment and execution, the stock is located where the corporation is legally located.

2. Attachment ⇐56
Execution ⇐29

At common law, shares of stock in a corporation being intangible and therefore incapable of manual seizure were not subject to attachment or execution.

3. Attachment ⇐165
Execution ⇐131

In California, it is not necessary to the validity of an attachment or a levy of execution that a certificate of stock in a corporation be actually and physically seized by the officer making the attachment or levy. Code Civ.Proc. § 541; § 542, subd. 4; §§ 694, 699.

4. Corporations ⇐52

Generally, a corporation's "residence" is deemed to be where its principal office or place of business as designated in the articles is located, but the rule is not of universal application.

See Words and Phrases, Permanent Edition, for all other definitions of "Residence".

5. Corporations ⇐509(3)

Corporate stock may be attached where any of the corporation's officers designated by statute may be found, and where the corporation carries on a major part of its business. Code Civ.Proc. § 541; § 542, subd. 4.

6. Attachment ⇐49, 50, 170
Execution ⇐20, 21, 127

The purpose of attachment and execution statutes is to make all property except that excepted subject to attachment and execution and to provide that some person is served who has control over the property, so that the property may be reached.

7. Corporations ⇐509(3)

Where a corporation carries on no activities and no officer is present at place designated in corporation's articles as the principal place of business, a valid attachment or execution may be had in the county where the corporation carries on its activities and a proper officer can be reached to complete the service. Code Civ.Proc. § 541; § 542, subd. 4; §§ 694, 699.

8. Corporations ⇐52

The fiction that a corporation has its legal domicile at the place designated in its articles was created to accomplish justice and not to defeat it, and, when the fiction results in absurdity, it should be disregarded.

9. Corporations ⇐509(3)

Where corporation's articles of incorporation designated Sacramento county as the location of its principal office and place of business, but the corporation did not maintain an office for transaction of corporate business in such county, but did maintain its office for transaction of corporate business in San Joaquin county, and its principal officers, executive offices, books of account, and stock records were located in San Joaquin county, San Joaquin county was the proper county for levy of execution on judgment debtor's stock in the corporation. Code Civ.Proc. §§ 694, 699.

10. Garnishment ⇐213

A judgment, in third party proceeding, with respect to third party claims to shares in corporation after levy of execution on the shares, was void.

11. Stipulations ⇐14(1)

Where second judgment creditor in point of time caused first judgment creditor to cancel proposed sheriff's sale of judgment debtor's stock in corporation under levy of execution, by instituting contempt proceedings against first judgment creditor for violation of restraining order in void third party proceeding, and thereafter second judgment creditor in violation of restraining order and in violation of stipulation with first judgment creditor caused an execution sale to be had before execution sale of first judgment creditor under a new levy, second judgment creditor was "estopped" from claiming priority over first judgment creditor. Code Civ.Proc. §§ 694, 699.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

12. Execution ⇐112

A first judgment creditor who levied execution on judgment debtor's stock, but who voluntarily canceled proposed sheriff's sale when second judgment creditor instituted contempt proceedings against him, had priority over second judgment creditor who thereafter levied execution on the stock and purchased stock at execution sale prior to first judgment creditor's purchase of the stock at execution sale. Code Civ.Proc. §§ 683, 688.

13. Execution ⇐146(1)

The return of a writ of execution unsatisfied terminates the sheriff's authority to make a levy, and it generally ter-

minates his authority to make a sale, but the lien of the levy is not necessarily lost by the return. Code Civ.Proc. §§ 683, 688.

14. Execution ⇐283

Alleged buyer of stock in corporation at execution sale failed to establish his claim to stock allegedly purchased at the sale by testimony that he received a certificate from the sheriff of county where corporation transacted its business and maintained its office, and that he took the certificate to the corporation's secretary, and that the secretary gave him a new certificate for the stock.

Appeal from Superior Court, of Alameda County; Warren V. Tryon, Judge assigned.

Action by Wallace T. Partch against Frank P. Adams, the Acampo Winery & Distilleries, Incorporated, and one Propper, to quiet title to shares of stock of the Acampo Winery & Distilleries, Incorporated. One Propper died, and his administrator was substituted. From an adverse judgment, the plaintiff appeals.

Judgment affirmed in part and reversed in part.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

James H. Boyer, of Oakland, for appellant.

Frank P. Adams in pro. per., and Dinkelspiel & Dinkelspiel, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment rendered in an action to quiet his title to 812½ shares of stock of defendant Acampo Winery and Distilleries, Incorporated. The trial court determined that 750 shares claimed by plaintiff were the property of defendant Adams, while the remaining 62½ shares were held to be the property of defendant Propper. Propper has since died and his administrator has been properly substituted. The appeal is taken on a bill of exceptions.

Plaintiff Partch and defendant Adams are both judgment creditors of one Mathews, who owned the 812½ shares of stock of the Acampo Winery and Distilleries, Incorporated, that are the subject of this action. Both litigants predicate their claim to ownership of this stock as purchasers at execution sales had upon their respective judgments. Propper predicates his claim upon his purchase at a separate execution sale of 62½ shares of the Mathews stock, which execution sale was had upon the judgment in favor of Adams against Mathews.

Partch caused execution to be levied on the 812½ shares in Sacramento County on October 20, 1938, and purchased at execution sale on November 3, 1938. The trial court found that Adams was entitled to priority as to the 750 shares by virtue of an execution levied in San Joaquin County on July 27, 1938, pursuant to which levy Adams purchased at execution sale on November 21, 1938. The trial court also found that Propper was entitled to priority over both Partch and Adams as to 62½ shares, by virtue of a levy of execution and sale thereunder in San Joaquin County in 1937.

It will be noted that both Adams and Propper claim by virtue of levies and execution sales had in San Joaquin County, while Partch claims by virtue of a levy and execution sale in Sacramento County. The main contention of Partch on this appeal is that the stock was not subject to execution levy or sale in San Joaquin County, but only in Sacramento County, that county being designated by the articles of incorporation of the Acampo Winery and Distilleries, Incorporated, as the principal place of business of the corporation. Appellant further urges that even if the levies and sales were proper in San Joaquin County, Adams and Propper failed to establish their priority, it being contended that the evidence shows priority in Partch.

Strangely enough, there appears to be no case in California determining the proper situs of corporate stock of a domestic corporation for the purpose of attachment or execution, and there is little authority in other jurisdictions. Appellant urges that the sole situs of such stock for the purposes of attachment or execution is the legal domicile of the corporation, that is, the county of the principal place of business as designated in the articles, while respondents urge that, although such county is undoubtedly a proper county, such attachment or execution can also be had in the county of the domicile in fact of the corporation.

[1-3] For many purposes, such as taxation, stock in a corporation follows the domicile of its owner. But for the purposes of attachment and execution, the stock is located where the corporation is legally located. At common law, shares of stock being intangible, and therefore in-

capable of manual seizure, were not subject to attachment or execution. Fletcher, Cyclopedia of the Law of Private Corporations, (perm.ed.) vol. 10, p. 70 § 4759. Whatever right exists in California to reach such stock, exists solely by statute. Under the provisions of section 13 of the Uniform Stock Transfer Act (partially adopted in this state) no attachment or levy is valid unless the certificate of stock is actually and physically seized by the officer making the attachment or levy. California failed to enact that provision of the uniform act. In this state the location of the certificate is of no consequence. Under section 699 of the Code of Civil Procedure it is not necessary for the sheriff to take physical possession of the certificates in order to hold a valid sale on execution of the shares. The sheriff simply gives the purchaser at such sale a certificate of sale which conveys all the right the debtor had.

The basic statutory provisions are four in number. Section 541 of the Code of Civil Procedure provides that: "The rights or shares which the defendant may have in the stock of any corporation or company * * * may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution."

Section 542, subdivision 4, provides the manner by which shares of stock must be attached. It provides: "Stocks or shares * * * of any corporation or company, must be attached by leaving with the president, vice president or other head of the same, or the secretary, assistant secretary, cashier, assistant cashier, or any managing agent, thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ."

Section 688 of the Code of Civil Procedure is the section listing the property subject to execution. So far as shares of stock are concerned, it provides that such shares "may be levied upon or released from levy in like manner as like property may be attached or released from attachment."

Section 694 of the Code of Civil Procedure provides how execution sales shall be conducted. So far as is pertinent here, it provides that: "All sales of property under execution * * * must be held in the county where said property or some part thereof is situated * * *."

As already pointed out, the articles of incorporation of the Acampo Wineries and Distilleries, Incorporated, a domestic corporation, designated Sacramento County as the location of its principal office and place of business. The trial court found that the corporation "did not maintain an office for the transaction of corporate business in Sacramento County" but that it maintained "its office for the transaction of corporate business in San Joaquin County, and its principal officers, executive offices, its books of account and stock records were and are located in said San Joaquin County." These findings are supported by the testimony of Elmer J. Walther, attorney for the corporation since 1936. He testified that the place of business of the winery is in San Joaquin County; that all the distilling takes place in that county; that all the officers of the corporation including the president, vice president and secretary, are in San Joaquin County except a director and vice president who live in Fresno County; that there is no office maintained by the corporation in Sacramento County and no officer is in that county; that all the corporate records are kept in San Joaquin County. Appellant contends that the testimony of Walther related to the time of trial rather than at the time the executions were levied. While it is true that the evidence as set forth in the bill of exceptions uses the present tense, when read in its entirety it is obvious that the witness was referring to the period since he became attorney in 1936.

[4] From the findings it is clear that we are dealing with a situation where the corporation has designated one county as its principal place of business, and actually, in fact, all of its business is done in another county where most of its officers reside and where it keeps all of its corporate records. There can be no doubt that, generally speaking, a corporation's residence is deemed to be where its principal office or place of business as designated in the articles is located. 13 Am.Jur., p. 281, § 148, et seq. But that rule is not of inevitable application. There are many situations in the law where, for purposes of venue and jurisdiction, a corporation has been held to be present in any county where it conducts its operations. See annotation 43 L.R.A.,N.S., 272. As to foreign corporations, California has held that its stock belonging to a California stockholder may have its situs in this state. In Wait v. Kern River Mining, etc., Co., 157 Cal. 16, 106 P. 98, the corporation was organized in Arizona, but all of its property was in California where it did all

of its business. The court recognized the rule that generally the situs of the shares is the state where the corporation is organized, but said that for all practical purposes the shares had their situs in California, and gave specific performance to plaintiff in this state on his contract to purchase. The court thus gave recognition to the practical aspects of the situation, refusing to be bound by the mere paper domicile of the corporation.

[5, 6] It would seem that the statutes above set forth, reasonably interpreted, recognize the practical problem here presented. Stock of a stockholder must be attached or levied upon by attaching or levying upon the corporation. Under section 542(4), supra, an attachment or levy is made by serving certain designated officers. There is nothing said in that section to indicate that the Legislature meant that such service had to be made in the county designated in the articles as the location of the principal office. So far as that section is concerned, service is sufficient if made in any county where any of the designated officers can be found. But section 694, supra, requires the execution sale to be had in the county "where said property or some part thereof is situated * * *." Read together we think the Legislature intended to provide, and has provided, that corporate stock may be attached where any of the designated officers may be found, and where the corporation carries on a major part of its business. There is nothing incongruous in thus holding that, for the purposes of attachment or execution, shares of stock may have several different situses in the same jurisdiction, such as at the legal domicile and the domicile in fact of the corporation. The obvious purpose of the attachment and execution sections is to make all property, except that excepted, subject to attachment and execution, and to provide that some person is served who has control over the property so that the property may be reached.

Unless it be held that shares may be reached by service on officers at the domicile in fact of the corporation, as well as at the legal domicile, the obvious purpose of the law to make shares of stock subject to the claims of creditors of stockholders will be defeated. Thus, if a domestic corporation in its articles designated Del Norte County as the legal domicile of the company, but in fact transacted all its business in San Diego County, where its officers resided, if appellant's contention is sound, no creditor of a stockholder of that corporation could ever reach that stockholder's stock as long as the officers kept away from Del Norte County. By the mere fictional designation of a particular county as the legal domicile of the corporation, a corporation could put the shares of its stockholders forever beyond the reach of persons to whom those stockholders owe valid and meritorious obligations. That is not the policy of the law.

[7-9] From the above quoted statutory provisions, it seems quite clear that the Legislature intended, at least where the corporation carries on no activities and no officer is present at the place designated in the articles as the principal place of business, that a valid attachment or execution may be had in the county where the corporation carries on its activities and a proper officer can be reached to complete the service. The fiction that a corporation has its legal domicile at the place designated in its articles was created to accomplish justice in certain cases, not to defeat justice. When a legal fiction results in an absurdity it should be disregarded. It follows that San Joaquin County was a proper county in which to serve the corporation.

Appellant also contends that, independently of the above point, the evidence does not sustain the findings that the Adams and Propper claims were prior to his. The two claims are based on different facts and will be separately considered. The controversy over whether appellant or Adams is entitled to priority to the 750 shares is based on the following facts:

Appellant recovered judgment against Mathews on October 11, 1938. Execution was levied on the judgment on October 20, 1938, and the execution sale at which appellant purchased, was held November 3, 1938.

Adams claims priority by virtue of an execution levied on July 27, 1938, antedating the levy of appellant. Adams purchased at execution sale held on November 21, 1938, subsequent to the sale to appellant. Appellant urges, however, that Adams' priority does not relate back to the levy of July 27, 1938, but is referable to a levy made by Adams on November 11, 1938.

The bill of exceptions recites that it was stipulated that Adams recovered his judg-

ment against Mathews in December of 1933; that on May 7, 1936, execution issued; that the sheriff levied on 750 shares standing in the name of Mathews. It also appears that on May 25, 1936, one Van Horn and appellant filed with the sheriff of San Joaquin County third party claims to the 750 shares owned by Mathews. Just what the basis of appellant's claim was at that time does not appear. He had not yet recovered his judgment against Mathews, nor, so far as appears, attached the stock on that date. Pending the hearing of the third party claims, Adams caused successive levies of execution to be made on the stock, the last levy, prior to appellant's levy, being made on July 27, 1938.

On June 25, 1936, appellant, Adams and Van Horn entered into a written stipulation that, pending the final determination of the validity of the third party claims, they would not in any way change the status of such shares. On May 13, 1937, the court in the third party proceeding, made an order restraining all sales of the stock pending the final determination of that action. This order was amended on July 1, 1937, the amended order providing that it did not prevent further levies on property of Mathews.

[10] On September 20, 1938, the court entered judgment in the third party proceeding to the effect that Mathews owned the stock, subject to the lien of the levy of execution of Adams. An appeal taken from that judgment by the third party claimants was abandoned November 9, 1938, by the filing of an abandonment. As a matter of law, the judgment in the third party proceeding was void. Such a proceeding does not lie where either corporate stock or an indebtedness has been attached. Bank of America Nat. Tr. & S. Ass'n v. Riggs, 39 Cal.App.2d 679, 104 P.2d 125.

Following entry of judgment in the third party proceeding, Adams caused the sheriff to advertise the 750 shares of stock for sale under the levy of execution of July 27, 1938. Van Horn and appellant immediately had Adams cited for contempt for violating the restraining order, since, by virtue of the appeal, of which Adams claims he had no knowledge, the judgment in the claims proceeding was not final. Adams, thereupon, voluntarily canceled the proposed sheriff's sale, and the writ of execution of July 27, 1938, was returned wholly unsatisfied on September 27, 1938—unsatisfied not because of the fact that no property had been found, but because of the outstanding restraining order, and the voluntary cancellation.

As already pointed out, the appeal in the third party proceeding was not abandoned until November 9, 1938. On October 11, 1938, while the restraining order was still apparently in effect, appellant caused a writ of execution to be issued on his judgment against Mathews. It was levied on October 20, 1938, and the execution sale took place on November 3, 1938. Thus, after appellant had caused Adams to cancel his proposed sheriff's sale by instituting the contempt proceeding, appellant went ahead, and, in violation of his written stipulation, and in violation of the order in the claims proceeding, caused an execution sale to be had while the appeal was pending.

[11] Adams claims that these facts raise an estoppel against appellant. The latter urges that, although the restraining order was still in effect, the third party proceedings were void, and, therefore, the restraining order did not operate as a valid restraint. But the answer is not so simple. Here appellant stipulated with Adams that, pending the final determination of the third party proceeding, they would not change the status of the shares. Then the court issued a restraining order restraining all sales under execution pending final determination of the third party proceeding. Judgment was entered therein, but appellant here appealed. Adams at that time had clear priority because of his levy of July 27, 1938. In apparent ignorance of the appeal, Adams caused the sheriff to advertise the stock for sale under that levy. Appellant, by contending the restraining order was still in effect, got Adams to cancel the sale, and the execution was returned unsatisfied. Then, while the restraining order was still in effect, appellant levied on the stock and bought at execution sale, and now contends he could thus secure priority over Adams because the third party proceeding was void, and, therefore, the restraining order was void. Thus, appellant relied on the stipulation and order in getting Adams to cancel his execution sale, and then, without notice to Adams, deliberately violated the stipulation and order. Such practice cannot be condoned. Under the facts, appellant would clearly be estopped from claiming priority over Adams, if in fact appellant had such priority.

[12] However, an examination of the pertinent code sections demonstrates that, independently of the doctrine of estoppel, Adams has priority over appellant. It is our opinion that the levy by Adams on July 27, 1938, gave him priority over the levy of appellant of October 20, 1938. The priority of successive executions depends upon the priority of the levies. § 688, Code Civ. Proc. Appellant argues, however, that when Adams' writ of execution of July 27, 1938, was returned wholly unsatisfied, the lien of that execution was terminated, with the result that Adams' priority must depend on the writ issued on November 11, 1938. That is not the law. Section 688 of the Code of Civil Procedure provides that: "Until a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution * * *." Thus, under this section it is contemplated that the lien of the levy may exist for one year. But section 683 of the Code of Civil Procedure provides that the "execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the officer to whom it is directed, to the court in which the judgment is entered. * * *" The July 27, 1938, levy was returned unsatisfied, not because no property had been subjected to the lien, the execution having been levied on the stock before the return, but only because the property actually levied upon had not been sold, Adams having canceled the sale for reasons already set forth.

[13] Of course, the return of the writ terminates the sheriff's authority to make a levy, and it generally terminates his authority to make a sale, but that is not an invariable rule. Weldon v. Rogers, 157 Cal. 410, 108 P. 266, 15 Cal.Jur. p. 1077, § 76. But that does not mean that the lien of the levy is necessarily lost by the return. Section 683 of the Code of Civil Procedure also provides: "If an execution is returned unsatisfied, another may be afterwards issued within the time specified in this code." Reading the sections together, it seems quite clear that once a levy is made on specific property the lien thereof may last for one year under section 688; under section 683 execution must be made returnable not more than sixty days after receipt by the officer. Obviously, if the execution levy binds the property for a year, such lien must survive, under some circumstances, the return. There would be no reason for providing for the continuance of the lien for one year, if the lien automatically was terminated by a return. Where a levy has been made on specific property, the lien of that levy should not be lost because such execution is returned unsatisfied because of facts over which the execution creditor has no control. Under such circumstances, another writ may be issued during the year, and its priority relates back to the prior levy. This is the only way in which the various code sections can be reconciled, and such interpretation is reasonable and reaches a fair result. If this interpretation be correct, and we think it is, Adams' lien dates from the levy of July 27, 1938, which was prior to the levy of appellant.

[14] The Propper claim to 62½ shares rests on an entirely different basis. This respondent pleaded in his answer that he purchased the 62½ shares at an execution sale in San Joaquin County on April 7, 1937. The finding is in accord with the allegations. But the bill of exceptions contains no evidence to sustain this finding. The sole evidence contained therein is the following: "Adolph Propper, defendant, called as a witness on his own behalf, sworn [sic] and testified as follows: I am in business in Lodi, and Lodi is the place where the Acampo winery is. I got that certificate from the sheriff of San Joaquin County and took it to the secretary of the Acampo Winery at Lodi, and he gave me the certificate 580 for the 62½ shares. I got this second certificate soon after the sale. That was in 1937."

The parties stipulated that the bill of exceptions "contains a full, true and correct statement of all evidence introduced" and the trial judge so certified. It is obvious that such evidence is totally insufficient to support the findings as to the Propper claim. The evidence standing alone is unintelligible. No documentary evidence of title was introduced, nor was oral evidence of title given. If the facts are as set forth in the answer of this respondent, then the Propper claim is entitled to priority, but there is no evidence to support the finding.

The judgment, insofar as it quiets the title of Adams to 750 shares of the Acampo Winery and Distilleries, Incorporated, stock, formerly owned by Mathews, is affirmed; but, insofar as the judgment quiets the title of Propper to 62½ shares of such stock formerly owned by Mathews, the judgment

is reversed; respondent Adams to recover his costs on this appeal, appellant Partch and respondent Propper to bear their own costs.

KNIGHT, and WARD, JJ., concurred.



55 Cal.App.2d 300

ALPHONZO E. BELL CORPORATION v. LISTLE et al.

Civ. 13588.

District Court of Appeal, Second District, Division 3, California.

Oct. 30, 1942.

1. Appeal and error ⇐931(1)

On appeal, findings should be given the most reasonable construction possible to support the judgment.

2. Mines and minerals ⇐78(3)

Evidence that lessor under an oil and gas lease on October 26 had mailed to lessee a notice setting forth cessation of work and demanding resumption of drilling within 60 days after service of notice as required by the lease and that lessee had received the notice October 28 did not support finding that notice had been served on October 26 so as to justify termination of lease, when lessee did not resume work until December 27.

3. Mines and minerals ⇐78(7)

Where evidence did not support finding that notice of default under oil and gas lease, required to establish lessor's right to terminate lease for 60 days' failure by lessee to prosecute drilling operations had been served upon lessee on October 26 and that lessee had failed to remedy the default within such period and lessor's complaint alleged service of notice October 28, finding determined that lessee did not resume work on or before December 26.

4. Notice ⇐10

The section of the Code of Civil Procedure providing for service of "notices" by mail and granting extension of time for exercise of right or doing of an act relates only to notices and filing and service of papers and does not apply to notices generally which are required to be given under Civil Code sections independently of pending actions, or to notices called for by private contracts failing to provide for service by mail. Code Civ.Proc. § 1013.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

5. Mines and minerals ⇐78(3)

Where oil and gas lease requiring lessor to give lessee notice of failure to prosecute drilling operations to establish lessor's right to terminate lease for 60 days' failure by lessee to prosecute such operations failed to provide for notice by mail, lessee was not entitled to an extension of time to commence operations because of distance between point where such notice was mailed and where it was received. Code Civ.Proc. § 1013.

6. Mines and minerals ⇐78(3)

Where oil and gas lease requiring lessor to give lessee notice of failure to prosecute drilling operations to establish lessor's right to terminate lease for 60 days' failure by lessee to prosecute such operations failed to provide for service by mail, lease required lessor to give lessee personal notice of default, and hence where lessee on October 28 received notice mailed October 26, resumption of work on December 27 was timely.

7. Mines and minerals ⇐78(5)

Where lessee under oil and gas lease, after failing to resume work on December 26, had repaired boilers after lessor had instructed lessee that boilers were not to be used until they were repaired, and lessor did not object to lessee's entering the property on December 27, or contend that lessee's time had expired on December 26, and did not protest against lessee's continuance of work until January 16, but continued to furnish water for lessee's operations, lessor was "estopped" from insisting that lessee's time to resume drilling operations to avoid forfeiture of lease had expired on December 26.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

8. Trial ⇐397(1)

Where lessor under oil and gas lease sought to quiet title against lessee on ground of breach of covenant relating to

prosecution of work and failure to resume and diligently pursue work after notice of default by lessor, and lessee had timely resumed work, a specific finding whether lessee's work constituted resumption of drilling operations within the lease was indispensable.

9. Trial ⇐397(1)

Where allegation of complaint to quiet title against lessee under an oil and gas lease, that lessee had failed to drill diligently, preceded allegation of giving notice of default required to establish lessor's right to terminate lease by failure of lessee to remedy the default, general finding that lessee had failed to drill diligently referred to period preceding date of giving notice where next finding referred to giving of notice, and general finding was not sufficient to overcome omission of indispensable finding as to lessee's good faith and sufficiency of work, timely commenced, to remedy the default.

10. Judgment ⇐256(1)

A judgment unsupported by findings cannot stand.

11. Appeal and error ⇐1071(6)

Where lessor under oil and gas lease sought to quiet title against lessee on ground of breach of covenant relating to prosecution of work and failure to diligently pursue work after notice of default by lessor, finding as to whether work as resumed by lessee constituted resumption of drilling operations was not made and appellate court could not say as a matter of law that such finding would have to be against lessee, such issue was required to be determined by a retrial.

12. Mines and minerals ⇐78(3)

If lessee under oil and gas lease timely resumes drilling after receipt of notice under covenant authorizing termination of lease by lessee's 60 days' failure to resume work after notice of default, subsequent default would require a new notice.

13. Mines and minerals ⇐78(1)

In determining whether lessor was entitled to terminate oil and gas lease because of lessee's breach of covenant relating to prosecution of work and failure to resume and diligently pursue work after notice of default, court was required to read lease and subsequently executed amendment advancing date for commencement of drilling together.

14. Mines and minerals ⇐78(3)

Under oil and gas lease authorizing termination by lessor for 60 days' failure by lessee to resume and diligently pursue drilling operations after notice of default by lessor when read with subsequently executed amendment purporting to advance date for commencement of drilling, cessation of drilling did not work a "forfeiture" without notice thereof from the lessor or time within which to remedy the default.

See Words and Phrases, Permanent Edition, for all other definitions of "Forfeiture".

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Suit by Alphonzo E. Bell Corporation against K. L. Listle and others to quiet title to realty. From a judgment for plaintiff, named defendant appeals.

Reversed.

Maddox & Vaughn and Chandler & Wright, all of Los Angeles, for appellant.

Overton, Lyman & Plumb, Donald H. Ford, and Irving H. Prince, all of Los Angeles, for respondent.

SHINN, Justice.

The appeal which is before us was taken by K. L. Listle (sometimes referred to herein as defendant) from a judgment quieting plaintiff's title against claims of interest in real property asserted by defendants under an oil lease. The judgment purports to rest upon findings that defendants breached their lease by failing to prosecute work thereunder and failing to resume and diligently pursue work in conformity with the requirements of the lease after notice of default given by the lessor.

[1] We have given the findings the most liberal construction possible within reasonable limits, as we should (Mardesich v. C. J. Hendry Co., 1942, 51 Cal.App.2d 567, 573, 125 P.2d 595) and have been unable to satisfy ourselves that they are sufficient to support the judgment. Furthermore, the essential finding as to the date when defendant was served with notice of default is not supported by the evidence. For these reasons the judgment must be reversed.

Plaintiff leased a parcel of land to defendant (Mrs.) K. L. Listle, who assigned to Frank Barton, who in turn assigned to

Sun-Bell Drilling Co. Mrs. Listle thereafter issued royalty interests to others of the defendants. The lease was reassigned to her after cessation of work on a well by Sun-Bell.

Sun-Bell started a well in August, 1939, drilled to about 3,000 feet and ceased work September 27, 1939. Defendants were given a notice by plaintiff lessor dated October 26, 1939, setting forth the cessation of work on September 27 and demanding a resumption of drilling within 60 days after service of notice as provided in the lease.

The lease, which was dated November 17, 1937, provided in paragraph X that the lessee should commence drilling operations within four and one-half years after that date and prosecute the same "with reasonable diligence until oil or gas is found in paying quantities or to a depth at which drilling would, in the judgment of the lessee, be unprofitable." It provided, "The words 'drilling operations' as used in this lease shall be held to mean any work or actual operations undertaken or commenced in good faith for the purpose of carrying out any of the rights, privileges or duties of the Lessee under this lease, followed diligently and in due course by the construction of a derrick and other necessary structures for the drilling of an oil or gas well, and by the actual operation of drilling in the ground. * * * Upon the violation of any of the terms or conditions of this lease by the Lessee and the failure to begin to remedy and continue the same to completion with diligence within 60 days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end, * * *."

An amendment of the lease, dated May 4, 1939, provided as follows: "The Lessee agrees to commence drilling operations on said land on or before August 15, 1939, and thereafter to prosecute the same continuously and diligently until oil or gas is found in paying quantities, or she may at any time within said period terminate this lease and surrender said land as hereinafter provided. * * *"

On the same date letters were exchanged between plaintiff and defendant by which it was agreed that plaintiff would within 30 days erect on the property a steel derrick at least 122 feet in height, would provide for a period of 12 months from the date drilling operations were commenced such water as a certain water well of plaintiff's would produce, would provide all fuel necessary for the drilling operations, would provide a rotary outfit complete with three boilers and fittings, one string of drill pipe of a size to be selected by the lessee, and 475 feet of suitable 15-inch casing which would meet the requirements of the Division of Oil and Gas; title to the rotary outfit, boilers, fittings and drill pipe was to remain in plaintiff and title to the derrick and casing to remain in plaintiff until paid for out of an agreed percentage of production of oil and gas. There was a substitution of 13¾-inch for 15-inch casing and there was some question concerning the furnishing of water as agreed, but except for these deviations from the agreement (which are of no moment on the appeal), it is not contended that plaintiff failed to provide the derrick and other equipment specified in the agreement.

It is not seriously contended by defendant, nor could it be so contended, that there was not a cessation of work and failure to resume work between September 27 and December 27, as alleged by plaintiff. The complaint further alleged, "That pursuant to the provisions of said oil and gas lease above described plaintiff, during the period from October 28 to October 30, 1939, did serve defendants K. L. Listle, J. I. Listle, Sun-Bell Drilling Company, Frank P. Barton, Wm. MacKenzie Brown, Robert Barlow, James A. Hague, Vernon G. Monte, Jeanne V. V. Helbush with notice of default under said oil and gas lease, which notice did specify that on September 27, 1939 drilling on said land was stopped and the well since that date has been standing idle and because of the cessation of operations drilling had not been prosecuted with reasonable diligence as provided in the terms of said lease. Demand was made that said default be remedied by the resumption of diligent drilling operations within sixty days from the date of service of said notice." It was further alleged, "That defendants and each of them failed to remedy said default specified in said notice within said sixty days' period and they and each of them failed to resume drilling operations with diligence within said period and by reason of said default and said failure plaintiff, during the period from January 17 to January 20, 1940, did serve each of the persons above named in paragraph XIII as the persons to whom notices of default had been sent, with a notice of termination of any interest that

they might have or claim to have had in the oil and gas lease above described and in and to the real property described in paragraph IV hereof."

The court found that the allegations of paragraph XI of the complaint were true, which paragraph reads as follows: "That drilling operations were commenced on said property on or about August 11, 1939. That said defendants breached said covenants as described in paragraph X hereof in that they failed to prosecute drilling operations on said leased premises with reasonable diligence until oil or gas was found in paying quantities, or to a depth at which further drilling would in her judgment prove unprofitable.", and made further findings reading as follows: "The Court finds that pursuant to the provisions of said Oil and Gas Lease entered into between the plaintiff and the said defendant K. L. Listle, the plaintiff, on October 26, 1939, served defendants K. L. Listle, J. I. Listle, Sun-Bell Drilling Company, Frank P. Barton, Wm. MacKenzie Brown, Robert Barlow, James A. Hague, Vernon G. Monte and Jeanne V. V. Helbush with a notice of default under said Oil and Gas Lease, which notice specified that on September 27, 1939, drilling on said land was stopped and the well since that date has been standing idle and because of the cessation of operations, drilling had not been prosecuted with reasonable diligence, as provided in the terms of said lease. The Court also finds that demand was made that said default be remedied by the resumption of diligent drilling operations within sixty days from the date of service of said notice. * * * The Court finds that the defendants, and each of them, failed to remedy said default specified in said notice within said sixty days period and they, and each of them, failed to resume drilling operations with diligence, or at all, within said period and by reason of said default and said failure plaintiff, during the period from January 16 to January 20, 1940, served each of the persons above named in Paragraph XIII of plaintiff's Complaint, as the persons to whom notices of default had been sent, with a notice of termination of any interest that they might have or claim to have had in the Oil and Gas Lease above described and in and to the real property hereinabove described."

[2, 3] Defendant resumed work on the well December 27, 1939. If she had been "served" with notice on or after October 28, as alleged in the complaint, her time would have expired with December 27 or later; if service was on October 26, as found by the court, her last day would have been December 26. The finding that notice of default was served upon defendant on October 26 is without support in the evidence. The notice was mailed at Los Angeles October 26. There was undisputed evidence that appellant Listle, who was in Lompoc at the time, did not actually receive a copy of the notice until October 28, although it did appear that other copies of the notice were addressed to her in care of her attorney at Los Angeles and to another Los Angeles address. The finding that the notices were served on October 26 was in direct conflict with the allegation of the complaint, and it had the effect of advancing the date for resumption of work to December 26. We cannot understand the finding as determining anything more than that defendants did not resume work on or before December 26, 1939. It was contended by plaintiff at the trial that the notice became effective on the date of its mailing and the court appears to have taken that view of the law.

[4, 5] Defendant contends that she was entitled to one additional day and one more day for each 100 miles of distance between the points where the notice was mailed (Los Angeles) and where it was received (Lompoc), which is more than 100 miles. Her last day would have been December 27 under this theory. Reliance is placed upon section 1013 of the Code of Civil Procedure, which provides for such extended time where notices are served by mail, but the provision relates only to the subject matter of the chapter of the code in which it appears and which deals with notices and filing and service of papers; it does not apply to notices generally which are required to be given under Civil Code sections, independently of pending actions (Colyear v. Tobriner, 1936, 7 Cal.2d 735, 62 P.2d 741, 109 A.L.R. 191), and of course would not apply to notices called for by private contracts which fail to provide for service by mail.

[6] However, there are two good reasons why resumption of work on December 27 would have been timely. In the first place the lease did not provide for notice by mail and in the absence of such a provision it should be construed as requiring the lessor to give the lessee personal notice of default (see Williams v. Bergin, 1895,

108 Cal. 166, 171, 41 P. 287; Stockton Automobile Co. v. Confer, 1908, 154 Cal. 402, 97 P. 881; Long v. Chronicle Pub. Co., 1924, 68 Cal.App. 171, 228 P. 873. Although two notices were mailed to appellant at Los Angeles addresses, plaintiff relies upon the one addressed to her at Lompoc.

[7] An additional reason why the finding that defendant forfeited her lease through failure to resume work by December 26 cannot be sustained results from the construction which plaintiff placed upon its notice and upon defendant's obligation to resume work. Plaintiff's conduct on and after December 27 as hereinafter related, was such as to estop it from insisting that defendant's time expired on December 26. On December 27 defendant employed men to resume work on the well. The boilers were fired up preparatory to setting a cement plug in the well for the purpose of making a test for water. Fifteen feet of cement were poured into 8⅝-inch casing and the setting of the plug was completed on December 28.

On December 27 plaintiff notified defendant that the boilers were in bad and dangerous condition and told defendant's husband that he would or could be arrested if he used them without their being repaired. Plaintiff's vice president, in charge of oil operations, testified that he had had a conversation with J. I. Listle, defendant's husband, on December 28 in which he asked Mr. Listle "where he expected to place the plug in the well that he intended to put there" and that the conversation at that time concerning the boilers "was to this effect: that the boilers were not to be used until they were repaired. After that it was all right for them to go ahead. We considered them hazardous." On January 3, at defendant's request, the boilers were inspected and on January 10 the inspector reported that they needed certain repairs. However, as early as January 6 defendant had set about to have them repaired. The flues were rolled, changes were made in the manifolds and in the pipes on top of the boilers. This work was commenced January 6 and was finished on January 15 or 16. One of defendant's employees also washed out the boilers between January 8 and January 10 at the same time the manifolds were being fixed. Plaintiff knew about these operations.

There was a string of 8⅝-inch casing in the hole to about 2,300 feet which Sun-Bell had purchased on conditional sales contract and had failed to pay for. The seller having demanded payment or return of the casing, plaintiff, some time before December 27, had purchased the casing for the sum of $1,431.25 to prevent its removal from the well. On December 27 plaintiff notified defendant in writing that it owned the casing and that she could not use it until she had paid plaintiff for the same. Plaintiff made no objection to defendant's entering upon the property on December 27 and did not contend then any more than it contended at the time the complaint was filed that defendant's time had expired on December 26. No protest was made to defendant between December 27 and January 16 against her continuing work on the well, and it is obvious that both parties considered during that period that defendant was not obliged to resume drilling before December 27. In fact, the written notices delivered to defendant on the 27th respecting payment for the casing and the expressed permission to make use of the boilers constituted conditional invitations for defendant to resume work. Defendant did repair the boilers as required, and while she did not pay for the casing, there was evidence that her husband, who was in charge of operations, promised to pay for it and defendant was allowed to use it without further protest. In addition to that, plaintiff continued to furnish water to defendant during this period for her operations on the well.

On January 16 plaintiff mailed to defendants the notice of termination of the lease above referred to. After that defendant did sporadic work on the well up until the institution of this action on February 23. The well was tested for water shut-off, one of defendant's employees worked for three days on the 29th, 30th and 31st of January, the well was bailed on or about the 19th of February and about that time the tools were run in the hole and some additional hole was drilled, notwithstanding the service of the notice of January 16. On February 21 defendant was ordered off the property.

[8-10] A specific finding whether defendant's work as commenced on December 27 constituted the resumption of drilling operations was indispensable to a determination of the issues on trial. No finding was made upon this issue. The general finding that defendant failed to prosecute the work of drilling diligently, which we have quoted above, is not sufficient. The allegation to that effect, as contained in the complaint,

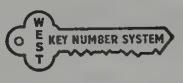
immediately precedes the allegation as to the giving of the October 26 notice, and in the findings the period referred to undoubtedly is that which preceded October 26 as the next finding refers to the giving of the notice. Furthermore, it is only a finding that defendants breached the covenant to continuously drill, and not a finding that they failed to remedy their default. The findings with relation to the failure to resume drilling operations within the 60-day period are specific. The finding of breach of covenant does not relate to the resumption of drilling operations but only to cessation of work and it cannot be construed as sufficient to overcome the obvious omission of a finding as to the good faith of defendant and the sufficiency of the work commenced on December 27 to remedy her default. A judgment unsupported by the findings cannot stand. Cargnani v. Cargnani, 1911, 16 Cal.App. 96, 99, 116 P. 306; Adams v. Helbing, 1895, 107 Cal. 298, 301, 40 P. 422.

[11, 12] We might have a definite opinion whether defendant's resumption of work was sufficient to remedy her default but if we had one it would not enable us to uphold the judgment unless we could say as a matter of law that the finding would have to be against defendant. We cannot do this. The drilling of an oil well does not consist alone of turning a bit in the hole; there are many other essential operations which constitute actual drilling of the well. There are also many operations which, if indulged in needlessly, would be a mere pretense of drilling. The element of good faith is of great importance to the trier of facts. For all we know, the trial judge may have believed that defendant in good faith resumed drilling on December 27 but that she was a day late, or he may have believed the contrary. Plaintiff cannot insist on the date of December 26 but can insist that the operations of defendant were not sufficient to constitute the resumption of drilling the well and the court will have to decide that question. If the court should find that defendant did resume drilling operations, within the meaning of the lease, on December 27, she would be held to have remedied her default. A subsequent default would have required a new notice. Smith v. Edelman, 1931, 214 Cal. 488, 6 P.2d 508. If she made a mere pretense of resuming drilling operations (and in this connection the question of good faith is an element to be considered) she would be held to have failed to remedy the default. We cannot say upon the record now before us that all of the substantial evidence was on one side of this issue, which is the crucial one in the case and can be determined only by a retrial.

[13, 14] We have not overlooked plaintiff's contention that under the amendment of the lease cessation of drilling would work a forfeiture, without notice thereof from the lessor or time within which to remedy the default. We should read the lease and the amendment as a single instrument, as plaintiff did when giving the notice, and as the trial court did; when so read there was no waiver of the right to receive notice. The amendment purported to do nothing but advance the date for commencement of drilling.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.



55 Cal.App.2d 56

SANTA CRUZ OIL CORPORATION et al. v. MILNOR et al., Fish and Game Com'rs.

Civ. 12022.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1942.

1. Statutes ⇐35½

Unless the legislative title of an initiative measure has a tendency to mislead the legislators, all presumptions after election are in favor of the sufficiency of the original title. Const. art. 4, § 1, as amended in 1932.

2. Statutes ⇐35½

The initiative measure relating to licensing of fishing boats was not invalid because in submitting the matter to the electors the title on the ballot simply contained the enacting clause of the measure presented in the legislature, since there was no necessity that the legislative title of the measure should appear on the ballot, and it did not appear that either the legislative or ballot title entrapped the voters by being misleading or deceiving in character. Ini-

tiative Measures St.1939, p. CXXXIX, § 1110; Pol.Code, §§ 1197, 1197a; Const. art. 4, § 1, as amended in 1932.

3. Statutes ⇐105(1)

Constitutional provision that every act shall embrace but one subject which subject shall be expressed in its title was not enacted to provide means for the overthrow of legitimate legislation. Const. art. 4, § 24.

4. States ⇐12(3)

While the state has no power to extend the operation of its laws beyond its maritime frontiers, when the impact of activities outside the three-mile limit necessarily adversely affects the public policy of the state within the three-mile limit, the state has the power to take steps against persons responsible for such activities when they come within the limits of its jurisdiction.

5. Fish ⇐9

A legal justification for statute requiring licenses of fishing boats which delivers to any point or place other than within the state any fish caught in or taken aboard boats from the water of the Pacific Ocean within the state or on the high seas rests upon the ground that it operates as a shield against the covert depletion of the local supply and thus tends to effectuate the policy of the law by rendering evasion of it less easy. Initiative Measures, St.1939, p. CXXXIX, § 1110.

6. Fish ⇐9

That fishing vessel owner might be unable to carry on fishing operations beyond the jurisdiction of the state of California without entering and operating his vessel within state waters would not void a California statute requiring owner of fishing vessel operating in territorial waters and delivering catch outside the state to obtain a permit. Initiative Measures, St.1939, p. CXXXIX, § 1110.

7. Commerce ⇐63, 77
Constitutional law ⇐278(6)
Fish ⇐9

The California statute requiring owners of fishing vessels operating in territorial waters and delivering catch outside the state to obtain a permit does not purport to regulate foreign commerce in fish or to control movements of fishing vessels in foreign commerce or affect importation into the state and to extent that it affects the exportation of fish taken from waters of the state, the statute was justified on ground that the state can impose any condition on the taking and use after taking of fish within its waters reasonably necessary for the conservation of its fisheries for the beneficial use of its own citizens. Initiative Measures, St.1939, p. CXXXIX, § 1110; U.S.C.A.Const. Amend. 14.

8. Constitutional law ⇐48
Fish ⇐8

A state has power to enact legislation for conservation of its fisheries and any law having reasonable relation to such object and its accomplishment which is not unduly oppressive upon individuals is a legitimate exercise of state "police power" without inquiry into possible soundness of legislative judgment and without consideration for possible individual hardships.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

9. Constitutional law ⇐278(6)
Fish ⇐9

Under the California statute providing for granting of permits for operation of fishing boats in state waters which deliver their catch beyond the state's jurisdiction, the Fish and Game Commission is not given arbitrary or discriminatory powers in matter of granting or withholding permits and it is assumed that commission will exercise its discretionary power in consonance with legitimate objects towards which legislation was aimed. Initiative Measures, St.1939, p. CXXXIX, § 1110; U.S.C.A.Const. Amend. 14.

10. Licenses ⇐5

The state of California has the right for conservation of its fisheries to require a permit for the operation of fishing vessels within state waters which are taking fish from the waters of the state. Initiative Measures, St.1939, p. CXXXIX, § 1110; U.S.C.A.Const. Amend. 14.

11. Licenses ⇐5

The insurmountable difficulties attendant upon policing waters of California from the coast to the imaginary three-mile limit wherever fishing operations occur, the impossibility of distinguishing fish taken from state waters from those taken from without or between vessels fishing within from those fishing beyond state limits and ease with which fraud might be practiced by vessels delivering fish taken from fish-

eries of the state to points outside the state on pretext of operating solely beyond the three-mile limit justified the state in the interest of conservation of its fisheries under the "police power" to require permits for the operation of fishing vessels taking fish from the waters of the state for delivery outside the state. Initiative Measures, St.1939, p. CXXXIX, § 1110; U.S.C.A.Const. Amend. 14.

12. Constitutional law ⇐303
Fish ⇐9

The statute providing for forfeiture in a proper proceeding of fishing vessels operating without permit in state waters and delivering fish beyond state's jurisdiction is a proper exercise of legislative power and is not invalid as lacking procedural "due process of law." Initiative Measures, St.1939, p. CXXXIX, § 1110; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

13. Appeal and error ⇐102

An order sustaining a demurrer is not appealable.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Santa Cruz Oil Corporation and others against Nate F. Milnor and others as Fish and Game Commissioners, etc., to enjoin defendants from enforcing Initiative Measures, St.1939, p. CXXXIX, § 1110, against plaintiffs. From an order sustaining a general demurrer to the complaint and from a judgment for defendants, the plaintiffs appeal.

Appeal from order sustaining demurrer dismissed, and judgment affirmed.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, for appellants.

Earl Warren, Atty. Gen., Ward Sullivan, Deputy Atty. Gen., and Helen Van Gulpen Harris, Deputy Atty. Gen., for respondents.

WARD, Justice.

Appellants—plaintiffs in the court below—brought suit to enjoin defendants, members of the Fish and Game Commission, from enforcing against them the provisions of section 1110 of the Fish and Game Code of this state (Stats.1939, p. CXXXIX; Initiative Measures approved Nov. 8, 1939), urging among other contentions that said section is violative of the state Constitution in that upon its submission to the voters it lacked the required legislative title. A general demurrer to the complaint was sustained. Plaintiffs electing to stand upon their pleading, declined to amend. Judgment for defendants was thereupon entered, from which the plaintiffs have taken this appeal.

Appellant Mezin is a resident of the state of Oregon; Cardinalli, of California. Both are fisherman-boat-owners operating under contracts to engage in fishing outside the territorial waters of California and deliver their catch, also out of such waters, to the "Lake Miraflores," a floating fish reduction plant operated on the high seas by appellant Santa Cruz Oil Corporation, a California corporation with its principal place of business in this state. The fish so delivered to "Lake Miraflores" are there, more than three miles westerly from an imaginary line on the coast of California, reduced to fishmeal and oil, which is delivered through the port of San Francisco to various parts of the country. All of the vessels so used visit ports of this state in making deliveries, for the purpose of repairs, procuring supplies, etc.

Section 1110 of the Fish and Game Code provides in part: "No person shall use or operate or assist in using or operating in this State or the waters thereof, any boat or vessel used in connection with fishing operations irrespective of its home port or port of registration, which fishing boat or vessel delivers or by which there is delivered to any point or place other than within this State any fish, mollusks or crustaceans which are caught in, or taken aboard said boat or vessel from, the waters of the Pacific Ocean within this State or on the high seas or elsewhere, unless a permit authorizing the same shall have been issued by the Fish and Game Commission." Deering's Gen.Laws, 1941 Supp., p. 843. Following a provision authorizing the commission, under specified circumstances, to grant permits, the section continues: "Any person who uses or operates or assists in using or operating any boat or vessel in violation of the provisions of this section is guilty of a misdemeanor and such boat or vessel and the net, gear or other equipment of said boat or vessel is a public nuisance and shall be forfeited." Deering's Gen.Laws, 1941

Supp., p. 843. The manner of the forfeiture is provided by the code.

Appellants contend that "section 1110 is void for the reason that it was illegally submitted to the voters of California without the required legislative title contrary to the provisions of the California Constitution, article IV, section 24." Section 24 provides that "Every act shall embrace but one subject, which subject shall be expressed in its title * * *." Section 1 of article IV, as adopted in 1911, provides that all initiative petitions described shall have printed in twelve point black-face type the following: "Initiative measure to be presented to the legislature," and that initiative or referendum petitions may be presented in sections, but that each section shall contain a full and correct copy of the title and text of the proposed measure, and that "legislation may be enacted to facilitate its operation."

Pursuant to the power granted, the Legislature in 1913, St.1913, p. 1157, amended Political Code, section 1197 and directed: "The attorney general shall provide and return to the secretary of state a ballot title or designation by which all such questions, propositions, proposed laws and constitutional amendments shall be designated upon the ballot. * * * The ballot title may be distinguished from the legislative or other title of the measure. * * * In making such ballot title, the attorney general shall give a true and impartial statement of the purpose of the measure * * *." In 1915, St.1915, p. 50, section 1197a was added making it mandatory upon proponents of any initiative measure to submit a draft thereof to the Attorney General so that a title might be prepared. In 1927 in Wallace v. Zinman, 200 Cal. 585, at pages 593, 595, 254 P. 946, at page 949, 62 A.L.R. 1341, the court considered the sufficiency of a title to a usury act, and in reference thereto stated: "We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation. * * * If an amendment of the Constitution were intended, the provision requires steps to be taken that will apprise the voters thereof so that they may intelligently judge of the fitness of such measure as a constituent part of the organic law." "It may be said in passing that section 1197a of the Political Code throws no light upon the question before us, as this act could not have been intended to dispense with this requirement as to title. We must therefore hold that the statute in question is subject to section 24 of article 4 of the Constitution, hereinbefore quoted, and that inasmuch as the provision here under consideration is an independent subject not referred to in the title to said act, so much of said act as comprises this provision is void." This case seems to recognize a difference in titles without use of the designation "legislative title" and "ballot title." In 1932 the mandatory provisions of section 1197a were incorporated into section 1 of article IV of the Constitution.

[1-3] The real question is: Are two titles needed, assuming them to be the same or different? Our attention has not been called to any provision requiring more than one title on the ballot. Unless the legislative title has a tendency to deceive or mislead the legislators (Wallace v. Zinman, supra)—a matter that might well be disposed of before the matter appears on the ballot—all presumptions after election are in favor of the sufficiency of the original title. There is no claim made on this appeal that there was deception, but rather, that the title simply contained the enacting clause. In 1938 the Supreme Court rendered opinions in the cases of Epperson v. Jordan, 12 Cal.2d 61, 82 P.2d 445; Vandeleur v. Jordan, 12 Cal.2d 71, 82 P.2d 455, and Brown v. Jordan, 12 Cal.2d 75, 82 P. 2d 450. In the last case, referring to the previous cases, the court said at page 78 of 12 Cal.2d at page 452 of 82 P.2d: "In those cases it was held that in passing upon the legal sufficiency of the circulation title prepared by the attorney-general all presumptions are in favor of the propriety of his actions, and that if reasonable minds may differ as to whether the title contains a proper 'summary of the chief purpose and points' of the proposal, the title so prepared must be held to be legally sufficient. Auxiliary and subsidiary matters need not be included in the title." See Hogan v. Hall, 198 Ark. 681, 130 S.W.2d 716; Nordquist v. Ford, 112 Mont. 278, 114 P.2d 1071. It was not necessary that the "legislative title" should appear on the ballot. Vandeleur v. Jordan, supra. There is no contention in this case that a legislative or ballot title entrapped the voters by being misleading or deceiving in character. Heron v. Riley, 209 Cal. 507, 289 P. 160. Section 24 of article IV of the state Constitution "was not enacted to provide means for the overthrow of legitimate legislation."

Evans v. Superior Court, 215 Cal. 58, 62, 8 P.2d 467, 469.

Appellants next urge that the Legislature has attempted to enact extraterritorial legislation; that the act constitutes an unlawful interference with interstate commerce; that it violates the privileges and immunities, equal protection of the laws and due process clauses of the federal Constitution.

[4, 5] It must be conceded that this statute presents a borderline case. It obviously affects extraterritorial operations over which this state has no jurisdiction. But it operates only on fishing boats that come within the territorial limits of this state. The lawful act of fishing outside the three mile limit obviously affects the natural resources of this state within the three mile limit. California has no power to extend the operation of its laws beyond its maritime frontier, but when the impact of activities outside the three mile limit necessarily adversely affects the public policy of this state, within the three mile limit, the state has the power to take steps against the persons responsible for such activities when they come within the limits of its jurisdiction. This statute does not make punishable acts committed outside the jurisdiction of California. It operates only when boats which fish outside its jurisdiction (but whose acts adversely affect the interests of this state) come within this state's jurisdiction. As was said in Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 426, 56 S.Ct. 513, 515, 80 L.Ed. 772, in upholding a somewhat similar statute: "* * * its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy." See, also, Silz v. Hesterberg, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75.

The constitutional questions presented on this appeal are identical with those raised and discussed in Mirkovich v. Milnor, D.C., 34 F.Supp. 409, 410, wherein the plaintiff, engaged in a business similar to that of plaintiffs herein, sought to enjoin the same defendants, members of the Fish and Game Commission of the State of California, from enforcing against him the provisions of section 1110 of the Fish and Game Code of the State of California. The plaintiff in each action is represented by the same attorneys. The motion for a preliminary injunction in the Mirkovich case was denied by a federal court of three judges created by statute primarily to pass upon constitutional questions, the matter being "Before Healy, Circuit Judge, and St. Sure and Welsh, District Judges." The opinion was delivered by Welsh, District Judge. Such a decision is not controlling in this court, but the reasoning and the conclusion therein are persuasive and, as we find in the present case, sound. We therefore take the liberty of adopting as the opinion of this court the following language from the Mirkovich case:

"One of plaintiff's grounds of attack is that the measure in question constitutes an interference with interstate and foreign commerce in attempting to regulate fishing operations beyond its jurisdiction. Section 1110 of the Fish and Game Code does not purport, by its terms, to forbid or control fishing operations beyond the state's jurisdiction. It relates solely to the operation, within state waters, of fishing vessels engaged in delivering their catch outside the state, regardless of where the fishing occurs. It appears from the provisions of the law in question that the object of its enactment was not to affect fishing operations beyond the state's jurisdiction, but rather to protect and conserve the state's fisheries from possible depletion and waste by virtue of uncontrolled taking of fish from the waters of the state to points beyond its jurisdiction.

[6, 7] "While the permit required is one which, in terms, authorizes the delivery of fish outside state limits, its actual effect is upon the operation, within state waters, of fishing vessels delivering their catch beyond the state's jurisdiction, and not upon the delivery itself. The statute cannot be fairly construed, on its face, to be an illegal attempt by the state to extend its legislation beyond the boundaries of its jurisdiction since it clearly appears therefrom that the acts prohibited without, and allowed with, a permit, are acts which are to be performed within the territorial jurisdiction of the state. So far as Section 1110 of the Fish and Game Code is concerned, plaintiff can fish to any extent he wishes beyond the three mile limit without violating any of its provisions which would subject his boat to seizure and forfeiture. That plaintiff might find himself unable to carry on his fishing operations beyond the state's jurisdiction without entering and operating his boat within state waters does not, for that reason, ren-

der Section 1110 void on its face in making it necessary for him to apply for a permit so to do, if the provisions of that section requiring such permit are sustainable as a proper exercise by the state of its police power in the conservation of its fisheries. Section 1110 does not, by any reasonable implication, purport to regulate foreign commerce in fish, or to control the movement of fishing vessels in such foreign commerce. It does not affect the importation of fish into the state. And to the extent that it affects any exportation of fish taken from the waters of the state, its action is fully justified on the principle that a state is the owner of its fisheries for the benefit of its citizens and can impose any condition on the taking and use, after taking, of fish within its waters, reasonably necessary for the conservation of its fisheries for the beneficial use of its own citizens. Geer v. State of Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793.

"If that portion of Section 1110 of the Fish and Game Code attacked by plaintiff is sustainable as a proper exercise by the state of its police power, the contention that its enforcement would indirectly affect interstate commerce and that it constitutes a violation of the guarantees of the 14th Amendment to the United States Constitution cannot be maintained. This principle is too well settled to require a reference to supporting authorities.

[8] "That a state has the power to enact legislation for the conservation of its fisheries is, of course, not open to question. Any law having a reasonable relation to such object and its accomplishment, and which is not unduly oppressive upon individuals must be upheld as a legitimate exercise of the state's police power without inquiry into the possible soundness of legislative judgment in the premises, and without consideration for possible individual hardships. Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772.

[9] "Section 1110 of the Fish and Game Code contemplates the granting of permits for the operation of fishing boats in state waters which deliver their catch beyond the state's jurisdiction, whenever the issuance of such permit 'will not tend to prevent, impede or obstruct the operation, enforcement or administration' of the Fish and Game Code and will not tend to result in the illegal taking of fish from the waters of the state, or in the depletion or waste of any species of fish. The object of the requirement for a permit to operate a fishing vessel in state waters is, by necessary implication from the specified conditions precedent to its granting, the conservation of the state's fisheries and their protection from possible depletion and waste. Plaintiff does not claim that the real purpose of such requirement is otherwise. While it may be said that the fish and game commission is granted considerable latitude in the matter of granting or withholding permits, it cannot be inferred therefrom that the commission is thereby given arbitrary or discriminatory powers; nor does it afford any basis for plaintiff's contention that the statute is an attempt to regulate fishing wherever it occurs. It is assumed by the terms of Section 1110 that the commission will exercise its discretionary power in consonance with the legitimate objects towards which the legislation is apparently aimed. This is a matter relating to the constitutional administration of the law, and not to its validity as it stands, and is not the subject of inquiry in this case.

[10] "Plaintiff cannot deny to the State of California its right, for the conservation of its fisheries, to require a permit for the operation of fishing vessels within state waters which are taking fish from the waters of the state. His complaint is that there is no power in the state to legislate, in the manner of Section 1110 of the Fish and Game Code, over fishing vessels within its waters which are not taking fish within the state's territorial boundaries. If this latter power were denied to the state, it would clearly result in the practical deprivation to the state of its undoubted right to regulate the taking of fish from within its territorial waters. Unless all fishing boats within state waters which deliver their catch beyond the state's jurisdiction are brought within the operation of Section 1110 of the Fish and Game Code, it is apparent from the nature of things that there can be no effective control over those boats whose operations within state waters tend to impede the administration and enforcement of the state's fish and game laws and tend to the depletion and waste of its fish supply. Vessels plying beyond the imaginary three mile boundary line which marks the termination of the state's jurisdiction, as plaintiff alleges he is about to do, can easily cross the line to within the state's territorial waters, engage in their fishing

operations and remove their take beyond the three mile limit without any real danger of apprehension in the act. * * *

[11] "The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing within from those fishing beyond the state's limits; the consequent ease with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of Section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of California, having reasonable relation to the object of their enactment, and reasonably calculated to render effective the state's power of control over the fish supply within its territorial waters.

"In Bayside Fish Flour Co. v. Gentry, supra, the United States Supreme Court upheld the constitutionality of certain portions of the California Fish and Game Code regulating the processing within the state, for interstate commerce, of sardines taken either from the waters of the state or from beyond the state's territorial boundaries. State legislation prohibiting the possession of wild game out of season within its borders was held a valid exercise by the state of its police power for the protection of the state's own game supply, in its application to game imported from without the state. [People of State of] New York ex rel. Silz v. Hesterberg, 211 U.S. 31, 29 S. Ct. 10, 53 L.Ed. 75. In Miller v. McLaughlin, 281 U.S. 261, 50 S.Ct. 296, 297, 74 L. Ed. 840, the United States Supreme Court held valid an act of the state legislature of Nebraska which not only prohibited the taking of fish from the waters of the state with nets, traps or seines, but made the bare possession of such equipment unlawful. The court said: 'A State may regulate or prohibit fishing within its waters, Manchester v. Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159; Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385; Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793, and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor, Barbour v. Georgia, 249 U.S. 454, 39 S.Ct. 316, 63 L.Ed. 704; Samuels v. McCurdy, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568, 37 L.R.A. 1378, compare Lawton v. Steele, supra; (People [of State of New York] ex rel.) Silz v. Hesterberg, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75; Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568.'

"We have referred to but a few of the decisions upholding the constitutionality of state legislation calculated to effectuate the exercise by the state of its police power for the general welfare of its inhabitants. In each instance, the legislation was adjudged valid by application of the principle which governs the instant case, namely; that the state's power of control over its fish and wild game includes the right to adopt any measure, not unduly oppressive to private individuals, reasonably necessary to render that control effective.

"There is nothing unduly oppressive to private individuals in the requirement of the section under consideration that fishing vessels obtain a permit to operate in state waters when they deliver fish beyond the state's jurisdiction. Nor is there anything unduly oppressive in the section by reason of the fact that under its provisions the granting of a permit will be made only where it will not impede the enforcement and operation of the Fish and Game Code or tend to the depletion or waste of the state's fisheries. For if the issuance of a permit in any particular case would have such effect, its refusal in such instance would be justified in the interests of the general public, to which considerations of individual hardship must always be subservient.

[12] "Nor is there any lack of procedural due process in the section as contended by plaintiff in his brief on file. A violation of the section calls for the seizure and forfeiture of the vessel, but the forfeiture is not by summary confiscation. It is provided that a proceeding in condemnation be had in the superior court of the county in which the seizure is made, and that there be a hearing on notice before any order of forfeiture is entered. The infliction of the penalty of seizure and forfeiture of the vessel for a violation of the provisions requiring a permit for the operation of such

vessel is within the power of the state legislature. In Smith v. Maryland, 59 U.S. 71, 75, 18 How. 71, 15 L.Ed. 269, an act of the legislature of the State of Maryland was held valid which prohibited the taking of oysters with a scoop or drag and providing for a forfeiture of any vessel employed for that purpose. The court in this case said: 'It is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board, —treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments.' "

While the authorities cited by appellants herein are not identical with those cited in the Mirkovich case, an examination of the former has not changed our view as to the correctness of the decision of the federal court.

The following citations submitted by respondents or the result of this court's own research, tend to uphold the views expressed in the Mirkovich case: Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400, 92 A.L.R. 1264; Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190; In re Makings, 200 Cal. 474, 253 P. 918; Moore v. Purse Seine Net, 18 Cal.2d 835, 118 P.2d 1; Pacific Coast Dairy v. Dept. of Agriculture, 19 Cal.2d 818, 123 P.2d 442; State of New Jersey v. New York City, 283 U.S. 473, 51 S.Ct. 519, 75 L.Ed. 1176; Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; 92 A.L.R. 1267; Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074; Alaska Packers Ass'n v. Industrial Acc. Comm., 294 U.S. 532, 55 S.Ct. 518, 79 L. Ed. 1044.

[13] The order sustaining the demurrer being non-appealable, the purported appeal therefrom is dismissed; the judgment is affirmed.

PETERS, P. J., and WAGLER, J. pro tem., concurred.

21 Cal.2d 100

UTZ v. STATE BAR.

S. F. 16715.

Supreme Court of California.

Oct. 30, 1942.

1. Attorney and client ⇐53(2)

Charges of unprofessional conduct by attorney may be established by circumstantial evidence.

2. Attorney and client ⇐48

In disciplinary proceedings the improbabilities in the statements of attorney concerning facts surrounding execution of forgery of signatures to bonds were properly considered by committee.

3. Attorney and client ⇐53(2)

In disciplinary proceeding, opportunities of trier of fact to observe attitude and demeanor of attorney in giving testimony were factors of importance in determining her credibility.

4. Attorney and client ⇐53(2)

In disciplinary proceeding, committee's finding that attorney had forged signatures of the sureties on two bonds filed in estates being probated by her was supported by substantial evidence.

5. Attorney and client ⇐42

The procurement by an attorney of an order of the probate court upon a document which had been altered after signature by the legatee was a deliberate misrepresentation to the court, and the fact that the client was not defrauded did not excuse the attorney's act.

6. Attorney and client ⇐48

In disciplinary proceedings the committee had a right to disbelieve the testimony of the attorney concerning alteration of a receipt for a distributive share from an estate after signature by the distributee.

7. Attorney and client ⇐53(2)

In disciplinary proceeding, finding that attorney had altered and then filed with probate court a receipt for a distributive share from an estate after signature by the distributee was sustained by the evidence.

8. Attorney and client ⇐53(1)

In disciplinary proceedings, where it appeared that attorney had solicited employment from a company and attorney referred to the company as an investigator, the court, on petition to review recommendation of suspension from practice would not presume that the company was an attorney at law merely because there was no proof to the contrary.

9. Attorney and client ⇐53(2)

Evidence that attorney had written to a person informing him of the death of another who left an estate and asked whether addressee was related to the deceased and subsequently wrote asking for an appointment sustained finding that attorney had improperly solicited professional employment.

10. Attorney and client ⇐38

Attorney's letter, prior to any retainer by claimant to estate and when attorney could be paid only from proceeds to be realized from administration of estate, to influence claimant to retain others who were engaged in business of locating heirs to dormant and unclaimed bank deposits who in turn would retain attorney to probate decedent's estate, constituted a prohibited "solicitation" of legal business.

See Words and Phrases, Permanent Edition, for all other definitions of "Solicitation".

11. Attorney and client ⇐38

The employment by an attorney of a layman, who was actively engaged in procuring business which often necessarily involved the use of legal services where both the attorney's and client's remuneration was often made contingent upon performance by attorney of such services, constituted "unprofessional conduct".

See Words and Phrases, Permanent Edition, for all other definitions of "Unprofessional Conduct".

12. Attorney and client ⇐38

Arrangements whereby attorneys having accepted professional employment known by them to have been solicited by lay persons engaged in the business of negotiating agreements between themselves and others having possible legal claims whereby the soliciting persons were able to control negotiations or litigations, and where the attorney and the solicitor were to share on a contingent basis in the proceeds of the employment, violate the rules of professional conduct.

13. Attorney and client ⇐58

Evidence showing that attorney had forged signatures of sureties on two bonds filed in estates being probated by her, had

altered and then filed with probate court a receipt of a distributive share from an estate after signature by distributee, and had improperly solicited professional employment and split professional fees with unlicensed persons, required that attorney be suspended from the practice of law for two years.

In Bank.

Proceeding by Hazel Utz to review the recommendation of the State Bar of California that petitioner be suspended from the practice of law for a period of two years.

Petitioner suspended from the practice of law for a period of two years commencing 30 days after the date of decision.

Leo R. Friedman of San Francisco, for petitioner.

Bert W. Levit and Robert L. Dreyfus, both of San Francisco, for respondent.

PER CURIAM.

By writ of certiorari, the petitioner has challenged the recommendation of The State Bar that she be suspended from the practice of law for a period of two years. Although a local administrative committee found that she should be disbarred because (1) she forged the signatures of the sureties on two bonds filed in estates being probated by her; (2) she altered and then filed with the probate court a receipt of a distributive share from an estate after signature by the distributee; and (3) she improperly solicited professional employment and split professional fees with unlicensed individuals, the Board of Governors, upon adopting all of the committee's findings, recommended the lesser discipline.

As her chief complaint, the petitioner urges that her guilt was not established by sufficient proof under the rules of evidence governing proceedings in which an attorney at law is charged with misconduct. More specifically, she claims that most of the charges are based upon the complaint and testimony of one Hollister Staniels who, she maintains, was so actuated by bias and prejudice as to render his testimony unworthy of credence. The local administrative committee did not believe this witness, she asserts, finding against her because "documentary evidence, as well as testimony elicited from the respondent herself, amply fills in any gap in the proof required to sustain the charges, even though we reject from our consideration such testimony given by Staniels, not otherwise corroborated." But without credible testimony by the principal witness against her, she argues, the findings should be in her favor.

The evidence concerning each charge may be briefly summarized as follows:

1. The Forgery of the Bonds.

Hollister Staniels testified that, on one occasion, he found the petitioner signing the names of R. L. Gray and G. S. Conger as sureties to a bond with two different pens and two different bottles of ink, one black and one blue. She told him, said Staniels, that she was accustomed to do so, and "it was all right." A handwriting expert testified that the names of these persons, which appeared on two bonds filed in estates in which the petitioner was the attorney, had, in his opinion, been written by the same person. His opinion was based, at least in part, upon a comparison of the signatures of R. L. Gray and G. S. Conger on three attachment bonds filed in actions in which Walter E. Dorn represented the plaintiffs. Miss Utz had been employed in Mr. Dorn's office about the time these bonds were filed. Neither of these signatures, said the expert, were by the individual who signed both names to the probate bonds. The witness, however, was unable to say that the petitioner did or did not sign the names of the sureties on the probate bonds, although he had compared the signatures with numerous specimens of her handwriting. Although he found points of similarity between Miss Utz's writing and the signatures on the bonds, he was not satisfied that they were characteristics and not coincidences. But he found no "dissimilarity which would break the similarity" between Miss Utz's handwriting and the signatures on the probate bonds.

The petitioner testified that she knew Gray and Conger well and that they signed the bonds in her office when she was present although not before the attesting notaries. Gray is now deceased and Conger is in Washington. Gray had lived in San Francisco with his married daughter, but the petitioner did not know her name or where she lived. She met him when he came to her to have a building contract drawn. Thereafter he frequently came to her office. According to the petitioner, Conger had been living in an Oakland rooming house and worked in a grocery

store as a clerk. Someone told her that at the time of the hearing he was in Washington, but she could not remember who gave her this information.

She met Conger when he had some work done by her stenographer. Both Gray and Conger owned personal property, she said, although she did not know whether or not either had a bank account. They were elderly men of about the same age. She had no copy of the building contract she drew for Gray, nor did she have any account in her books in his name. He paid her $5 for the building contract. Thereafter he "kept coming in and asking how things were."

Concerning the signing of the bonds, the petitioner explained, Gray would come in now and then when he happened to be around. He and Conger did not come to the office at the same time. She just happened to have the bond ready for signature when each of them came in. Neither of the estates in which the questioned bonds were used exceeded $100 in value.

[1,2] The petitioner contends that Staniels' testimony should be rejected in its entirety. And since the evidence presented by the handwriting expert does not tend to prove that she signed the names of Gray and Conger to the bonds, disbelief of her testimony, she argues, will not supply this necessary proof. But charges of professional misconduct may be established upon circumstantial evidence. McCue v. State Bar, 4 Cal.2d 79, 47 P.2d 268. The petitioner testified that Gray and Conger signed the bonds in her office and in her presence. The handwriting expert stated positively that the signatures on the probate bonds were made by one person. This evidence presents an irreconcilable conflict. And improbabilities in the statements of the petitioner as to the facts surrounding the execution of these bonds were also properly considered by the committee. She did not know where either Gray or Conger lived when, as she asserts, they were visitors to her office, or what became of them. Another circumstance, which undoubtedly did not escape the committee's attention, is the fact that, although the men came to the petitioner's office only occasionally and separately, and she did not know how to reach them, their names always appeared upon the same bonds. There are also other inconsistencies in her testimony regarding their visits.

[3,4] Upon this record and bearing in mind that the trier of fact had an opportunity to observe the attitude and demeanor of the petitioner in giving her testimony, factors of importance in determining her credibility (Hizar v. State Bar, 20 Cal.2d 223, 227, 124 P.2d 812), the committee's findings are amply supported by substantial evidence.

2. Alteration of Receipt of Distributive Share.

Mary Hamilton, a resident of Australia, as an heir of Daniel Sheehan, deceased, was entitled to $572.21 on deposit in this country. By agreement, Miss Utz was to retain everything over $300 for all costs and services rendered by her in probating the estate of Daniel Sheehan and securing distribution of the legacy to Mrs. Hamilton. In her account as administratrix, Miss Utz was allowed a fee of $50.15, leaving, after the deduction of costs and expenses, a net amount of $477.16 to be distributed. She remitted $300 to Mrs. Hamilton, who returned the receipt acknowledging the payment of that amount. The figures "$300" were altered to "$477.16," and, as so altered, the receipt was filed with the probate court and the petitioner discharged. Miss Utz testified that her secretary admitted to her that she had made this change in the receipt. However, not only was this hearsay statement not corroborated by the secretary but, upon the objection of the petitioner, the secretary was not allowed to testify.

[5-7] The petitioner argues that as Mrs. Hamilton was not defrauded by the alteration of the receipt, she cannot be guilty of misconduct. But if the petitioner had filed Mrs. Hamilton's receipt for $300, she could not have obtained her discharge as administratrix. Conceding that Mrs. Hamilton would have signed a receipt for $477.16, Miss Utz procured an order of the probate court upon a document which had been altered after signature by the legatee. This was a deliberate misrepresentation to the court, and the fact that the client was not defrauded does not excuse the attorney's dishonesty. In the words of this court upon another occasion, "* * * the plan conceived by petitioner was unworthy of an ethical practitioner. Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." Paine v. State Bar, 14 Cal.2d 150, 154, 93 P.2d 103, 105. The committee had a right

to disbelieve the testimony of the petitioner as to the alteration, and the evidence before it concerning the transaction fully justifies the finding that Miss Utz altered the receipt and filed it with the court.

3. Solicitation of Business and Division of Fees.

The petitioner is charged with soliciting legal business from Mary Hamilton, Patrick J. McCaffrey, and L. O. Thieme & Company. So far as L. O. Thieme & Company is concerned, Miss Utz admits that the evidence discloses a solicitation by her of professional employment, but claims that the record is void of any evidence showing that Thieme was not an attorney at law. Since, she urges, all presumptions are in favor of innocence and all intendments in favor of the accused, this court should presume that L. O. Thieme & Company is an attorney at law because, under such circumstances, her acts would not constitute an offense.

[8] This court will indulge in no such unwarranted presumption. Moreover, Miss Utz has never asserted that Thieme is an attorney at law. On the contrary, at the hearing she referred to L. O. Thieme & Company as an "investigator."

[9] Concerning the charge as to Patrick J. McCaffrey, the petitioner maintains that in letters which she sent him she only stated that one Maurice Shannon died leaving an estate, and asked if he was related to the deceased. Subsequently she wrote asking for an appointment. This, says the petitioner, demonstrates that no solicitation was made "of any kind or character." But for what purpose other than her retention as his attorney could she have wanted an appointment with McCaffrey?

The charge of solicitation from Mary Hamilton should be considered in connection with the relations of the petitioner with Hollister Staniels and Associates. Hollister Staniels was engaged in the business of locating the heirs entitled to dormant and unclaimed bank deposits. He testified that he and the petitioner entered into a partnership arrangement by which they were to divide equally all profits realized from the enterprise. Staniels was to make all the investigations and secure from those entitled to the deposits contracts fixing his compensation at 50 per cent of the amount obtained. Miss Utz was to do all the legal work, principally the probating of the depositors' estates, if this was necessary.

The petitioner's version of her relation with Hollister Staniels and Associates is quite different. Staniels, she says, had been working as a clerk in her office, serving legal process and doing other "little things" around the office. But because he wanted an office address for his business of Hollister Staniels and Associates, he offered to give her for rent his services as clerk and one-half of anything he might "make on the business for expenses and any legal advice [she] might give and for the telephone and any stationery * * * and any use of the stenographer," regardless of whether she did any work on the particular case or not.

To support her testimony, Miss Utz introduced a letter of Staniels to The State Bar of California in which he stated that at no time did he and Miss Utz have "any agreement either written or verbal whereby she could claim any interest in the concern of Hollister Staniels & Associates * * * there is no partnership agreement. * * *" But Staniels produced a canceled check payable to Miss Utz for $300, $250 of which he asserts was for his share of the office expenses. And one Glenn A. Reels testified that, during the period the firm of Hollister Staniels and Associates was located in Miss Utz's office, he entered into an arrangement with Staniels and the petitioner whereby, on all fees from claimants secured by him, he was to receive one-third, and they were each to receive one-third.

Yet accepting the petitioner's explanation of her arrangement with Staniels, the record shows that she actively participated in soliciting business from Mrs. Hamilton. Hollister Staniels and Associates wrote Mrs. Hamilton a letter stating that they were engaged in the business of locating heirs to "unclaimed assets and estates" and had discovered that she was the sole heir of one Daniel Sheehan who had left a small estate in the United States. "Of course," the letter continued, "we would have to be compensated for our work in this matter and for our investigation in locating you. * * * Our charges on such small matters usually amount to 50% on the amount recovered, we to advance all costs, attorney's fees, etc. * * * I am having our attorney write you a letter which is enclosed herewith, which will further explain this matter. I am enclosing you one

of our contract forms, and if this is agreeable to you, kindly return the same to us."

The enclosed letter of Miss Utz read in part as follows: "My client Hollister Staniels and Associates has asked me to write to you in the matter of the estate of the above named party. Mr. Staniels has done considerable investigation in this matter and has presented the result of his work to me for my opinion. * * * It is my opinion that Mr. Staniels' firm can obtain sufficient proof that you are entitled to the £100 estate left in this country by a Daniel Sheehan. * * * In view of the fact that I am so far away from you I am enclosing you herewith a letter of reference from my Bankers who are known to be one of the largest institutions in this country. If you should desire to have your local attorney correspond with me, that will be perfectly agreeable. * * * I deem it advisable for you to authorize Mr. Staniels to proceed with this matter, and * * * if you do so I will exercise the utmost diligence in obtaining this fund for you promptly. * * * "

[10] The petitioner's letter was written prior to any retainer by the claimant, and she could only be paid for her "opinion" from proceeds to be realized from the administration of the estate of Daniel Sheehan. The obvious purpose of that letter was to influence Mrs. Hamilton to retain Hollister Staniels and Associates, who, in turn, would retain her to probate the decedent's estate. Clearly this was a solicitation of legal business.

The record further shows that she had employed one William Lancaster as a "law clerk." He was also an investigator operating under the name "Hamilton Company." It appears that Miss Utz sent a letter, as attorney for Hamilton Company, to Patrick McCaffrey, before the retainer by McCaffrey of Hamilton Company, in which she stated that it would "be to your advantage to see me" relative to a possible claim of McCaffrey to an unclaimed deposit.

[11, 12] The employment by an attorney at law of a layman, who was at the same time a client actively engaged in procuring business which often necessarily involved the use of legal services, and where both the attorney's and the client's remuneration was often made contingent upon her performance of such services, discloses an arrangement analogous to many schemes expressly condemned by this court as unprofessional conduct. Arrangements whereby attorneys have accepted professional employment known by them to have been solicited by lay persons engaged in the business of negotiating agreements between themselves and others having possible legal claims, whereby the soliciting persons were able to control negotiations or litigation, and where the attorney and the solicitor were to share on a contingent basis in the proceeds of the employment, have on numerous occasions been declared violations of the Rules of Professional Conduct. Dahl v. State Bar, 213 Cal. 160, 1 P.2d 977; Irving v. State Bar, 213 Cal. 81, 1 P.2d 2; Howe v. State Bar, 212 Cal. 222, 298 P. 25; Smallberg v. State Bar, 212 Cal. 113, 297 P. 916; Shaw v. State Bar, 212 Cal. 52, 297 P. 532; Smith v. State Bar, 211 Cal. 249, 294 P. 1057, 73 A.L.R. 393.

To support her contention that she was not guilty of "fee-splitting," the petitioner directs the attention of the court to the fact that, in cases where she performed legal services for Staniels, her 50 per cent of the proceeds reserved by Staniels under his contracts with the claimants amounted to a sum greatly in excess of any fees that could be allowed her by law as an attorney in the estates. Therefore, she concludes, when Staniels received his half of the contract fee, he did not share any portion of the amount awarded her as attorney's fees.

Assuming this argument to be sound so far as Staniels is concerned, the petitioner admitted at the hearing before the local committee that she agreed to divide with L. O. Thieme & Company any fee which she might earn as the representative of any heirs of one Jonas Sauble, deceased, which L. O. Thieme & Company could locate. And her letter to L. O. Thieme & Company contained the statement: "However, it did occur to me that this party [an heir of Jonas Sauble] might like local representation and if we obtained even a small percentage, even five per cent I could split fifty-fifty with you and still make a fee."

[13] All of the charges against the petitioner are supported by substantial evidence. She is therefore suspended from the practice of law for a period of two years commencing thirty days after the date of this decision.

21 Cal.2d 215

GAMBLE v. BOARD OF OSTEOPATHIC EXAMINERS OF CALIFORNIA et al.

L. A. 18450.

Supreme Court of California.

Nov. 2, 1942.

As Modified on Denial of Rehearing Nov. 30, 1942.

1. Statutes ⇐133

The Osteopathic Act making State Medical Practice Act and acts amendatory thereof applicable to Board of Osteopathic Examiners did not, though adopted by initiative without special provision for amendment, prohibit enactment of statute requiring each person licensed by Osteopathic Board to submit satisfactory evidence that he completed during preceding year a minimum of 30 hours' of professional educational work, though holders of physicians' and surgeons' certificates were not required to do annual educational work for renewal of licenses. Osteopathic Act, § 2, St. 1923, p. xciii; St.1937, pp. 1258, 1284, §§ 2137, 2496; St.1941, p. 2541, § 2493; Const. art. 4.

2. Physicians and surgeons ⇐1

The power to regulate treatment of disease is an elastic one, and regulations may vary according to the school or methods of practice, so long as the regulations entail no unreasonable discrimination. Const. art. 1, § 21.

3. Constitutional law ⇐205(5)
Physicians and surgeons ⇐2

The statute requiring each person licensed by the Osteopathic Board to submit satisfactory evidence that he has completed during the preceding year a minimum of 30 hours of professional educational work approved by the board is not unconstitutional as granting special "privileges or immunities" though holders of physicians' and surgeons' certificates issued by Board of Medical Examiners were not required to do annual educational work for renewal of their licenses. St.1941, p. 2541, § 2493; Const. art. 1, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileges or Immunities".

In Bank.

Mandamus proceeding by William O. Gamble against the Board of Osteopathic Examiners of the State of California and others, to compel the Board to issue a receipt to petitioner for payment of the annual tax and registration fee required by the Business and Professions Code.

Petition for writ of mandamus denied.

Roscoe R. Hess, of Los Angeles, for petitioner.

John L. Brannely, of Sacramento, for respondents.

TRAYNOR, Justice.

Petitioner has brought this proceeding in mandamus to compel the respondent board to issue a receipt for the payment for the calendar year 1943, of the annual tax and registration fee required by section 2496 of the Business and Professions Code, St.1937, p. 1284.

Section 2493 of the Business and Professions Code, as amended in 1941, Stats.1941, chap. 945, p. 2541, requires each person licensed by the osteopathic board to pay an annual tax and registration fee and to submit therewith satisfactory evidence that he has completed during the preceding year a minimum of 30 hours of professional educational work approved by the board. Petitioner is a graduate of an osteopathic school and holds a physician and surgeon certificate issued in 1934, which authorizes "the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions." (§ 2137, Business and Professions Code). He tendered the annual fee for the calendar year 1943 as required by section 2496 of the Business and Professions Code but declined to submit evidence of the performance of 30 hours of professional educational work. He contends that since holders of physician and surgeon certificates issued by the Board of Medical Examiners are not required to do annual educational work for the renewal of their licenses, the requirement of such work of holders of physician and surgeon certificates issued by the Board of Osteopathic Examiners violates, in addition to article I, section 21 of the California Constitution, the Osteopathic Act, which cannot be amended by the Legislature because it was adopted by initiative without special provision for its amendment. (Cal.Const. art. IV.)

[1] Between 1913 and 1922 all physicians and surgeons were licensed by the Board of Medical Examiners. Graduates of all schools recognized by the medical

board, whether osteopathic, homeopathic, eclectic or allopathic, were entitled to take the physician and surgeon's examination if they met the prescribed conditions. The Osteopathic Act created a Board of Osteopathic Examiners and gave it jurisdiction, formerly residing in the Board of Medical Examiners, over graduates of osteopathic schools. The act was intended to effect administrative changes only, and made no substantive changes in the standards of education and examination for the physician and surgeon certificate. When the Osteopathic Act was adopted the rights and duties attached to the physician and surgeon certificate did not vary according to the kind of school from which the holder graduated. Petitioner argues that since the Osteopathic Act made the Medical Practice Act applicable to graduates of osteopathic schools such rights and duties remain invariable. The Legislature, however, is not committed to a uniform policy in this regard. There is no provision in the Osteopathic Act limiting its power to change the standards for receiving or holding a physician and surgeon certificate. The argument submitted to the voters in support of the act set forth that it left the Legislature free to change the standards of education and examination. The act itself demonstrates the care with which its framers guarded that freedom and made the act exclusively administrative in character: "All persons who are graduates of osteopathic schools and who desire to apply for any form of certificate mentioned or provided for in the state medical practice act, approved June 2, 1913, and all acts amendatory thereof, shall make application therefor, to said board of osteopathic examiners and not to the board of medical examiners of the State of California. The board of osteopathic examiners in respect to graduates of osteopathic schools, applying for any form of certificate mentioned or provided for in the state medical practice act, approved June 2, 1913, *and all acts amendatory thereof,* is hereby authorized and directed to carry out the terms and provisions of the state medical practice act, approved June 2, 1913, *and all acts amendatory thereof, and all laws hereafter enacted prescribing and regulating* the approval of schools, *the qualifications of applicants for examination for any form of certificate,* the applications for any form of certificate, the admission of applicants to examinations for any form of certificate, the conduct of examinations, *the issuance of any form of certificate,* the collection of fees from applicants, the collection of an annual tax and registration fee, the compilation and issuance of a directory, *the revocation of any form of license or certificate,* the prosecution of persons who attempt to practice without a certificate, *and all other matters relating to the graduates of osteopathic schools, holding or applying for any form of certificate or license.* Every applicant to said board of osteopathic examiners for any form of certificate shall pay to the secretary-treasurer of the board the fees prescribed for such application by said state medical practice act, approved June 2, 1913, *or any acts amendatory thereof or laws hereafter enacted.* Said board of osteopathic examiners shall, in respect to all the matters aforesaid, relating to graduates of osteopathic schools, applying for or holding any form of certificate or license, take over, exercise and perform all the functions and duties imposed upon and heretofore exercised or performed by the board of medical examiners of the state of California under the provisions of the state medical practice act, approved June 2, 1913, *and acts amendatory thereof.* The provisions of said state medical practice act, approved June 2, 1913, *and acts amendatory thereof* are hereby declared to be applicable to said board of osteopathic examiners in respect to all of the aforesaid matters and *all other matters now or hereafter prescribed by law* relating to the graduates of osteopathic colleges holding or applying for any form of certificate or license. In no other respects than as herein provided shall the jurisdiction, duties or functions of said board of medical examiners of the state of California be in any wise limited or changed; nor shall the board of osteopathic examiners have any power or jurisdiction over the graduates of any other than osteopathic schools. From and after the time of the organization of the board of osteopathic examiners said board of medical examiners of the state of California, shall have no further jurisdiction, duties or functions with respect to graduates of osteopathic schools holding or applying for any form of certificate or license and the said jurisdiction, duties and functions shall be assumed and performed by said board of osteopathic examiners." [Italics ours.] (Stats.1923, p. xciii; Deering's Gen.Laws, 1923, Act 5727; Osteopathic Act, § 2.)

Every reference in the foregoing act to the Medical Practice Act is followed immediately by a phrase including all acts amendatory thereof. The act, moreover, specifically contemplates "laws hereafter enacted" affecting persons applying for or holding the physician and surgeon or other certificate, including laws "regulating * * * the issuance of any form of certificate * * * the revocation of any form of license or certificate * * * and all other matters relating to the graduates of osteopathic schools, holding or applying for any form of certificate or license." The only limitation in the act upon legislation on these matters is that the administration thereof in relation to graduates of osteopathic schools be by the Board of Osteopathic Examiners. So long as the respective jurisdictions of the Board of Medical Examiners and Board of Osteopathic Examiners are not disturbed, the Legislature remains as free to impose varying requirements on osteopaths and other practitioners after the adoption of the Osteopathic Act as before.

[2, 3] The contention that the 1941 amendment to section 2493 of the Business and Professions Code violates article I, section 21 of the California Constitution is based on the theory that since osteopaths must meet the same educational requirements as other practitioners and receive the same certificate they cannot be made subject to additional requirements not imposed upon the others. It is generally recognized, however, that the power to regulate the treatment of disease is an elastic one and that regulations may vary according to the schools or methods of practice so long as they entail no unreasonable discrimination. In re Rust, 181 Cal. 73, 183 P. 548; People v. Jordan, 172 Cal. 391, 156 P. 451; People v. Ratledge, 172 Cal. 401, 156 P. 455; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; People v. Mills, 74 Cal.App. 353, 240 P. 296; People v. Chong, 28 Cal.App. 121, 151 P. 553; Bohannon v. Board of Medical Examiners, 24 Cal.App. 215, 140 P. 1089; Crane v. Johnson, 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348, Ann.Cas.1917B, 796; see cases cited in People v. Love, 298 Ill. 304, 131 N.E. 809, 16 A.L.R. 709. In the light of the foregoing cases the requirement in question in the present case cannot be regarded as unreasonable. In re Rust, supra, held that the Optometry Act of 1913, Stats.1913, p. 1097, forbidding osteopaths but not physicians and surgeons, from practicing optometry without a license from the state board of optometry, did not violate article I, section 21 of the state Constitution. The opinion set forth a history of the distinctions that the Legislature has made at various times between practitioners of osteopathy and other practitioners. Thus for many years different licenses were issued to osteopaths than to physicians and surgeons with different rights and duties attached to the respective licenses. Although the certificates as well as the educational requirements for graduates of osteopathic schools and graduates of medical schools may now be the same, the Legislature is as free to return to different certificates and educational requirements as it was to abandon them.

The petition for writ of mandate is denied.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concurred.



21 Cal.2d 126

In re HALCOMB.

Cr. 4423.

Supreme Court of California.

Oct. 30, 1942.

Rehearing Denied Nov. 27, 1942.

1. Escape ⇐1

That section of the Penal Code penalizing as a felony the escape from a prison or industrial farm or road camp applies to both misdemeanor and felony prisoners. Pen. Code, § 4532.

2. Statutes ⇐225¾

When the Legislature enacted statutes making an escape of a prisoner a felony in practically the same language as an earlier statute, the Legislature was presumed to have known of Supreme Court's decisions construing the earlier statutes as applicable to misdemeanor prisoners as well as felony prisoners. Pen.Code, §§ 107, 4532.

3. Courts ⇐91(1)

Decision of District Court of Appeal in direct conflict with Supreme Court's decision was disapproved.

4. Statutes ⇐211

Heading to section of the Penal Code was not binding on the courts, and even if the heading was contained in the official enactment, it would not govern, limit or modify, or in any manner affect the scope, meaning or intent of the section. Pen.Code, § 10004.

5. Escape ⇐1

One who had been convicted of a misdemeanor, and who escaped from county prison road gang, was guilty of a "felony" under statute providing that every prisoner charged with or convicted of a felony who is engaged in any county road or other county work, and who shall escape or attempt to escape, is guilty of a felony. Pen. Code, § 4532.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Habeas corpus proceeding by Grady Halcomb to secure his release from imprisonment in the state prison at San Quentin.

Petition denied, and petitioner remanded.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Seibert L. Sefton, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Petitioner, now in custody of the warden of the California State Prison at San Quentin, seeks by habeas corpus proceeding his release from said imprisonment. His petition shows that he was convicted of a misdemeanor and sentenced to one year's imprisonment in the county jail at San Bernardino. At his own request he was assigned to work upon the county prison road gang of said county for the term of his imprisonment, and while a prisoner in said road gang, and on the 22d day of January, 1942, he escaped therefrom. Upon his apprehension by the officials of said county he was charged with the "crime of escape—a felony." He pleaded guilty to said charge and was sentenced to imprisonment in the California State Prison at San Quentin for the term prescribed by law.

The information charging petitioner with the crime of escape does not specify any particular section of the code, the violation of which would constitute the crime of escape. It simply alleged that he escaped from the custody of the sheriff of said county contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of California.

Prior to 1941, section 107 of the Penal Code was the only section of that code that made it a crime for a prisoner to escape from legal custody, but in that year the Legislature split section 107 into two parts and gave one of said parts the old number 107, and the other part the new number of 4532. These two sections were in effect at the date of the alleged crime of escape to which the petitioner pleaded guilty. The present section 107 of the Penal Code relates only to escapes or attempted escapes "from such public training school or reformatory or county hospital." It is perfectly clear that petitioner was not guilty of the violation of this section of the code.

Section 4532 of the Penal Code as enacted in 1941, reads as follows: "Every prisoner charged with or convicted of a felony who is confined in any jail or prison or industrial farm or industrial road camp or who is engaged on any county road or other county work or who is in the lawful custody of any officer or person, who escapes or attempts to escape from such jail, prison, industrial farm or industrial road camp or from the custody of the officer or person in charge of him while engaged on or going to or returning from such county work or from the custody of any officer or person in whose lawful custody he is, is guilty of a felony and is punishable by imprisonment in the State prison not exceeding 10 years, or by a fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment."

It is the position of the petitioner that section 4532 applies only to escapes of "prisoner charged with or convicted of a felony," and as at the time of his escape petitioner was under conviction of a misdemeanor only, he violated no provision of this section of the code in eluding the custody of the officer who at the time had him in charge.

Insofar as the question now before us is concerned section 4532 of the Penal Code, as in effect at the time petitioner made his escape, does not differ materially except as to the punishment from section 107 of the Penal Code, enacted in 1923, St.1923, p. 270,

and construed by this court in the year 1925 in the case of In re Haines, 195 Cal. 605, 234 P. 883, 885. Section 4532 of the Penal Code applies to escapes of every character mentioned in section 107 of the Penal Code in effect in 1925 and construed in Re Haines, supra, except escapes from a "public training school, reformatory or county hospital." These just mentioned, as stated above, are covered by the new section 107 of the Penal Code enacted in 1941. The only additional provisions contained in section 4532 not found in section 107 as amended in 1923 include "industrial farm or industrial road camp" and the present section provides that an escape from either of those places is a crime. It will therefore be seen that insofar as material to this proceeding, section 4532 of the Penal Code is precisely like section 107 of the Penal Code as construed by this court in Re Haines, supra.

In the case of In re Haines, supra, the petitioner was convicted of the crime of malicious mischief, a misdemeanor, and while serving a sentence in the county jail of Shasta County as punishment for said crime, he escaped from the legal custody of the officer who then had charge of him. He was apprehended and charged with the crime of escape. By virtue of this charge he was imprisoned and restrained of his liberty by the sheriff of said county. He instituted habeas corpus proceedings and in support thereof contended "that the charge under which he is held and thereby deprived of his liberty does not constitute a public offense, 'inasmuch as, at the time of said alleged escape said George Haines was not a prisoner charged with or convicted of a felony, but was a prisoner convicted of a misdemeanor'; that section 107 of the Penal Code 'applies only to prisoners charged with or convicted of a felony.'" This is precisely the position of the petitioner in this proceeding. This court held in that case that the contention of petitioner was without merit and remanded the petitioner.

[1] It is not necessary for us in this proceeding to discuss the grounds upon which the court decided the question involved in that case. It is sufficient we think to call attention to the fact that this decision was rendered over seventeen years ago, and it has never been overruled. It is evident that the opinion was prepared with unusual care and after a most thorough and minute consideration of the various provisions of the section and of their relation to the intent and purpose of the Legislature in the enactment of the section. It was the unanimous decision of the court as then constituted. The section of the code as therein construed has never been repealed nor amended in any material respect except as stated above. Moreover the provisions thereof material to the present proceeding were re-enacted as section 4532 at the recent session of the Legislature.

[2] Prior to the decision of In re Haines, supra, by this court, the District Court of Appeal in an application by the same petitioner had reached the same conclusion as that at which this court arrived in construing said section (In re Haines, 68 Cal.App. 522, 229 P. 984), and at a later date but prior to 1941, the District Court of Appeal had the same question before it in the case of In re Durand, 6 Cal.App.2d 69, 44 P.2d 367. In the latter decision it was ruled: "Irrespective of whatever force there may be in petitioner's point, the question raised thereby is no longer an open one so far as the courts are concerned, because it has been held by the Supreme Court in the case of In re Haines, 195 Cal. 605, 234 P. 883, in conformity with a previous decision rendered by the District Court of Appeal (In re Haines, 68 Cal.App. 522, 229 P. 984), that the said section 107 applies to misdemeanor prisoners as well as to felony prisoners." The Legislature is presumed to have known of these decisions and to have had them in mind when it enacted section 4532 of the Penal Code in practically the exact language of section 107 of the Penal Code as in force at the time of the decisions construing the earlier section. In re Moffitt's Estate, 153 Cal. 359, 95 P. 653, 1025, 20 L.R.A.,N.S., 207; Whitley v. Superior Court, 18 Cal.2d 75, 78, 113 P.2d 449; Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424.

[3, 4] The sole reliance of petitioner in support of his petition is upon the case of In re Ramirez decided by the District Court of Appeal, February 14, 1942, and reported in 49 Cal.App.2d 709, 122 P.2d 361. The decision in that case is in direct conflict with the decision of this court in the case of In re Haines, supra, and for that reason should be and is hereby disapproved. While not relying solely upon the "heading" preceding section 4532 of the Penal Code as a ground for its decision, the District Court of Appeal refers to said "heading" to reinforce its construction of said section. The headings to this section are indicated

as enclosed in brackets, and are not to be regarded as official. Deering Pen.Code, 1941, p. xxii. Evidently they are inserted in the code by the publisher and as such they are not binding upon the courts. Even if the heading of this section were contained in its official enactment, it would not govern, limit or modify nor in any manner affect the scope, meaning or intent of said section. Pen.Code, § 10004. This last mentioned section of the Penal Code was a part of the same statute enacted in 1941, which amended section 107 of the Penal Code, by dividing the then existing section into two parts, one of which is the present section 4532 of the Penal Code.

[5] For the reason stated herein the petition is denied and the petitioner is remanded to the custody of the warden of the State Prison at San Quentin.

GIBSON, C. J., SHENK and CARTER, JJ., and SCHAUER, J. pro tem., concurred.

TRAYNOR, Justice.

I dissent. Section 4532 of the Penal Code plainly defines the class of persons to whom the section applies as "Every prisoner *charged with or convicted of a felony.*" (Italics ours.) The qualifying phrase is unequivocal. Whether or not it is wise is a concern of the Legislature and not of courts. The courts cannot lift qualifying phrases from legislation without usurping legislative functions and the usurpation is particularly flagrant when the phrase has been added by amendment. As first enacted in 1872, section 107, the forerunner of section 4532, simply provided: "Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor." In 1923 the Legislature amended the section, St.1923, p. 270, making the crime a felony and amplifying the scope of the section by setting forth additional circumstances under which escapes might be made or attempted. At the same time the word "prisoner" was qualified by the phrase "charged with or convicted of a felony." Sections 105 and 106 covered the escape of felons who were imprisoned or being conveyed to or from prison. Section 107 was intended to cover escape under other circumstances, including escape from the lawful custody of any officer, or from a county jail pending trial after indictment or preliminary examination or after conviction and final judgment preceding removal to the state prison. As a result there was no longer any provision for the punishment of misdemeanants who escaped or attempted to escape. The legislative history of the bill amending section 107 set forth in the opinion in Re Haines, 195 Cal. 605, 608. 614–616, 234 P. 883, indicates that the Legislature deliberately excluded misdemeanants. It may well be that the Legislature was unwilling to bring misdemeanants within the scope of an amendment converting a misdemeanor to the more serious crime of felony. There is no way of determining with certainty whether the omission was deliberate or an oversight. In any event it is no ordinary omission, no mere absence of a phrase. Misdemeanants are excluded because felons are singled out in a qualifying phrase that states what it means in the simplest terms. The court cannot reject its obvious interpretation without denying all assurance that an act of the Legislature will be interpreted to mean what it says. It is for the Legislature and not the court, to confirm the omission if it was intended, or to correct it if it was not. Code Civ.Proc. § 1858. It is questionable whether the court should undertake to correct even an obvious oversight when the Legislature has it within its power to do so. Whatever delay attends legislative action is far outweighed by the uncertainty that must attend judicial correction of legislative lapses. There is always the possibility that the Legislature intended a provision to be read as it is written, however unwise it appears. The court's refusal to read it as it is written makes it impossible for any one to rely upon the written word of the Legislature.

For the foregoing reasons In re Haines, supra, and In re Durand, 6 Cal.App.2d 69, 44 P.2d 367, should be overruled. Age has not hallowed their error. The qualifying phrase that they sought to conjure away still stands in plain, unmistakable words to mock the interpretation that would interpret away its existence. The failure of the Legislature to change the language of the statute thereafter, far from being an adoption of the court's revision, represents merely a failure to undertake its own revision. The division in 1941 of section 107 of the Penal Code into sections 107 and 4532 was not a revision, and the problem raised by the qualifying phrase was carried over into the rearrangement. The amendment of 1933, St.1933, p. 1072, simply pre-

scribed the punishment previously incorporated by reference to section 108 of the Penal Code, while the 1935 amendment, St. 1935, p. 2118, merely included "industrial farm or industrial road camp" among the places from which it was a felony to escape or attempt to escape. There is no evidence that the Legislature ever had its attention directed to the construction in question. It is unrealistic to suppose that it can take note, much less deliberate the effect, of each judicial construction of statutory provisions, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the Legislature to repudiate an erroneous construction amounts to an incorporation of that construction into the statute not only commits the Legislature to embrace something that it may not even be aware of, but bars the court from re-examining its own errors, consequences as unnecessary as they are serious. It is an iniquitous fiction indeed that reads into the Legislature's silence an acceptance of a construction belied by the phrase whose insistent presence drowns out the interpretation that would be its requiem. See Toucey v. New York Life Ins. Co., 314 U.S. 118, 139, 140, 62 S.Ct. 139, 86 L.Ed. 100, 137 A.L.R. 967; Helvering v. Hallock, 309 U.S. 106, 119–121, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368.

EDMONDS, J., concurred.



21 Cal.2d 891

In re HAYNES.

Cr. 4424.

Supreme Court of California.

Oct. 30, 1942.

Rehearing Denied Nov. 27, 1942.

Escape ⇦1

One who had been convicted of a misdemeanor, and who escaped from county honor farm while working out his sentence, was guilty of a "felony" under statute providing that every prisoner charged with or convicted of a felony who is confined in any jail, prison, or industrial farm or road camp, or engaged on any county road or other county work, and who shall escape or attempt to escape is guilty of a felony. Pen.Code, § 4532.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Habeas corpus proceeding by Warren Haynes to secure his release from custody.

Petition denied, and petitioner remanded.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Seibert L. Sefton, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Petition for writ of habeas corpus. In this proceeding the record shows that the petitioner was charged with the crime of petit theft, a misdemeanor, to which charge he pleaded guilty and was sentenced to serve one year in the county jail of the county of Los Angeles for the commission of said offense. While serving said sentence he made application to be permitted to spend the rest of his term of imprisonment at the Los Angeles County Honor Farm. His application was granted, and while working out his sentence to the county jail as aforesaid at said County Honor Farm, and on November 5, 1941, he escaped therefrom. He was apprehended and was charged and convicted of the crime of escape from legal custody of an officer, in violation of section 4532 of the Penal Code. He now claims that his imprisonment is illegal on the ground that said section 4532 of the Penal Code applies only to felony prisoners and not to misdemeanor prisoners. The facts in this case present the same question as that decided by us in the matter of the application of Grady Halcomb for a writ of habeas corpus, the opinion in which proceeding is this day filed, Ex parte Halcomb, 130 P.2d 384, On the authority of our decision in that proceeding, the petition herein is hereby denied, and the petitioner is remanded to the warden of the California State Prison at San Quentin.

GIBSON, C. J., SHENK and CARTER, JJ., and SCHAUER, J. pro tem., concurred.

TRAYNOR, Justice.

I dissent for the reasons set forth in the dissenting opinion in Ex parte Halcomb, 130 P.2d 384, this day filed.

EDMONDS, J., concurred.



21 Cal.2d 109

DEEVY et al. v. TASSI et al.

S. F. 16754.

Supreme Court of California.

Oct. 30, 1942.

1. Appeal and error ⇐930(1)

On appeal from judgment for plaintiffs, Supreme Court was required to presume that jury had resolved all factual issues in favor of plaintiffs.

2. Assault and battery ⇐15

That mortgagors were in default under chattel mortgage on cattle providing that if mortgagors defaulted in payments on the mortgage note, mortgagee could, with or without process of law, take possession of cattle, and that mortgagee had a legal right to acquire possession of the cattle that he attempted to take, did not justify commission of assault and battery in effecting recaption, where mortgagors' possession had been lawfully acquired.

3. Assault and battery ⇐15

Use of force to retake a chattel which is being tortiously withheld from the actor is not privileged if the other's possession was rightfully acquired, notwithstanding that the holder's right to possession had ceased, and he is a wrongdoer in refusing to give up the chattel to an actor entitled to possession.

4. Assault and battery ⇐15

Mere right to possession of property does not entitle the party to take the same from one in actual rightful possession by force, but to recover possession under such circumstances resort must be had to legal proceedings.

5. Assault and battery ⇐15

Where assaults upon two plaintiffs were perpetrated by defendant attempting to repossess mortgaged cattle from plaintiffs while cattle were in plaintiffs' possession, and attack upon another plaintiff took place on an adjacent road while struggle was still in progress, and force used in striking such plaintiff and riding a horse against her was out of proportion to that reasonably necessary to interrupt her efforts to control the herd, verdicts for plaintiffs were authorized.

6. Assault and battery ⇐15

An actor is not privileged to use means of defending his chattels from intrusion which are likely to cause bodily harm in excess of what the actor reasonably believes to be necessary to prevent the intrusion.

7. Assault and battery ⇐40

$2,500 as compensatory damages to each plaintiff in action for injuries and mental suffering sustained in an assault was not excessive. Code Civ.Proc. § 956a.

8. Damages ⇐32, 48

"Compensatory damages" for harm not involving pecuniary loss include compensation for bodily harm and for emotional distress, and a person having a cause of action for tort may recover for humiliation resulting from physical harm or from destruction or dispossession of chattels, or for a feeling of anxiety for himself or for others if this is the expected or intended result of defendant's tortious act.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensatory Damages".

9. Damages ⇐48

"Mental suffering" constitutes an aggravation of damages when it naturally ensues from the act complained of, and mental suffering includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.

See Words and Phrases, Permanent Edition, for all other definitions of "Mental Suffering".

10. Appeal and error ⇐1004(1), 1151(2)

An appellate court should not assume to substitute its appraisal of damages for physical pain and mental suffering, in a case where trial by jury was had as a matter of right, for that of jury, but where a verdict is so grossly disproportionate to any reasonable limit of compensation as to

shock the sense of justice and to raise a strong presumption that the verdict was based on passion or prejudice, appellate court may reverse judgment and remand case for new trial or may, with consent of party against whom modification is made, modify judgment as to amount of damages and affirm it. Code Civ.Proc. § 956a.

11. Assault and battery ⇐40

That punitive damages for assault and battery were limited to $500 for each plaintiff and that defendants' motion for new trial on ground of excessive damages had been denied established that $2,500 compensatory damages for each plaintiff were not the result of passion or prejudice.

12. Appeal and error ⇐1060(1)

In assault action, reference by plaintiffs' counsel in his opening statement, in questions asked of witnesses, and in argument to jury, to a defendant and his helpers as a "gang of desperadoes," that defendant "showed himself to be a racketeer" that a helper was a "cowpuncher," a "cattle gangster" and a "drunken brute" was not such prejudicial "misconduct" as to require reversal of judgment for plaintiffs.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

13. Evidence ⇐106(1)

The character or reputation of a defendant is not in issue in civil actions for assault.

14. Evidence ⇐106(5)

Testimony of specific instances of misconduct is not admissible on issue of defendant's character in civil actions for assault.

15. Appeal and error ⇐1060(1)

In assault action, opening statement of plaintiffs' counsel of intention to prove that defendant's reputation for peace and quiet was bad and to prove specific instances of misconduct was not prejudicial where the subject was abandoned upon objections and trial court admonished jury.

16. Assault and battery ⇐32

In action for injuries received in an assault, evidence showing one plaintiff's pre-existing heart condition was properly admitted to provide a basis for showing that the condition was aggravated by the injury inflicted.

17. Assault and battery ⇐35

Evidence warranted conclusion that pre-existing heart condition of one plaintiff had been aggravated by an assault justifying recovery for such injury.

18. Trial ⇐243

In action for injuries sustained in an assault arising from mortgagee's attempt to repossess mortgaged cattle, instruction as to mortgagee's right forcefully to repossess cattle was not conflicting as stating that a mortgagee may not use force to acquire possession from mortgagor, but that an owner may retake personalty by force from one wrongfully depriving him of his property, but was proper as protecting defendant against recovery of one plaintiff if jury concluded that defendant had gained exclusive possession of the cattle before such plaintiff was injured.

19. Assault and battery ⇐43(5)

Instruction on measure of damages for assault authorizing recovery of mental suffering occasioned by future pain from plaintiffs' injuries when preceded by limitation which the evidence might show might be suffered by plaintiffs for injuries caused by defendants, was proper.

20. Appeal and error ⇐928(4)

Where record did not show at whose request complained of instructions were given, Supreme Court was required to presume that such instructions were given at appellants' request.

21. Pleading ⇐236(7)
Trial ⇐106

Where defendants' evidence did not show self-defense and factual issues were as to whether assault was committed and by whom, trial court did not abuse its discretion in refusing to permit, after the evidence had been closed, filing of an amended answer pleading self-defense as a special defense, and in refusing to permit argument on that theory.

22. Assault and battery ⇐39

Where plaintiff mortgagors' action against mortgagee and his employee for assault and battery arising when mortgagee sought to repossess mortgaged cattle was predicated solely on unlawful, malicious, and oppressive assaults and batteries, that mortgagee had sought to take possession of the cattle only after he had been advised by his attorney that he had a legal right to

do so did not render awards of exemplary damages contrary to law.

23. Master and servant ⇐331

Where evidence failed to show that an employer had personally participated in assault and battery by his employees against plaintiffs or that he had previously authorized the assaults or had subsequently ratified them with full knowledge of the facts, employer was not liable in exemplary damages.

24. Stipulations ⇐14(12)

Where plaintiffs sought damages from employer and employee for injuries received in an assault by employee, stipulation that any judgment that might be taken against the employee if the jury should return a verdict in favor of plaintiffs, any such verdict might be rendered in favor of employer, was not an agreement that an award of punitive damages properly assessed against the employee only should be included in judgment against employer.

25. Assault and battery ⇐39

Where defendant was personally present and directing a helper in an assault against plaintiffs, punitive damages were properly assessed against defendant for his own and the helper's malicious conduct.

26. Master and servant ⇐306

An employer is liable to third persons for wrongful acts committed by his agent in the transaction of the business of the agency, notwithstanding that the acts be willful and malicious, the test being not whether the wrongful act was authorized, but whether it was committed in the course of a series of acts by the agent which were authorized by the principal and while the agent was occupying himself with the principal's business within the scope of his employment.

In Bank.

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge.

Action by Dan Deevy and others against J. A. Tassi and others to recover damages for injuries sustained in an assault. From a judgment for plaintiffs, defendants appeal.

Judgment modified, and, as modified, affirmed.

Prior opinion, 122 P.2d 942.

George T. Davis, of San Francisco, and Walter F. Freitas, of San Rafael, for appellants.

Vincent W. Hallinan and James A. Himmel, both of San Franciso, for respondents.

SCHAUER, Justice pro tem.

Defendants appeal from a judgment entered pursuant to jury verdicts in favor of the several plaintiffs in an action for damages for malicious assault and battery. Each plaintiff was awarded both compensatory and exemplary damages against both defendants. Arguments are advanced to the effect that the evidence is insufficient to support any of the verdicts, that plaintiffs' counsel was guilty of prejudicial misconduct at the trial, and that the court erred in instructing the jury and in various rulings on questions of law. We find nothing in the record which requires a new trial but the judgment must be modified by striking out the award of punitive damages as against the defendant J. A. Tassi, who was the employer of the other defendant but who is not shown to have personally participated in, directed, or ratified the acts of violence which were committed.

Dramatis Personae.

The principal characters participating in the rural life drama depicted in the evidence include the plaintiffs Dan Deevy, who was a dairy-farmer, fifty-five years of age, suffering from chronic miocarditis; his wife Nellie, of approximately the same age; and their twenty-year-old daughter Julia. An older brother of Julia, Dan Deevy, Jr., also played a part, and a hired hand of the Deevys is mentioned in a minor capacity. The defendants are Emmet A. Tassi, the managing agent of the San Jose Cow Market, a fictitious name enterprise; and J. A. Tassi, the owner of such enterprise and father of Emmet. Of the defendants, only Emmet appears in an active role. Associated with him, however, in almost equal prominence in the activities, was one Sam Howe, a 180-pound professional rodeo rider and steer bulldogger, who liked wine with his meals. In a semi-neutral but active capacity was one Jack Bones, a constable and special deputy sheriff, whose compensation for the day was provided by the Tassis but who was directed by his chief, the sheriff, to attempt to preserve peace. Other persons whose names appear materially in the evidence

as employees or helpers of defendants but who took little or no active part in the actual dragooning hereinafter depicted, were Ralph Kynock, his uncle Dave Kynock, and Lawrence Mackin.

Basic Facts.

On Saturday, March 30, 1940, the daughter Julia Deevy and her brother Dan, Jr., were the owners of a 1,421-acre cattle ranch in Marin County. On that ranch were forty-seven cows owned by Dan, Jr., and approximately eighty other cattle owned by his father and mother.

The trouble arose when, on the day mentioned, Emmet A. Tassi, hereinafter referred to as Tassi, came to the Deevy ranch with several helpers, including Bones, the two Kynocks, and Mackin, and endeavored to take possession of and remove substantially all the cattle on the ranch. He claimed right of entry on the premises and right of possession of the cattle on the basis of a chattel mortgage theretofore executed by Dan Deevy, Sr., and Nellie Deevy.

The mortgage was given by the senior Deevys in the year 1937 when they purchased fifty-two cows from the San Jose Cow Market through Tassi, acting as manager. The transaction was on a credit basis. The fifty-two head of cattle were billed at $6,065. Interest, computed at 4 per cent in advance, sales tax, and fees, brought the total charge to $6,503.06, for which a promissory note and the mortgage were executed. The note called for additional interest at 8 per cent on deferred payments and provided for 12 per cent per annum interest payable monthly, on sums paid after maturity. The fifty-two head of cattle so purchased were hypothecated as security and in addition the mortgage purported to impose its lien on thirty-eight other cattle which were then owned in whole or in part by the senior Deevys and a Mr. and Mrs. Gomez who joined in the note and mortgage. In the description of property mortgaged there was a further provision reading, "Also all of the heifer increase from the above animals." The default clause provided that "if there should be any default * * * or in event of an unreasonable depreciation in value of the mortgaged property or the mortgaged property from any other cause reasonably shall be deemed, by the mortgagee * * * inadequate security * * * then * * * the mortgagee or his assigns thereupon or at any time during such default shall have the right to take possession of any and/or all of the mortgaged property wherever the same may be, and for that purpose may enter into and upon any premises whatever or wherever the mortgaged property or any part thereof may be or may be supposed to be, either with or without process of law and using all necessary force so to do, and if found shall have the right to take possession of and/or remove the same or any part thereof. * * *" It was under this latter clause that Tassi asserted the right to take possession of the cattle on March 30, 1940.

The exact amount claimed to be due on that date does not clearly appear, nor is it material except as it throws light on the relationship and intentions of the parties, but a statement rendered in the name of the San Jose Cow Market, dated April 17, 1939, asserts total charges of $7,212.54, payments aggregating $3,254.48, and a balance owing of $3,958.06. On March 30, 1940, according to his testimony at the trial, Tassi claimed that the Deevys (Dan, Sr., and Nellie) were in default in not having paid more than $3,254.48 on account for the fifty-two cattle he had sold, that the security had depreciated in value, that there was or should have been an augmentation of the cattle originally hypothecated to the extent of fifty heifers under the "heifer increase" clause, and that he was entitled to take possession of approximately 136 cattle. The Deevys disputed the account. On the date involved (March 30, 1940) when Tassi claimed the cattle, they denied that they owed anything and asserted that Tassi had no right to any of the cattle. However, there was then pending in the Superior Court of Marin County an action for accounting and for declaratory relief, brought by Nellie Deevy, Dan Deevy, Jr., and Julia Deevy, against various defendants, including E. A. Tassi, in which, among other averments, was the following: "that the total present amount due upon the aforesaid contract [the contract for the purchase of the 52 cows] is the sum of $2000.00; that plaintiff Nellie Deevy has at all times been, and is now ready, able and willing to pay such sum of $2000.00, or such other amount as may be actually due and payable to said defendant Tassi." Although the copy of the note set forth in the mortgage purported to be payable in installments but fixed no times or amounts of payments, the original note appears to have called for payments of $541.92 month-

ly, commencing February 15, 1938. Whatever the fact in regard to payments due, we shall assume, for the purposes of this opinion, that the senior Deevys were in default on the date in question.

Preliminary Skirmish.

The day was stormy with heavy rain. Tassi, the two Kynocks, Mackin, and Bones, arrived at the Deevy ranch shortly after noon. With them, in a truck, they brought two saddled horses. Tassi and Bones told Mr. and Mrs. Deevy that they had come to take the cattle. The Deevys replied, in substance, that they owed nothing, that Tassi had no right to the cattle without a court order, and that they would not permit the cattle to be removed without such court order. Tassi did not have "a court order" but said, "I am going to take the cattle." Then he and the younger Kynock mounted horses and endeavored to round up the cattle. Mr. and Mrs. Deevy stood against a nearby gate leading to the pasture and thus prevented Tassi and his helper from entering at that point. The latter two, however, proceeded along the fence and gained access through another gate. They drove about sixty head of cattle down to the vicinity of the barn, near the driveway to the county road. At this juncture the Kynocks decided that they would take no further part in the proceedings and Tassi left to get more help. He returned in about one hour with Sam Howe. In the meantime Mrs. Deevy and Dan, Jr., had departed to seek the aid of the local justice of the peace, leaving Mr. Deevy and the girl Julia alone to protect the property. Also during Tassi's absence about sixty milking cows had been placed in stalls in the dairy barn, a modern building with concrete floors and mangers and wooden stall stanchions. A substantial number of the cows were not subject to the Tassi mortgage. Resting on a ledge in the dairy barn, in its customary place, was a .22 calibre rifle, owned by Dan Deevy, Jr.

Mackin had remained on the premises, in defiance of an order by Mr. Deevy to leave, and when Tassi returned with Howe the three of them proceeded directly in an effort to carry out their purpose. It developed at the trial that Howe had been told by Tassi that the latter had a court order for the cattle and, apparently fortified by belief in that statement, as well as by "two or three" glasses of wine which he said he had had, he proved to be an active, if not a wise, assistant.

Assault and Battery.

As Tassi and Howe approached the barn Tassi was carrying a redwood fence picket about five feet long and two inches square. Deevy, Sr., stepped into the barn ahead of them. In the barn he picked up a willow stick or cane about one-half inch in diameter and weighing about one-half pound. He stepped in front of Tassi and "told him he would not take those cows out and he said—he said if you don't keep out of my way I will murder you." Deevy did not raise his stick or make a threatening motion with it at any time except once as related later herein. Tassi, untouched physically, simply walked past Deevy and started releasing the cows on the farther side of the barn. Howe, who had no stick, started the same procedure at his side of the barn. Deevy, using his hands and not the stick, endeavored to push Howe away from the stanchions. The latter then struck Deevy a blow with his fist, on the side of the head, knocking him down on the concrete floor, dazing him, and breaking his glasses. Howe then stepped to the nearby wall of the barn and picked up the rifle. In the meantime Tassi rushed up and as Deevy was arising Tassi struck him with the fence picket across the back of the head. Julia Deevy had come to the door and saw Howe with the gun pointing it at her father. She "dived" at Howe and in the struggle for the gun, which was a loaded automatic, it fell on the concrete and one shell fired. Howe held the girl and struck her with his fist. She struggled to escape his clutch and screamed for help, turning toward Tassi. He responded by striking her on the jaw with his fist, a blow which stunned her momentarily. By this blow (or some other or others during the encounter) her jaw was apparently dislocated (as she described it: "My face was to one side. * * * My jaw was right over to the side; I could not get it back") and two teeth were broken. When she recovered consciousness she saw that Tassi had picked up the rifle and was pointing it at her. At about this stage in the melee, Bones, the deputy sheriff, who had been near enough to hear the gun shot and Julia's screams, appeared in the scene. He demanded the gun from Tassi in the name of the law. Tassi replied that he had no respect for the law and refused to surrender it.

Bones wrested it from him. He then heard Julia scream again and saw "Sam Howe was striking the girl." He caught Howe with a jiu jitsu hold and forced him to release Julia. He saw Howe strike Julia once. Both Tassi and Howe swore at the girl. Julia saw Howe "twirling around again," and said, "You are drunk; please get out of this barn." He denied the accusation but grabbed her again and threw her against a stanchion. Both her father and Bones now attempted to help her escape from Howe. On this one occasion Deevy used his stick. He "made a clout" at Howe. But unfortunately for the gallant Bones, Mr. Deevy's glasses were broken and his target was a moving one. When the blow fell it was Bones, not Howe, who was in range.

Julia was released by Howe, but she was not through. Again she turned to Tassi and (in her own language) asked him "please to get out, he had done enough trouble. He didn't say anything, but swung around with the picket and hit me full against the chest."

Tassi and his helpers succeeded in releasing all the cows in the barn and, with the other cattle which had been rounded up, they drove out onto the county road, adjacent to the Deevy ranch, a herd numbering according to various witnesses for plaintiffs, from 115 to 132 head. Forty-seven of them were owned by Dan, Jr., and were not subject to the mortgage. The Deevys, however, had not yet surrendered possession. Braving threats by Tassi to Deevy that "If you come down after me to stop me from taking those cows I will murder you. * * * I will murder you with this picket. I will split your skull with it," Mr. Deevy, Julia, and a hired hand stayed with the herd, endeavoring to turn it back. While still adjacent to the ranch they met Mrs. Deevy and Dan, Jr., returning home. With the latter's assistance the tide of battle soon turned, but not before the bulldogger Howe had again figured prominently.

Final Engagement.

Mrs. Deevy, Julia, Mr. Deevy, and Dan, Jr., faced the oncoming herd of 115 or more cattle to turn them back. The road was cut into the side of a hill. Mrs. Deevy was at the outer edge of the embankment. Howe came riding through or around the herd, and struck Mrs. Deevy across the head and shoulders with an eight-foot lash, described as a "bull-whip," made of plaited leather. He rode his horse against and over her, knocking her down the embankment. She rolled about twenty feet, striking two tree stumps, and coming to rest against a fence which prevented her rolling about 150 feet farther down the hill. Dazed or unconscious, she was carried up the bank by Mr. Deevy, Dan, and Julia, placed in an automobile, and taken home. In the meantime Dan, Jr., had had a short but decisive meeting with Tassi. The latter was swinging an eight-foot post as Dan approached—but the weapon was unwieldy. Dan reached close quarters and Mr. Tassi announced that he was ready to go home without the cows. Mr. Howe came to the same conclusion. Father and son drove their cattle home. The milking was resumed.

Physical Injuries.

A doctor, whom the plaintiffs tried to see on the day of the assaults and who did examine them on the following day, added little by way of description of their injuries. He found that Mr. Deevy's heart evidenced "nervous augmentation" of the chronic miocarditis. His heart "was a little more rapid than usual." He said that, as a general thing, it was harmful or dangerous for a person suffering from chronic miocarditis to be engaged in any kind of physical exertion or altercation. He had previously prescribed bed-rest and digitalis as treatment for the condition and had warned of the possible consequences of any over-exertion. All three of the plaintiffs complained of traumatic injuries and pain. The doctor observed evidences of the same but discovered no fractures or dislocations. Mr. Deevy testified that his jaw was sore "for a month or six weeks," that his heart was weaker, that he had pain in his side, and that he had "never been well since." Mrs. Deevy, in addition to describing extensive bruises and some abrasions, said that she had not been without a headache after the battery upon her and up to the time of trial. Julia, prior to the trial, had had one of her broken teeth extracted. The other, which had been chipped, had been neither extracted nor repaired. The pain in her jaw had continued for at least seven months.

[1] While there was substantial conflict on a number of factual issues the jury must be presumed to have resolved all such issues in favor of plaintiffs. The evidence is adequate to establish the facts related above.

Law Points.

[2, 3] The assumed fact that Mr. and Mrs. Deevy were in default under the terms of the chattel mortgage and that Tassi had a legal right to acquire possession of some or even all of the cattle he attempted to take, does not justify the commission of assault and battery in effecting reception. Admittedly the Deevys' possession had been lawfully acquired. The rule is stated by the American Law Institute in Restatement of the Law (Torts, § 108, p. 240) as follows: "The use of force against another for the purpose of recaption of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired." The comment, on the same page, is: "An invasion of another's interests of personality for the purpose of regaining a chattel, the possession of which the other has rightfully acquired, is not privileged. This is so although the other's right to possession has ceased and he is therefore a wrongdoer in refusing to give the chattel up to the actor, who is entitled to the possession thereof. Thus, if the actor has bailed his chattel to the other, he is not privileged to use force to retake it, even though the bailment is at an end and the bailee's retention of it is a conversion."

[4] This court followed that rule in Silverstin v. Kohler & Chase, (1919) 181 Cal. 51, 54, 183 P. 451, 9 A.L.R. 1177. Substantially the same rule is declared to be "the great weight of authority" in the annotation at page 1180 of 9 A.L.R., and it is stated in 4 Am.Jur., Assault and Battery, section 80, page 170. The Supreme Court of Iowa, in Biggs v. Seufferlein, (1914) 164 Iowa 241, 145 N.W. 507, at page 510, L.R.A.1915F, 673, at 679, expressed it thus: "It is well settled that the mere right to the possession of property does not entitle the party to take the same from the one in the actual rightful possession by force or violence. But to recover possession, under such circumstances, resort must be had to legal proceedings."

[5, 6] The assaults and batteries upon plaintiffs Dan Deevy and Julia Deevy were perpetrated while the cattle were still in the Deevy barn and clearly were in their possession. The attack on Mrs. Nellie Deevy took place on the county road adjacent to the Deevy property while the struggle for control and possession of the cattle was still in progress. The jury was justified in finding that the Deevys had not relinquished or been deprived of possession at that time but even if we should assume that they had been dispossessed and that Tassi had acquired possession, the judgment must nevertheless stand. The quantity and character of force used by the 180-pound mounted bulldogger in striking the fifty-five-year-old woman across the head and shoulders with the eight-foot plaited leather lash and in riding the horse against and over her was shockingly out of proportion to that which would have been reasonably necessary to offset or interrupt her efforts to control the herd of cattle. The rule in such a case is stated in Restatement of the Law (Torts, § 81, p. 187) in these words: "The actor is not privileged to use any means of defending his land or chattels from intrusion which are intended or likely to cause bodily harm or confinement in excess of that which the actor correctly or reasonably believes to be necessary to prevent or terminate the other's intrusion." There is no contention by defendants that they reasonably believed it to be necessary, in the premises, to lash Mrs. Deevy or run her over with the horse. The rule stated above conforms to that which has been followed in California. (McLean v. Colf, (1918) 179 Cal. 237, 238, 176 P. 169.)

[7, 8] Defendants attack the sufficiency of the evidence to sustain the amounts of compensatory damages awarded each plaintiff; i.e., $2,500. There is no merit in this contention. Again turning to the work of the American Law Institute (Restatement of the Law, Damages, § 905, p. 543) we find the following statement: "Compensatory damages for harm not involving pecuniary loss include compensation (a) for bodily harm, and (b) for emotional distress." In commenting on clause (b) the institute says: "The principal element of damages in actions for battery, assault or false imprisonment, as well as in actions for defamation, malicious prosecution and alienation of affections, is frequently the disagreeable emotion experienced by the plaintiff. * * * A person who has a cause of action for a tort may be entitled to recover as an element of damages for that form of mental distress known as humiliation. * * * This state of mind may result from a physical harm * * * or even the destruction or dispossession of chattels. * * * As an element of damages for a tort, a person may be entitled to recover for a feeling of anxiety, not only for himself but for others, if this is

the expectable result of the defendant's tortious act or if the defendant intended such result. * * * In some cases fear and anxiety alone are a sufficient basis for the action, as where the defendant has assaulted the plaintiff."

[9] In California the law is settled that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of (Sloane v. Southern California Ry. Co., (1896) 111 Cal. 668, 680, 44 P. 320, 32 A.L.R. 193) and in this connection mental suffering includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain (8 Cal.Jur. pp. 771, 772, § 34).

[10] An appellate court should not assume to substitute its appraisal, for that of a jury, of the amount of damages for physical pain and mental suffering sustained by a party in a case where trial by jury was had as a matter of right, see Code Civ.Proc. § 956a, but in a case where it appears that a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment (see Ware v. McPherson, (1931) 213 Cal. 120, 121, 1 P.2d 433; Hart v. Farris, (1933) 218 Cal. 69, 77, 21 P.2d 432) the appellate court may reverse the judgment and remand the case for a new trial either on all the issues or on the issue of damages alone (see Bellman v. San Francisco H. S. Dist., (1938) 11 Cal.2d 576, 588, 81 P.2d 894; Pretzer v. California Transit Co., (1930) 211 Cal. 202, 209, 294 P. 382; Moeller v. Market St. R. Co., (1938) 27 Cal.App.2d 562, 570, 81 P.2d 475), or it may, in the interests of justice and with the consent of the party against whom the modification is made, modify the judgment as to the amount of damages, and affirm it as modified (see Simoneau v. Pacific Electric R. Co., (1913) 166 Cal. 264, 277, 136 P. 544, 49 L.R.A.,N.S., 737; Lightner Mining Co. v. Lane, (1911) 161 Cal. 689, 709, 120 P. 771, Ann.Cas.1913C, 1093; Salstrom v. Orleans Bar Gold Min. Co., (1908) 153 Cal. 551, 559, 96 P. 292). But here we have no such verdict as shocks the sense of justice or raises a presumption that it was based on prejudice or passion. The fact that the punitive damages were limited to the moderate amount of $500 in each case suggests that the jurors were careful and conservative in their deliberations. Certainly in the cloistered detachment of our chambers, without view of the parties or their witnesses and in the absence of awards obviously disproportionate to the facts, we should not assume that we are better equipped than were the citizen-jurors of Marin County to appraise all those elements of damages entering into the case, the principal of which are essentially dependent to a material degree on manifestations of the parties concerned.

[11] Furthermore, defendants' contentions on this subject were considered by the trial judge on their motion for a new trial. As was said in Willoughby v. Zylstra, (1935) 5 Cal.App.2d 297, at page 302, 42 P.2d 685, at page 687, "The fact that the trial court denied a motion for new trial on the ground of excessive damages, among others, is persuasive and confirms us in our conclusion from a review of the record that the verdicts herein may not be declared excessive."

[12] In connection with their contention that the verdicts were excessive defendants complain of asserted misconduct on the part of plaintiffs' counsel in his opening statement, in questions asked of witnesses and in argument to the jury, tending to incite the jurors to passion and prejudice. It does not appear that the jurors were so incited. Counsel referred to defendant Tassi and his helpers as a "gang of desperadoes." He said Tassi "showed himself to be a racketeer." He referred to Howe variously as a "cow puncher," a "cattle gangster" and a "drunken brute." The language was strong, but so was the evidence. Assuming that the use of such language in the heat of a trial is misconduct, it does not appear, in the light of the evidence and the verdicts reached, that such misconduct was prejudicial.

It further appears that an effort was made by counsel for plaintiffs to show that Tassi's reputation for peace and quiet was bad. In his opening statement counsel said: "We will show by evidence that will be introduced that Tassi is a notorious brawler, that his reputation for peace and quiet is very bad, an ex-prize fighter, and vicious and bad-tempered, and an ungovernable man, and inclined at every chance to take the law into his own hands. We will show that he has slugged with his fist, shortly preceding this incident, numerous people, if you please, of somewhat the

same characteristics—elderly and helpless people." At this point an objection was interposed and the court ruled, "I think you had better leave out the reference to specific acts in your opening statement." A little later in the opening statement the following appears: "We will show Tassi not only refused to do it [negotiate a settlement with the Deevys], but appeared in Mr. Gardiner's [an attorney then representing the Deevys] office, addressing him by such names as 'shyster,' and so forth, and threatened to kick him out of his own window, and accused him of fomenting trouble, trying to put himself in the way of Mr. Tassi's right—

"Mr. Davis: Counsel is talking of specific acts, none of which would be admissible in evidence, in attempting to prove what he claims he can prove, and this bad reputation by—

"The Court: It is directed to malice, as I understand it. * * * An offer of proof in support of malice, or what you expect to prove; objection overruled." During the reception of evidence plaintiffs called a witness who testified that he knew the general reputation of Tassi in the community for peace and quiet but upon objection the subject was abandoned without the fact being stated.

[13-15] It is now conceded by plaintiffs that the character or reputation of a defendant is not in issue in civil actions for assault (see Vance v. Richardson, 1895, 110 Cal. 414, 416-417, 42 P. 909) and that testimony of specific instances of misconduct is not admissible (see Marks v. Reissinger, 1917, 35 Cal.App. 44, 57-58, 169 P. 243). Assuming that the above-recited statements of intention relative to proof were wholly improper it nevertheless does not appear that defendants were prejudiced thereby. The court in its instructions admonished the jury carefully, clearly, comprehensively ,and in various forms of expression, as to their duty to consider legal evidence only, and to distinguish carefully between the facts testified to by witnesses and statements by counsel. It likewise correctly instructed the jurors as to the legitimate purpose of argument; as to questions and offers of proof to which objections had been sustained; and as to statements by counsel and discussions between court and counsel. Furthermore the trial court with like accuracy and clarity cautioned the jurors to deliberate and act fairly and dispassionately and not to permit themselves "to be influenced in the slightest degree by sympathy, prejudice or any emotion in favor or against any party to the action." In the light of all the evidence properly admitted in this case and upon the entire record we are satisfied that the conclusion of the trial judge, on the motion for a new trial, that defendants suffered no prejudice in the premises, is controlling under the circumstances. (Gerberich v. Southern Cal. Edison Co., 1938, 26 Cal.App.2d 471, 476, 79 P.2d 783.)

[16, 17] Defendants assert errors in the admission of evidence showing Mr. Deevy's pre-existing heart condition. The trial court's ruling was proper. Such evidence provided a basis for showing that the condition was aggravated by the injury inflicted. The doctor's testimony as to the ensuing nervous augmentation of the chronic miocarditis and the more rapid heart beats, and his opinion that exertion or altercation was dangerous or harmful, coupled with Mr. Deevy's testimony as to the nature of his injuries and his symptoms, was sufficient to warrant the jury's conclusion that the condition had been aggravated by the assault and battery (see Smith v. Schumacker, 1938, 30 Cal.App.2d 251, 263, 85 P. 2d 967; Kerby v. Elk Grove Union H. S. Dist., 1934, 1 Cal.App.2d 246, 251, 36 P.2d 431, 94 A.L.R. 1502).

[18] It is also contended by defendants that the instructions relative to Tassi's right to use force in repossessing the cattle were conflicting and confusing as stating in substance that the mortgagee of chattels may not use force to acquire possession from the mortgagor in possession but that an owner of personal property "may retake such property by force if necessary from one *who wrongfully deprives him* of his property." (Italics added.) A sufficient answer to this contention is that any inconsistency in such instructions favored the defendants. On any construction placed on them the instructions on that subject did not state the law more favorably to plaintiffs than was proper. Moreover such instruction, covering two different factual situations, was proper as a protection to defendants against Nellie Deevy's case in the event that the jury concluded that defendants had succeeded in gaining exclusive possession of the cattle before she was injured. Lastly, the record does not show at whose request the instructions complained of were given.

[19, 20] The last observation also applies to an instruction on the measure of damages, likewise complained of. It declared that "Mental suffering occasioned by any future pain developing from injuries are [sic] also proper elements [sic] of damages." This statement was preceded by the limitation, "which the evidence may show as reasonably and necessarily may be suffered by them [plaintiffs], or either of them, for injuries caused by the defendants, if any." The instruction was awkwardly worded but it correctly stated the law and the evidence hereinabove epitomized justified giving it. In any event, even if it were held that the instructions complained of were erroneously given, that error would not be available to defendants, as on the record we must presume that such instructions were given at defendants' request. (2 Cal.Jur. 870, § 509; Gray v. Eschen, 1899, 125 Cal. 1, 6, 57 P. 664; Buckley v. Shell Chemical Co., 1939, 32 Cal.App.2d 209, 217, 89 P.2d 453; Forbes v. Mattos, 1939, 35 Cal.App.2d 481, 484, 96 P.2d 166.)

[21] Error is urged in the refusal of the trial court to permit, *after the evidence had been closed,* the filing of an amended answer pleading self-defense as a special defense, and in refusing to permit argument on that theory. The rulings were within the discretion of the trial court. The character of the evidence introduced by defendants did not tend to show self-defense. They did not testify to facts tending to the conclusion that Nellie Deevy was struck with the "bull-whip" or ridden down by the horseman in self-defense. Likewise as to the other plaintiffs, the factual issues were not as to self-defense but as to whether the physical acts of assault and battery were committed, and by whom.

[22] Lastly, it is contended that the awards of exemplary damages are contrary to law because Tassi sought to take possession of the cattle only after he had been advised by his attorney that he had a legal right so to do. There is no merit in this contention. It was not for any effort lawfully to take the cattle that plaintiffs brought this action. It is predicated solely on unlawful, malicious, and oppressive assaults and batteries which no advice could justify.

[23-26] As to J. A. Tassi, however, the imposition of the punitive award is not tenable. The evidence fails to show that he personally participated in the wrongful acts or that he previously authorized them or subsequently ratified them with full knowledge of the facts. In the absence of such showing he is not liable in exemplary damages. (Warner v. Southern Pacific Co., 1896, 113 Cal. 105, 111, 45 P. 187, 54 Am. St.Rep. 327; Davis v. Hearst, 1911, 160 Cal. 143, 165, 116 P. 530; Lightner Mining Co. v. Lane, supra, 1911, 161 Cal. 689, 705, 120 P. 771, Ann.Cas.1913C, 1093.) The stipulation which counsel entered into during the trial, in connection with setting aside the default of J. A. Tassi, to the effect that both Tassis should be deemed parties defendant from the inception of the trial and "that any judgment that may be taken against E. A. Tassi, if the jury should return a verdict in favor of the plaintiff, any such verdict may also be rendered *in favor* of J. A. Tassi," should not, in our opinion, be construed as an agreement that an award of punitive damages properly assessed against E. A. Tassi only, for his own and Howe's (since E. A. Tassi was personally present and directing Howe) malicious and oppressive conduct, should also be included in the judgment against J. A. Tassi. Upon the record it does not appear that such was the intention of counsel. As to compensatory damages, however, J. A. Tassi was the owner of the San Jose Cow Market, and the employer of E. A. Tassi. The employer is liable to third persons for wrongful acts committed by his agent in and as a part of the transactions of the business of the agency. This is true even though the acts be willful and malicious. The test is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal and while the agent was still occupying himself with the principal's business within the scope of his employment. (Andrews v. Seidner, (1942) 49 Cal.App.2d 427, 429–430, 121 P.2d 863; Stansell v. Safeway Stores, Inc., (1941) 44 Cal.App.2d 822, 823-825, 113 P.2d 264.)

The judgment is modified by deducting the sum of $500 from the award to each plaintiff as against the defendant J. A. Tassi only, and as so modified is affirmed, respondents to recover costs on appeal.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

21 Cal.2d 153

GEORGE et al. v. BURDUSIS et al.

S. F. 16255.

Supreme Court of California.

Nov. 2, 1942.

Rehearing Denied Nov. 30, 1942.

1. Injunction ⇐56

After an employee who has worked on a retail delivery route has left the service of his employer, employee's use of a former employer's customer list to solicit business for another person is an unwarranted disclosure of trade secrets and equity will enjoin the solicitation of customers of the former employer and acceptance of orders from them by the other person.

2. Injunction ⇐56

Where customers are wholesale buyers whose names appear in directories and they are so few in number that any one might readily discover them, employer's list is not secret and confidential information, the use of which to solicit business for another person by an employee leaving the employer's service would be restrained.

3. Injunction ⇐56

A solicitor's personal acquaintance with customers and knowledge of their respective places of residence and their peculiar likes and other characteristics, knowledge of which would greatly aid the solicitor in securing and retaining such former customers' business, is sufficient to invoke equitable protection against subsequent use by a former employee of the knowledge of and identity of customers and friendly contact with them.

4. Injunction ⇐56

A list of customers may become a "trade secret" entitled to judicial protection if the owner has confidential information concerning the value of such customers.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Secret".

5. Trial ⇐404(5)

Finding that no route book existed for retail customers of linen supply business served by former route man was not determinative of former employer's right to injunctive relief against route man and his present employer where route man had testified that he carried his list in his mind and his customers were easily identified.

6. Trade-marks and trade-names and unfair competition ⇐77

Where business of serving retail customers of linen supply business was purely personal to the route man and was retained as a matter of friendly feeling between the customers and the route man, and 90 per cent. of the customers on former route man's route did not know the owners of the business, by leaving his employment without giving the owners a list of customers whom he had acquired while he was working for them, former route man took an interest which equity would protect and his later solicitation of such customers for another would constitute "unfair competition" entitling the owners to injunctive relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

7. Trade-marks and trade-names and unfair competition ⇐93(3)

Evidence that 97 customers of linen supply business' competitor were secured through route man's individual solicitation of customers of the business formerly served by route man did not support finding that competitor had not succeeded through the efforts of the route man in taking customers from the business so as to sustain denial of injunctive relief.

8. Partnership ⇐230

Where bill of sale of linen supply business executed by one of partners to his copartners expressly reserved right of seller to solicit former customers of the firm, the words "former customers" were not limited only to customers who had discontinued their patronage prior to the day of the sale but referred to all customers of the partnership which was terminated by the seller's withdrawal from it.

See Words and Phrases, Permanent Edition, for all other definitions of "Former Customer".

9. Partnership ⇐230

Where bill of sale of linen supply business executed by one of partners to copartners expressly reserved right of seller to solicit former customers of the firm, the seller's implied obligation not to solicit former customers directly was modified by the reservation notwithstanding that sale

of good will of a business ordinarily carries with it the expectation by the vendee of continued public patronage, and the reservation was superior to any contrary implication arising from transfer of seller's interest in partnership's route books. St.1941, p. 702, § 14100.

10. Partnership ⇐230

Where bill of sale of linen supply business executed by one of partners to his copartners expressly reserved right of seller to solicit former customers of the firm, seller was entitled to solicit the customers of the firm by any legitimate means open to a competitor and personally or by agent to endeavor to secure the business of those persons whom he remembered to have been customers of the firm but was not entitled to use for that purpose a former route man of the firm who, in that capacity, had sold to the persons the seller wished to secure as customers, since such solicitation would be "unfair competition" entitling the firm to injunctive relief.

11. Trade-marks and trade-names and unfair competition ⇐97

When plaintiffs were entitled to injunction restraining former route man from solicitation of his former customers for a competitor, the order should prohibit the former route man's new employer from obtaining the benefits of such unfair practice thereby making plaintiffs' remedy complete.

12. Appeal and error ⇐781(1)

The appellate courts will refuse to determine an abstract question which does not rest upon existing facts as presenting a "moot case".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Case".

13. Appeal and error ⇐781(4)

Defendants' bare assertion that linen supply routes in controversy were different from what they were at time of trial of suit to restrain alleged unfair competition and that many customers had been exchanged constituted no basis for dismissal of plaintiffs' appeal as involving a "moot case".

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Peter George and another against Aleck Burdusis and another for an injunction to restrain unfair competition and for damages wherein named defendant interposed a cross-complaint. From a judgment denying relief upon the complaint and cross-complaint, plaintiffs appeal.

Reversed.

Prior opinion, 123 P.2d 134.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellants.

Marvin E. Lewis, of San Francisco, for respondents.

EDMONDS, Justice.

By their complaint, the appellants charged Aleck Burdusis, who is their former partner, with unfair competition following the sale to them of his interest in the partnership business. They were denied both injunctive relief and damages. Aleck Burdusis fared no better on his cross-complaint, which was based upon certain asserted activities of the appellants and false representations made by them, as a result of which he claims to have suffered loss of business and consequent damage. He did not appeal.

For a number of years the appellants were co-owners of Stone Linen Supply Company. Under this trade name they supplied laundered aprons, gowns and towels to various business establishments, principally markets and grocery stores. In May, 1930, Aleck Burdusis entered the business as a copartner. Before that time he was a grocer. Each of the partners serviced a particular route, calling regularly on certain customers one or more times each week. A fourth route was serviced by Tom Burdusis, brother of Aleck. He had been employed continuously for three years when, on November 16, 1934, as a sequel to differences which had arisen among the partners, Aleck Burdusis sold his interest in the business to his partners.

By a bill of sale, Aleck Burdusis transferred to his former partners the good will and all of the property of the business, and the vendor's interest in four laundry route books. It also required him to "deliver up the route book in his possession." Another provision reads: "The vendor does not agree not to engage in the same or a similar business in San Francisco, Oakland, or elsewhere, nor that he will not

solicit former customers of said firm for business."

After the sale, Tom Burdusis continued in the employ of the appellants, who carried on the business under the same name as before. Less than four weeks later, Aleck Burdusis went into business for himself under the trade name of ABC Linen Supply Company. A month later, Tom left his position with the Stone Linen Supply Company and went to work for his brother. On the following morning, which was Saturday, he accompanied his brother Aleck over the route he had for three years served for the appellants on each Monday and obtained as customers 35 of the 37 persons or firms which had formerly patronized the partnership. On Monday, Tom called on the customers whom he had customarily served on Tuesday, and solicited their business for his brother. By the end of the week he had obtained 137 of the 160 customers served by him on the route of his former employers.

The appellants took prompt action. Three days after Tom Burdusis left their employment, they sued him and his brother. They charged that Tom, as the driver on one of their routes for three years, had confidential knowledge and information as to customers served on that route, their names, addresses, time and type of linen service; that a route book had been delivered to Tom for the purpose of aiding him, as an employee, in servicing the route; that he refused their request to surrender this route book when leaving their employ and stated that he had lost the book, whereas, in truth he had it and used the information the next day, in conjunction with Aleck, in unfair competition with them; and that Tom acted and conspired with his brother Aleck in soliciting their customers.

As to Aleck, the appellants alleged that for $7,500 they had bought his interest in and the good will of the partnership business, including the four routes by which its customers are supplied with permission to Aleck to re-engage in business; that notwithstanding his sale to them, Aleck immediately began drawing off their customers on the route theretofore served by himself, using the knowledge obtained while a member of the partnership, and availing himself of the wrongdoing of Tom Burdusis. According to the complaint, their business "represents an investment in excess of $15,000, consisting of machinery, equipment and supplies * * * and by reason of the loss of trade already caused, the [appellants] have suffered loss, injury and damage in the sum of $5,000 and will continue to lose and suffer loss, injury and damage." They also asked for judgment against the Burdusis brothers for $5,000 for the route book and for costs of suit, and for an injunction restraining them from acts of unfair competition and from taking or accepting any business from persons who were their customers at the time when Tom Burdusis was working for them.

In answering this complaint, Aleck and Tom Burdusis denied that good will is a major asset of the Stone Linen Supply Company or that they are injuring it, and that they ever entered into a conspiracy to deprive the appellants of their customers. They alleged that the firms which they obtained as customers are all butcher shops and markets open to the public and listed in various directories. Every shop where clerks wear aprons is a potential customer and a legitimate object of solicitation; and as any normally intelligent person might seek out and find such customers, their identity is not of a confidential nature. According to their pleading, service in the linen supply business is obtained and held chiefly as a matter of friendly feeling between the customer and the man on the route.

By way of cross-complaint, Aleck Burdusis alleged that he agreed to accept $7,500 instead of the $15,000 at which he valued his interest in Stone Linen Supply Company, upon the condition that the bill of sale should contain a clause giving him the privilege of engaging in the same business in San Francisco and soliciting the former customers of the Stone Linen Supply Company. After the sale, however, the appellants went to their former customers whose business had been obtained by Aleck and falsely and fraudulently misrepresented the terms of the sale by showing the customers their cancelled check for $7,500 and telling them that Aleck had agreed not to compete with them or solicit their former customers but had "double-crossed" his former associates by soliciting their former customers. By such misrepresentations, he continued, he lost not less than 20 of these customers. In an additional count of his cross-complaint, Aleck Burdusis charged that the appellants have, since the sale of his interest in Stone Linen Supply Com-

pany, unlawfully engaged in a price cutting campaign against him by means of which they offered their supplies to his customers at prices less than the fair cost of such service. In order to retain his customers, he likewise was compelled to reduce his prices. As a result of this price cutting campaign, concluded Aleck, he lost both customers and profits he would otherwise have made from the business. He therefore asked for an injunction restraining the appellants from making such misrepresentation or from quoting prices below the fair cost of the service, and for damages.

The trial court found for Aleck Burdusis on all issues presented by his cross-complaint concluding that he had been damaged but failing to find the amount to which he is entitled. It is evident that the provision of the sale by which he reserved the right to re-engage in business and to solicit former customers of the partnership is the basis for this determination. And apparently upon the theory that this provision of the bill of sale allowed Tom Burdusis to solicit former customers of the partnership for his brother, the trial court denied the appellants any relief against him.

As grounds for reversal, the appellants contend that the findings are inconsistent and conflicting, and, in some instances, are directly contrary to the evidence. They thus attack the finding that Aleck solicited former customers of the Stone Linen Supply Company by using his knowledge of the names and addresses of the customers but that such information was not acquired while a member of the partnership. And they claim as contrary to the evidence the finding that Tom Burdusis went out with his brother on the day after he left the employ of the appellants but did not solicit the trade of the former customers.

And the trial court, they assert, improperly construed the provision in the bill of sale reserving to Aleck the right to solicit "former" customers of the firm for business. This plain language, say the appellants, cannot mean that Aleck Burdusis was permitted to solicit customers who were at the time of the sale patronizing the Stone Linen Supply Company. Since the clause was inserted by Aleck, any uncertainty should be interpreted most strongly against him, and the word "former" literally and strictly construed so as to confine Aleck's right of solicitation to those persons who at one time, but not at the date of the sale, were customers of the partnership. Furthermore, the appellants assert, the express provision requiring Aleck Burdusis to transfer his interest in the four route books of the Stone Linen Supply Company to his associates indicates that there was no intention to allow Aleck the right to solicit the current customers of the firm. Yet another provision in the bill of sale, the transfer by Aleck to the appellants of the good will of the business, is inconsistent with any interpretation allowing him to solicit such customers. And even though the court may not adopt their construction of the bill of sale, yet in any event, argue the appellants, the law will not permit an employee to quit his employer and use confidential information to draw off his former employer's customers, and the trial court therefore erred in refusing an injunction against Tom Burdusis.

In reply to these contentions, the respondents claim that the customers' list served by Tom Burdusis for the Stone Linen Supply Company were not a "trade secret," but that the customers served by Tom on his route were all retail dealers whose shops are recognizable by any one and whose identities and addresses can be readily ascertained by observation, or by reference to telephone or business directories. Under the findings made by the trial court that the respondents received no confidential information or trade secrets from the appellants and did not conspire or injure the appellants in their business, together with the finding that Aleck Burdusis had paid a valuable consideration for the right to solicit customers of the appellants and that the route served by Tom was neither written nor oral, but was acquired by the respondents and kept in their memory, the respondents assert that no other judgment than the one in their favor could be sustained. And although the evidence upon which these findings were based may be conflicting, since they are supported by substantial evidence, they may not be disturbed on appeal. In addition, the respondents suggest, the questions involved have become moot because in the intervening years since the respondents left the partnership, customers have been exchanged and routes altered. Moreover, insist the respondents, damages are not permissible in this type of action.

[1, 2] It is well settled in California that after an employee who worked on a retail delivery route has left the service of his employer, his use of the customer list to

solicit business for another person is an unwarranted disclosure of trade secrets. Under such circumstances, a court of equity will enjoin not only the solicitation of the customers of the first employer but also the acceptance of any orders from them. Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, Ann.Cas.1914C, 628, 44 L.R.A.,N.S., 1159; Cornish v. Dickey, 172 Cal. 120, 155 P. 629; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas.1918C, 1022; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; Santa Monica Ice, etc., Co. v. Rossier, 42 Cal.App.2d 467, 109 P.2d 382; Mackechnie Bread Co. v. Huber, 60 Cal.App. 539, 213 P. 285. However, where the customers are wholesale buyers whose names appear in directories, and they are so few in number that any one might readily discover them, it has been held that the employer's list is not secret and confidential information. Avocado Sales Co. v. Wyse, 122 Cal. App. 627, 10 P.2d 485; and see Gloria Ice Cream & M. Co. v. Cowan, 2 Cal.2d 460, 464, 41 P.2d 340.

[3] The rule of Avocado Sales Co. v. Wyse, supra, has, however, been expressly limited by subsequent decisions of this court. It "is not merely the knowledge of the identity of the customers, but the friendly contact with them, which is important to the solicitors * * *." Their personal acquaintance with customers and knowledge of "their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers," is sufficient to invoke equitable protection against the subsequent use by a former employee of such information. Dairy Dale Co. v. Azevedo, 211 Cal. 344, 295 P. 10.

[4] And the list of customers, not ordinarily entitled to judicial protection, may become a trade secret, if there is confidential information concerning the value of these customers. Thus in Scavengers' Protective Association v. Serv-U-Garbage Co., 218 Cal. 568, 24 P.2d 489, although most of the persons in a particular district were served by the former employer and consequently the identity of the customers might easily be ascertained by any one, the defendants had acquired, during the course of their employment for the plaintiff, a knowledge of the salvage value of the refuse of the residents served by them. The use of this information, said the court, to underbid their former employer constituted an improper use of confidential information and amounted to unfair competition. And although the court in Gloria Ice Cream, etc., Co. v. Cowan, supra, assumed that, since the customers on the milk route there in question consisted of restaurants, bakeries, markets, grocery stores and like concerns and were listed in public directories, their names were not "trade secrets," yet the deliberate separation of the employee from his employment and use of whatever information he had gained as an agent for the purpose of injuring his former employer's business were unfair tactics which equity would not tolerate.

[5] As a customer list within the rules expressed may exist in the memory of the employee as well as in writing (Avocado Sales Co. v. Wyse, supra), the finding that no route book ever existed for the customers of the appellants served by Tom Burdusis is not determinative of the appellants' rights. Tom Burdusis testified that he carried in his mind his list of customers, and they are as easily identified as those in the cases of Avocado Sales Co. v. Wyse, supra, and Gloria Ice Cream, etc., Co. v. Cowan, supra. It is true that in these two cases wholesale routes were involved and the customers were retailers, but this fact does not make the patrons more available to discovery by a competitor than the persons solicited by these linen supply companies. As found by the trial court, "every butcher shop and market whose clerks wear aprons, is a potential customer of a linen supply company, and a legitimate object of its solicitation, and any person of normal intelligence can seek out and find such potential customers." Therefore, unless the facts upon which the present action is based bring the appellants within the limitations to the rule announced in Avocado Sales Co. v. Wyse, supra, the customer list was not a "trade secret," and Tom Burdusis was free to solicit his former customers without restriction.

[6] Concerning the rights of the parties in this proceeding, the trial court found that the "business of serving customers is purely personal to the route man, and is obtained and held chiefly as a matter of friendly feeling between the customers and the man on the route, and ninety per cent of the customers on the route of defendant

Tom Burdusis do not know either of the plaintiffs." Obviously, the friendly contact Tom had with his customers would be an influencing factor in soliciting their business for a new employer. And by leaving the employment of the appellants without giving them a list of the customers which he had acquired during the time he was working for them and who were still using the supplies of the partnership, he took from them an interest which equity will protect. His later solicitation of these customers for another employer would therefore constitute unfair competition within the rule stated in Dairy Dale Co. v. Azevedo, supra.

The question of principal importance then is: Did Tom Burdusis solicit former customers of the appellants for Aleck Burdusis? In his testimony, Tom admitted that he accompanied his brother in the supply truck on the Saturday when Aleck called upon the customers whom he ordinarily saw on Monday. Tom also said he told some of them he was now working for his brother. But he and Aleck insisted that all of the solicitation was done by the latter. Assuming that the trial court believed this testimony, the solicitation by Tom alone of his former customers during the following week may not be similarly explained. On Monday, he testified, he went alone on his usual Tuesday route, "because we started the route on Saturday." In soliciting business for Aleck, Tom said, "I walked in the place and told them I was no longer with the Stone Linen Supply Company, I was working for my brother and if they would give me the business I would appreciate it."

[7] From Tom's testimony, it appears that of the 145 customers of the Stone Linen Supply Company served by Tom who changed their patronage to Aleck's business, eight had been solicited by Aleck before Tom left the appellants' employ, five were secured by Aleck before Tom got around to them while working for his brother, 35 were obtained on the Saturday expedition, and 97 were secured through Tom's individual solicitation. Four of these customers subsequently retransferred their patronage to the appellants, he stated. In view of these admissions of the respondent Tom Burdusis, the finding that "it is not true that defendant Aleck Burdusis has succeeded by or through any efforts of his said brother Tom Burdusis is taking from plaintiffs, or either of them, their customers, or any of them" is not supported by the evidence.

[8, 9] But the respondents insist that because Aleck Burdusis had reserved the specific right by contract to solicit the customers of the appellants, he could employ someone to do it for him. This contention requires an analysis of the reservation in the bill of sale. The construction suggested by the appellants, limiting the right of Aleck to solicit only customers of the partnership who had discontinued their patronage prior to the date of the sale by Aleck of his interest in the business, must be rejected as placing too strained an interpretation upon the word "former." Unquestionably, by the words "former customers," the vendor referred to all customers of the partnership which was terminated by Aleck's withdrawal from it. And although the sale of the good will of the business ordinarily carries with it the expectation on the part of the vendee of continued public patronage (Bus. & Prof. Code, § 14100, St.1941, p. 702), this implied obligation of the vendor not to directly solicit former customers was expressly modified by the reservation in the bill of sale of such a right. This provision is also superior to any implication to the contrary arising from the transfer of Aleck's interest in the four route books.

[10, 11] But what is the extent of the right so reserved? Obviously Aleck may solicit the customers of the appellants by any legitimate means open to a competitor. And he may, either personally or by an agent, endeavor to secure the business of those persons whom he remembers to have been customers of the partnership when he was a member of it. But he has no right to use for that purpose a former employee of the appellants, who, in that capacity, sold to the persons he now wishes to secure as customers, the linen service of his former competitors. For the additional influence of the friendly contact of the former employee with the persons whose business he would carry to his new connection brings the solicitation within the condemnation of unfair competition. Not only should the employee be enjoined from the solicitation of his former customers, but the court's order should prohibit the new employer from obtaining the benefits of such an unfair practice, thereby making the remedy of the former employer effective

and complete. Pasadena Ice Co. v. Reeder, supra; Gloria Ice Cream, etc., Co. v. Cowan, supra; Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, 53 P.2d 363; Santa Monica Ice, etc., Co. v. Rossier, supra.

[12, 13] The fact that some years have passed since this proceeding was commenced does not require its dismissal, as the respondents assert. Although courts will refuse to determine an abstract question which does not rest upon existing facts as presenting a moot case, the respondents' bare assertion that the routes in controversy are now quite different than they were at the time of trial and many customers have been exchanged constitutes no basis for such an order.

The judgment is reversed.

GIBSON, C. J. and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and SCHAUER, J. pro tem., concurred.



21 Cal.2d 63

JOHNSTON et al. v. LANDUCCI.

L. A. 17749.

Supreme Court of California.

Oct. 29, 1942.

Rehearing Denied Nov. 27, 1942.

1. Vendor and purchaser ⇐214(2)

Provisions in contract to purchase land prohibiting assignment without vendor's consent are for the benefit of vendor only and do not affect the validity of an assignment without consent as between assignor and assignee.

2. Vendor and purchaser ⇐214(2)

Where contract to purchase land, containing provision against assignment without vendor's consent, was assigned by purchaser without vendor's consent, the assignment passed to assignee the interest of the purchaser subject to the rights of vendor.

3. Vendor and purchaser ⇐214(2)

Where form of contract to purchase land contained prohibition against assignment without vendor's consent and also contained printed form of assignment with a "subject to approval" clause, the "subject to approval" clause would be interpreted to refer back to the provision against assignment and to mean that the assignment, although passing to assignee all assignor's interest, might be defeated by vendor by refusing consent, where the conduct of parties to the assignment justified such interpretation.

See Words and Phrases, Permanent Edition, for all other definitions of "Subject to Approval".

4. Appeal and error ⇐1008(3)

Where construction given an instrument by trial court appears to be consistent with the true intent of parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of the evidence, seem equally tenable.

5. Vendor and purchaser ⇐214(2)

Where contract to purchase land, containing provision against assignment without vendor's consent, was assigned by purchaser by assignment containing "subject to approval" clause, the assignment passed all purchaser's interest in contract, even though vendor's consent was not obtained, where parties to the assignment by their conduct regarded same as complete without such consent.

6. Contracts ⇐170(1)

When a contractual provision is ambiguous, it is proper for the court to look at the subsequent conduct of the parties to ascertain how they construed the provision in question.

7. Contracts ⇐170(1)

The contemporaneous practical construction of a contract by the parties is strong evidence as to the meaning of equivocal provisions.

8. Vendor and purchaser ⇐214(4)

Where contract to purchase land, containing provision against assignment without vendor's consent, was assigned by purchaser without consent by assignment containing "subject to approval" clause, but the parties thereto regarded the assignment as complete, the assignment constituted "good consideration" for note given

by assignee secured by assignment of assignee's contract interest in other land.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Consideration".

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. E. Johnston and others against Olive Landucci to quiet title to realty, wherein defendant filed a cross-complaint claiming an equitable lien upon a portion of the realty. From a judgment quieting plaintiff's title subject to defendant's lien and foreclosing the lien, plaintiffs appeal.

Judgment affirmed.

For prior opinion, see 122 P.2d 285.

D. E. Peckinpah and L. N. Barber, both of Fresno, for appellants.

Matt Wahrhaftig, of Oakland, and Samuel F. Hollins and G. L. Aynesworth, both of Fresno, for respondent.

PETERS, Justice pro tem.

Plaintiffs and cross-defendants E. E. Johnston and Viola Johnston, husband and wife, appeal from a judgment quieting their title to certain lands in Fresno County, subject to a lien of defendant and cross-complainant Olive Landucci, which lien is ordered foreclosed by the judgment. The sole question presented on this appeal is whether the lien ordered foreclosed is based upon a valid contract, it being the contention of the appellants that such contract was totally unsupported by consideration. The trial court found, and its judgment is predicated on such finding, that the contract was supported by consideration.

The facts giving rise to the controversy are as follows: In 1928 appellant E. E. Johnston, and his adult son, defendant Arthur F. Johnston, purchased on an installment contract from Miller & Lux certain farming land in Fresno County for a total purchase price of $9,230.70. Prior to November of 1931 the two Johnstons took possession of the land, farmed it, and expended substantial sums in improvements. In July of 1931 the two Johnstons, by written agreement, and subject to the Miller & Lux contract, partitioned the property, Arthur taking the east half and his father taking the west half. The land declared subject to respondent's lien is that allocated to Arthur—the east half of the Fresno property.

After the voluntary partition, Arthur leased his portion to his father for the year 1931, receiving $1,500 for the lease. After 1931, E. E. Johnston remained in possession of the entire property. He farmed it and each year paid the installment due Miller & Lux. These payments were made, for the most part, from the proceeds realized by him from farming the entire parcel—both his own and that belonging to his son. In 1938 the last installment was paid, and Miller & Lux deeded the entire parcel to E. E. and Arthur Johnston. In February of 1939 Arthur quitclaimed his half to his mother, Viola Johnston, one of the appellants.

On February 5, 1931, A. E. Landucci, now deceased, and through whom his wife, the respondent claims, purchased from Miller & Lux certain farming lands in Merced County for a total purchase price of $39,750.40, $9,937.60 of which was paid in cash, the balance payable in installments. The trial court found that Landucci purchased the Merced property "at the special instance and request of Arthur F. Johnston," the evidence showing that Arthur wanted to buy the land, but Miller & Lux was unwilling to enter into the transaction with him because of his lack of financial backing. On the same day (February 5, 1931) Landucci entered into a sub-contract with Arthur to sell him the Merced property for a total purchase price of $42,146.30, $2,000 of which was paid in cash, the balance payable in installments. Arthur immediately took possession of the Merced lands and attempted to farm and develop them. By November of 1931 Arthur found that he was unable to further finance the operations on the Merced property, and was unable to make the payments called for by his sub-contract with Landucci. Arthur was desirous of salvaging some portion of his equity. He started negotiations with a man by the name of Imperatrice, looking toward an exchange of his interest in the Merced contract for a hotel building in the city of Fresno, and an escrow was set up to accomplish that trade. In order to facilitate the trade Arthur wanted more than a mere sub-contract to buy the Merced lands from Landucci—he wanted an assignment of Landucci's contract with Miller & Lux. After some negotiations with Landucci, on November 24, 1931, Landucci and Arthur entered into a trans-

action whereby Landucci delivered to Arthur the contract under which he was purchasing the Merced property from Miller & Lux, and executed and delivered an assignment of that contract to Arthur. In return, Arthur executed and delivered to Landucci his promissory note for $9,000, payable in installments, and, as security for the note, assigned to Landucci his interest in the east half of the Fresno lands. That promissory note has never been paid.

After the Arthur Johnston-Landucci deal was completed in November of 1931, Arthur treated the Merced equity as his own, going so far as taking possession and collecting the rentals from the hotel for which he expected to trade that equity. The Imperatrice deal was never consummated, partially, at least, because the other parties to the transaction believed that Arthur was attempting to defraud them. Thereafter, Arthur attempted to sell his equity to others, but was unsuccessful.

After E. E. Johnston had completed payments on the Fresno lands, and Miller & Lux had deeded the land to E. E. and Arthur Johnston, and after Arthur had quitclaimed his interest in those lands to his mother, E. E. Johnston and his wife brought the present action to quiet their title to the entire Fresno parcel. Respondent Landucci cross-complained, claiming an equitable mortgage on the east half of such lands, based on the promissory note and assignment executed by Arthur in November of 1931. The trial court determined that the 1931 note had not been paid, was not barred by the statute of limitations, and held that the assignment created a valid lien as security, which lien it ordered foreclosed. Although Arthur was made a party to the proceeding, no deficiency judgment was sought against him, and he has not appealed.

Appellants urge that the promissory note and assignment executed by Arthur in November of 1931 were totally unsupported by consideration, and for that reason created no valid lien on Arthur's interest in the Fresno property. This contention is predicated on the argument that such note and assignment were given by Arthur to Landucci for an assignment of the latter's contract with Miller & Lux for the purchase of the Merced lands, and, so it is urged, that assignment was totally ineffective until approved by Miller & Lux, which approval was never secured. It is therefore contended that Arthur received no consideration for his note and assignment. The question presented is whether, as between Arthur Johnston and A. E. Landucci, the latter's assignment of the Miller & Lux contract for the purchase of the Merced lands passed the interest of Landucci in such lands. If it did, the note and assignment by Arthur are amply supported by consideration and the judgment appealed from should be affirmed. If it did not, the deal between Landucci and Arthur was never consummated, Arthur never received the consideration bargained for, his note and assignment are unsupported by consideration, and the judgment should be reversed.

The argument that the Landucci-Arthur Johnston assignment of the Merced contract was ineffective to pass the interest of Landucci in that contract, is based on the following facts: The contract between Landucci and Miller & Lux for the purchase of the Merced lands is on a printed form prepared for the use of Miller & Lux. Printed paragraph, numbered 17, reads as follows: "Neither this contract nor any interest therein shall be assignable without the written consent of the seller." On the back of this printed contract there appears a printed form assignment, blanks being left for the signatures of the assignor and assignee, and for the approval of Miller & Lux. This printed assignment is in the usual form, except that the last sentence reads as follows: "This assignment is subject to the approval of Miller & Lux, Incorporated." This assignment was properly filled out, naming Arthur Johnston as assignee, was properly signed by Landucci as assignor, Arthur signed it, accepting the assignment, and it was delivered to and accepted by Arthur. The approval of Miller & Lux was never secured.

It is at once apparent that two questions are presented: (1) Does a provision prohibiting assignment without consent of the seller, such as that contained in paragraph 17, above quoted, prevent the interest of the buyer-assignor passing to an assignee, where such consent is not secured? (2) If an assignment without consent does pass the interest of the assignor to the assignee, where the assignment itself provides it is "subject to the approval" of the seller, is such assignment effective as between the assignor and assignee to pass the assignor's interest although no consent was ever secured?

[1] Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment, such as that contained in paragraph 17 of the Miller & Lux contract, are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: "A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition."

The rule that such provisions are for the benefit of the seller and in no way affect the validity of an assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court (Portuguese-American Bank v. Welles, 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116, Ann.Cas. 1918D, 643), and is the rule approved by Williston in his work on Contracts (Williston on Contracts, Revised ed., vol. II, § 422). Although there are no cases in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee. Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L.R.A.,N.S., 609; Garcia v. Gunn, 119 Cal. 315, 51 P. 684; Randol v. Tatum, 98 Cal. 390, 33 P. 433; Kendis v. Cohn, 90 Cal.App. 41, 265 P. 844.

[2] It therefore follows, so far as paragraph 17 is concerned, that the assignment from Landucci to Arthur Johnston passed to the latter the interest of the former, subject to the rights of Miller & Lux.

[3-5] Appellants do not seriously urge that paragraph 17 affected the validity of the assignment. Their main contention is that the assignment itself recited it was "subject to the approval" of Miller & Lux, and they argue that, as a matter of law, that phrase must be interpreted as rendering the otherwise completely executed and delivered assignment ineffective until the approval of Miller & Lux was secured. In other words, appellants urge that the quoted phrase, as a matter of law, compels the construction that securing such consent was a condition precedent to the taking effect of the assignment, and that since such consent was admittedly never secured, the assignment never took effect and passed nothing to the assignee. That is a possible and reasonable interpretation of the phrase considered apart from the evidence. It has been held that where certain acts of parties are made by contract "subject to approval" or "subject to confirmation," the contract is not complete until such approval or confirmation is secured. State v. Stafford, 97 Mont. 275, 34 P.2d 372; Manning v. Sams, 143 Ga. 205, 84 S.E. 451; Allen v. Simmons, 97 W.Va. 318, 125 S.E. 86; Cable Co. v. Hancock, 2 Ga.App. 73, 58 S.E. 319. But that interpretation is not inevitable. A more reasonable interpretation, in view of the evidence, is that such a phrase appearing in a printed contract prepared by the vendor, which contract itself contains a prohibition against assignment without consent, is intended to refer back to the provision against assignment in the contract and to call the assignee's attention to the fact that the assignment may be defeated by the vendor refusing its consent. Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N.E. 1105, 38 L.R.A. 624; Shell Oil Co. v. Manley Oil Corp., 7 Cir., 124 F.2d 714; Atlantic-Pacific Oil Co. v. Gas Development Co., 105 Mont. 1, 69 P.2d 750. In other words, the "subject to approval" clause reasonably could mean that the vendor in preparing the form wanted to call the attention of an assignee to the fact that all assignments, so far as the vendor was concerned, were subject to its approval. Under this interpretation the "subject to approval" clause merely put into express words what otherwise was implied by virtue of paragraph 17, and has the same legal effect as paragraph 17. The trial court gave the clause this construction. Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of the evidence, seem equally tenable. Hale v. Har-

bor Petroleum Corp., 139 Cal.App. 455, 33 P.2d 1039; see, also Teater v. Good Hope Dev. Corp., 14 Cal.2d 196, 93 P.2d 112; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; In re Boyd's Estate, 24 Cal.App.2d 287, 74 P.2d 1049; In re Wilson's Estate, 40 Cal.App.2d 229, 104 P.2d 716. That the construction given the assignment is consistent with the intent of the parties is amply demonstrated by the evidence. The record shows that the Landucci-Arthur Johnston transaction was entered into under the supervision of a lawyer. He testified that nothing was said by either party about securing the consent of Miller & Lux to the assignment. The court found, and the finding is admittedly supported, that Landucci did not promise or agree to obtain the approval of Miller & Lux to the assignment. Immediately upon the completion of the deal Johnston delivered to Landucci his promissory note and his assignment, and Landucci delivered his assignment to Johnston. It is a reasonable inference that Johnston, who was fully familiar with such transactions, would never have delivered his promissory note to Landucci if he knew and intended that the assignment by Landucci was not complete until approval had been secured. The inference that he intended the deal to be complete upon delivery of the documents is strengthened by other matters shown by the evidence. Both parties knew that Miller & Lux had refused to sell the Merced property to Arthur Johnston. Apparently, Landucci was willing to take an unapproved assignment for the purpose of immediately re-assigning it to someone who would be acceptable. The evidence shows that during the very time that Arthur Johnston was negotiating with Landucci for the assignment of the Merced lands he was negotiating with a man by the name of Imperatrice to exchange the contract thus secured for a hotel in Fresno. Certainly, after Arthur Johnston received the assignment he did not treat it as an incomplete inchoate transaction. Without attempting to secure the consent of Miller & Lux, on the very day the Landucci-Johnston transaction was completed he entered into the proposed trade with Imperatrice, and as part of such deal deposited the Landucci assignment with the title company, and executed another assignment of the same to Imperatrice which was recorded. The deal with Imperatrice was not consummated for the reason that Imperatrice rescinded the transaction because of the asserted fraud of Arthur Johnston.

[6, 7] So far as Landucci is concerned, he certainly treated the assignment as a completed transaction. The evidence shows that after the date of the assignment he took no further steps to protect his substantial investment in that contract. He was apparently satisfied to rely upon reimbursement of his expenditures on the $9,000 note and its security. It is, of course, proper when a contractual provision is ambiguous, for the courts to look at the subsequent conduct of the parties to ascertain how they construed the provision in question. The contemporaneous and practical construction of a contract by the parties is strong evidence as to the meaning of equivocal provisions. Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P. 598; Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886.

[8] For the foregoing reasons we are of the opinion that the assignment of the Merced contract as between Landucci and Johnston passed Landucci's interest to Johnston. The note and assignment executed by Arthur Johnston were, therefore, supported by consideration.

The judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, J., and TRAYNOR, JJ., concurred.

21 Cal.2d 164

STERLING REALTY CO. v. RELFE et al.

S. F. 16432.

Supreme Court of California.

Nov. 2, 1942.

1. Municipal corporations ⇐575, 577, 579

Street improvement ordinance authorizing sale of realty by board of public works in event of default in payment of bonds representing amount of assessment on realty, and providing that board shall issue for each sale an original and a duplicate certificate of sale describing the parcels sold, and that originals shall be delivered to the purchaser and the duplicates shall be filed, contemplated that each one of realty company's 78 separate parcels of realty should be sold separately on default, and hence one certificate of sale for the 78 separate parcels was invalid, as well as all subsequent proceedings, including an ultimate deed to purchaser, where each parcel was individually assessed and each bond was a lien against the particular parcel described therein.

2. Taxation ⇐671

Generally, several parcels of realty separately assessed should be sold separately at a tax sale, even though having a common owner.

3. Municipal corporations ⇐579

Where testimony in realty company's action to quiet title to 78 parcels of realty which were sold by officials of city and county on default by company in payment of installments due on bonds representing amount of assessments for street improvements was uncontradicted, and trial court found that the parcels were sold individually as required by ordinance, sale was valid.

4. Municipal corporations ⇐579

If certificate of sale issued for sale of parcels of realty on default by owner of the parcels in payment of bonds representing amount of street improvement assessments on the parcels under ordinance of city and county was invalid, all proceedings thereafter taken would be invalid, including the ultimate deed of the parcels to the purchaser after expiration of the period of redemption.

5. Municipal corporations ⇐575, 577

Where street improvement ordinance authorizing sale of realty by board of public works in event of default in payment of bonds representing amount of assessments on realty provided that the board should issue "for each sale" an original and a duplicate certificate of sale, it was necessary that there should be a separate sale of each one of realty company's 78 separate parcels of realty, and hence there should have been a separate certificate of sale for each parcel.

6. Taxation ⇐614

Inasmuch as tax proceedings are in invitum, a statute relating to those proceedings must be strictly followed, otherwise the proceedings are void.

7. Municipal corporations ⇐577

Where there are separate sales of separate parcels of realty on default in payment of street improvement assessments, as required by municipal ordinance, and all proceedings leading up to and including the sales are valid, purchaser of the parcels may be entitled to have a corrected certificate of sale issued to him.

8. Municipal corporations ⇐577

Where certificate of sale of 78 separate parcels of realty sold on default of owner in payment of bonds representing amount of assessment on parcels for street improvements set forth a description of each parcel, but opposite thereto appeared the sum due under the bonds and assessment, and certificate did not state that those were the sums for which each parcel was sold, although the total amount recited as having been bid for the parcels equalled the total of those sums, the single certificate was not substantially equivalent to separate certificates of sale for each parcel as required by improvement ordinance.

9. Municipal corporations ⇐575

Provision in street improvement ordinance that sales, when bonds representing amount of assessments on realty were not paid, should be made in the manner provided by law for the sale of realty on execution, did not prevent sale of parcels of realty from being invalid, though there were defects in certificate of sale, since sales under the ordinance were "tax sales," and a strict compliance with the law was required.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax Sale".

10. Municipal corporations ⇐579

In action to quiet title by original owner of realty which was sold under street improvement ordinance of city and county for default in payment of bonds representing amount of assessments on the realty, because certificate of sale was invalid, wherein original owner admitted that the obligation and assessment lien were alive, original owner was not entitled to an unconditional decree in its favor merely because the lien securing the bonds allegedly expired by virtue of statute. Civ. Code, § 2911.

11. Municipal corporations ⇐579

In action to quiet title by original owner of realty which was sold under street improvement ordinance for default in payment of bonds representing amount of assessments on the realty, because certificate of sale was invalid, original owner of realty, though it did not tender or offer to pay amount admittedly due under the bonds, was entitled to have its title quieted on condition that it pay, within time allowed for redemption, amount due against the parcels, together with penalties and costs of sale.

12. Municipal corporations ⇐579

Where action by original owner of realty to quiet title to the realty which had been sold under street improvement ordinance on default by owner in payment of bonds representing amount of assessments on the realty, because of the invalidity of certificate of sale, was brought prior to expiration of one-year period of redemption if certificate had been valid, original owner was not guilty of "laches."

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action to quiet title by the Sterling Realty Company against Emily Relfe and others. From an adverse judgment, the plaintiff appeals.

Judgment reversed, and trial court directed to enter decree in accordance with opinion.

Prior opinion, 120 P.2d 918.

Phil F. Garvey and Julia M. Easley, both of San Francisco, for appellant.

John J. O'Toole, City Atty., Norman S. Wolff, Deputy City Atty., and M. Weber, Ralph Alfred Wood, Jr., and Henry F. Wrigley, all of San Francisco, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment denying it relief in an action to quiet title to seventy-five parcels of real property situated in the City and County of San Francisco.

The record discloses that in 1926, plaintiff was the owner of seventy-eight separate parcels of real property situated in said city and county. It is not questioned that in that year, pursuant to a street improvement ordinance of said city and county providing therefor, proceedings were regularly taken for the construction of an improvement affecting said property, the levy of an assessment thereon and the issuance of bonds for the payment of such assessment. One bond was issued against each of the seventy-eight parcels of said property. Defendant Federal Construction Company became the owner of said bonds. Each bond executed by plaintiff was payable both as to principal and interest in twenty semi-annual installments representing the amount of the assessment on each parcel of said property. Eleven of the installment payments were made by plaintiff, but it defaulted on the installment which became due February 4, 1933, and it has since been in default. On March 5, 1937, in accordance with the ordinance and at the request of the Federal Construction Company, the property was sold by the officials of the City and County of San Francisco because of that default. It is not questioned that the sale was regular in all respects except as hereinafter mentioned. The purchaser at the sale was defendant Emily Relfe. One certificate of sale was issued to her for all of the seventy-eight parcels of property. The ordinance authorized the sale of the property upon default as specified in the bonds, the approved form of which read:

"In the event of default in the payment of any installment * * * the Board * * * is hereby authorized to sell the property *herein described* to pay the amount so due, together with the expenses of such sale.

"Such sale shall be made in the manner and form provided by law for the sale of

real property upon execution. * * *" (Emphasis added.) The bond also gave the holder thereof the following remedy: "* * * the person in legal ownership of this bond, shall, in the event of such default, have the right to foreclose the lien created by the said assessment for any unpaid portion thereof, as in the case where no bond had been made or executed, and such lien shall continue until such assessment is fully paid." With reference to the sale and certificate of sale, the requirements are: "The said Board is hereby authorized to make any sale authorized by any agreement and bond and shall issue *for each sale* an original and duplicate certificate of sale, in appropriate form, referring to this Ordinance, describing the *parcels* sold and containing the name of the purchaser; the *originals* shall be delivered to the purchaser and the duplicates shall be on file in the form of stubs in a certificate book." (Emphasis added.) A deed to the property described in the certificate is to be issued to the purchaser one year after the sale if the property is not redeemed. A year's period of redemption is allowed the owner and "all redemption money shall be paid by the Board of Public Works to the holder of the proper original certificate of sale, upon delivering up the same and receipting for the amount received."

It is plaintiff's claim that the certificate of sale and sale of the lots was void because only one certificate of sale was issued for all of the seventy-eight lots, rather than a separate certificate for each lot; that by making the certificate in that fashion plaintiff was injured by having thereby impaired its right to redeem the lots separately.

[1-3] Clearly the ordinance contemplated that each parcel of plaintiff's property be sold separately. That is true because each lot was individually assessed and each bond was a lien against the particular parcel described therein. It is the general rule that several parcels of real property separately assessed should be sold separately at a tax sale even though having a common owner. Stege v. City of Richmond, 194 Cal. 305, 228 P. 461; 61 C.J. 1197. Only one certificate of sale was issued in the instant case for all of the lots and it might be construed to mean that a separate sale of each of the parcels was not had inasmuch as it refers to a "sale" (singular) and recites that "but *one* bid was received" and which was "$46,094.04 for all of said 78 lots." However, the testimony is uncontradicted and the court found that the lots were sold individually. So far as appears it must therefore be concluded that the sale itself was valid.

[4] Nevertheless if the certificate of sale was invalid, all proceedings thereafter taken would be invalid including the ultimate deed of the property to the purchaser after the expiration of the period of redemption. The ordinance provides that "At any time before the expiration of one year from the *date of the certificate of sale*" the property may be redeemed. If the certificate of sale is invalid then the period within which the property could be redeemed would not have commenced to run. It was said in Hinds v. Clark, 173 Cal. 49, 52, 159 P. 153, 154, involving a tax sale to the city, a void certificate issued by the city treasurer to the city and a subsequent deed to the city followed by a deed from the city to a private purchaser, in which the owner brought an action to quiet title: "But we do not find it necessary to consider whether the latter discrepancy is error, or if so, whether it is fatal to the defendant's alleged title to the land, as we are satisfied that the failure to correctly state in the *certificate* the time 'when the city will be entitled to a deed' renders the *certificate void*, and *annuls the subsequent proceedings.*" (Emphasis added.)

[5-7] It is to be noted that under the ordinance here in question a certificate of sale is to be issued "for each sale." We think it is clear that a separate sale of each parcel was necessary, hence there should have been a separate certificate of sale for each parcel. True, the ordinance goes on to provide that the certificate shall describe the "parcels" (plural) sold, but that refers to parcels upon which a single assessment was levied, inasmuch as immediately following that clause it is said the "originals" shall be delivered to the purchaser. The words "for each sale" are specific and control over any inference that may flow from general language. Inasmuch as tax proceedings are in invitum, the statute must be strictly followed, otherwise they are void. 24 Cal.Jur. 324. This does not mean that where there are separate sales and all proceedings leading up to and including the sales are valid, the purchaser may not be entitled to have a corrected certificate issued to him under the same rule that entitles a purchaser at a tax sale to have a corrected deed issued to him

where all of the proceedings are regular. See Webster v. Somer, 159 Cal. 459, 114 P. 575; Fox v. Townsend, 152 Cal. 51, 91 P. 1004, 1007; Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1.

[8] Defendants contend, however, that the single certificate was substantially equivalent to separate certificates. It is true that the certificate in question does set forth a description of each lot but opposite thereto appears the sum due under the bond and assessment. It does not state that those are the sums for which each parcel was sold, although the total amount recited as having been bid for the lots equals the total of those sums. It is obvious, therefore, that the single certificate covering all of the lots was not the equivalent of a separate certificate of sale for each lot.

[9] Defendants refer to the rules pertaining to execution sales, such as, that certain defects in a certificate of sale does not affect the validity of the sale (Anthony v. Janssen, 183 Cal. 329, 191 P. 538), and that various instances of irregularity in such a sale do not render it subject to attack (11 Cal.Jur. 133). They also point to the statement in the ordinance that the sales when the bond is not paid "shall be made in the manner and form provided by law for the sale of real property upon execution." The sales under the ordinance are tax sales and a strict compliance with the law is required in sales of that character. It is said in Walton v. Moore, 58 Or. 237, 113 P. 58, 59, 114 P. 105: "While the proceedings regarding the sale of land for taxes is in many respects analogous to sales of real property on execution, yet there is abundant reason for requiring a stricter compliance with statutory requirements in the former than in the latter class of cases. Sales on execution are usually the result of the voluntary contracts or acts of the debtor. There is an opportunity to realize something approaching the full value of the property sold and only so much need be sold as will satisfy the debt. While in tax sales the liability is involuntary and the delinquency usually the result of poverty or accident, and however great the value of the property, it cannot be sold for more than the amount of the tax." The reference in the ordinance to the "manner and form" of execution sales cannot be said to require the application of the rules pertaining to execution sales, to matters particularly covered by the tax ordinance, which we have seen is the case in the instant action. Contrary to the rules applied to execution sales it has been held that various defects in a certificate in a tax sale will nullify the proceedings. See Hinds v. Clark, supra; Preston v. Hirsch, 5 Cal. App. 485, 90 P. 965.

We think it is obvious that the invalidity of the certificate of sale affected the substantial rights of the plaintiff. It appears from the above quoted portion of the ordinance that the owner may redeem the property within one year after the sale upon paying the amount for which the property was sold plus a penalty, and "all redemption money shall be paid by the Board * * * to the holder of the * * * certificate of sale, *upon delivering up the same* and receipting for the amount received." With only one certificate of sale for all of the parcels, it is obvious that compliance could not be had with that provision of the ordinance, if the owner desired to redeem any number of the parcels less than all of them. The purchaser would not wish to deliver the certificate of sale because he would still be entitled to it as representing his rights in the parcels not redeemed, while the owner would be entitled to have the certificate no longer outstanding and thus a cloud on his title as to the parcels redeemed. The owner's right to redeem should not be made dependent upon what the city officials might endeavor to accomplish as a solution of the dilemma, when no solution could be in conformity with the terms of the ordinance. Defendants' contention that because there has been a redemption by the owner of three of the seventy-eight parcels of the property the above difficulty is shown not to exist, is not convincing inasmuch as the circumstances of those redemptions do not appear, and we are advised of no method whereby they could have been made in conformity with the ordinance.

In connection with the question of the single certificate of sale substantially infringing plaintiff's rights, defendants refer to the section of the ordinance reading: "The provisions of this Ordinance shall be liberally construed to promote the objects thereof, and no error, omission, or irregularity in connection with the proceedings thereunder not affecting a substantial right of a party interested shall invalidate any of such proceedings." That section can be

of no help to defendants because as we have seen a substantial right of the plaintiff has been affected.

[10] Plaintiff urges that under the ordinance two liens are created on the property, one securing the assessment, and the other securing the obligation represented by the bonds; that the former is declared by the ordinance to continue until the assessment is paid, whereas the latter is not; that the lien securing the obligation of the bonds may be foreclosed by a sale of the property as was had in the case at bar, but that the other lien may be foreclosed by an action therefor; that because the lien securing the bonds did not continue until the obligation was paid, it expired by virtue of section 2911 of the Civil Code as to any installments that had become payable more than four years prior to the sale, Code Civ. Proc. § 337; and that as the eleventh installment became due more than four years before the sale, the sale was void inasmuch as the purchase price included that installment. The obligation created by the bonds is the same as the assessment, the latter being the basis for the former. But whatever may be the rule in that respect plaintiff concedes that the obligation and the assessment lien are alive. Its action is one to quiet title and it is not entitled to an unconditional decree in its favor. The rule in an analogous situation is applicable. Although the obligation is barred by the statute of limitation, a mortgagor cannot have his title unconditionally quieted against the lien of the mortgagee. 17 Cal. Jur. 1005. It is conceded by plaintiff that the lien of the assessment is continuing, and that therefore, if the bondholder brought an action of foreclosure, the statute of limitation would not be a bar.

[11] Defendants assert that the judgment is correct because plaintiff did not tender or offer to pay the amount admittedly due under the bonds and that inasmuch as he is asking for equitable relief, he must do equity. It appears that no offer was made by plaintiff to pay the amount due on all or any one of the parcels of the property. Plaintiff's complaint is in the conventional form of quiet title actions which in substance alleges that it is the owner of the property and that defendants claim an interest therein but their claim is without right. The prayer was for such other and further relief as shall seem meet and just in equity.

Defendants rely upon Stege v. City of Richmond, supra; and Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194. In the Stege case the action was by an owner to quiet title against an invalid sale for delinquent special assessments. Judgment for defendants was affirmed on appeal even though the proceedings were invalid. The court stated at page 318 of 194 Cal., at page 466 of 228 P.: "But the fact that the sale of appellants' property was invalid would not *necessarily* entitle the appellants to a decree quieting their title under the circumstances here shown. * * * The plaintiffs in this equitable action seek to relieve the lands from the burden of the assessment for such benefits without paying or offering to pay their just portion of the cost of the improvements. * * * The later case of Hayne v. [City and County of] San Francisco, 174 Cal. 185, 162 P. 625, was an action to quiet title. The defendant asserted a lien on the land by virtue of certain special assessments levied to pay the costs of the construction of a tunnel. The plaintiffs did not pay or offer to pay the assessments. The court said: 'As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. [249] 253, 66 P. [301] 303, "this being the case they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, *unless on the condition of* paying what is due from them. Here *no such condition has been imposed by the court,* nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief."'" (Emphasis added.)

The intimation is clear from the foregoing that it is wholly proper that a conditional judgment may be entered which preserves the lien of defendants. Although plaintiff did not plead a tender or make one, as we have seen, if the ordinance is complied with plaintiff is confronted with a difficult situation with reference to the exercise of its right to redeem the various parcels severally. It is entitled to a determination of its rights under the circumstances. The certificate issued is void, and

it should be so determined. Defendants have their lien on the property and it should be protected, but plaintiff should have its title quieted as to any or all of the parcels upon condition that it pay within the time allowed for redemption, the amount due against such parcel together with penalties and the costs of the sale. The court should order correct certificates of sale issued and compute the period of redemption from the date thereof. That equity requires such a result is further apparent when we consider that the judgment declares that the Department of Public Works is "authorized to make, issue and deliver to * * * Emily Relfe a deed to the real property." By reason of the invalidity of the certificate of sale she is not entitled to such deed. If that provision were permitted to remain in the judgment it would be tantamount to quieting title in Emily Relfe against plaintiff and deprive it of its right of redemption.

[12] Defendants assert that plaintiff was guilty of laches. Suffice it to say that the sale was held on April 28, 1937, and the certificate bears that date. Plaintiff commenced its action on April 20, 1938, prior to the expiration of the period of redemption if the certificate had been valid.

The judgment is reversed and the trial court is directed to enter a decree in accordance with the views herein expressed.

GIBSON, C. J., SHENK and CURTIS, JJ., and SCHAUER, Justice pro tem., concurred.

TRAYNOR and EDMONDS, JJ., dissent.

TRAYNOR, Justice (dissenting).

I dissent. It was admitted by the parties, and the majority opinion concedes, that the proceedings leading to the sale were valid in all respects. It is also conceded that the sale of the property was valid. In this regard the trial court found, and the testimony was uncontradicted, that the seventy-eight lots were sold separately. The only irregularity in the proceedings was the issuance of a single certificate of sale instead of separate certificates for each parcel. Section 35 of the ordinance provides: "The * * * Board is hereby authorized to make any sale authorized by any agreement and bond and shall issue for each sale an original and duplicate certificate of sale, in appropriate form, referring to this ordinance, describing the parcels sold and containing the name of the purchaser; the originals shall be delivered to the purchaser and the duplicates shall be on file in the form of stubs in a certificate book."

While the ordinance required separate certificates of sale, it does not follow that the certificate issued was invalid. In Los Angeles Olive Growers' Ass'n v. Pozzi, 167 Cal. 454, 140 P. 581, 583, this court stated: "* * * the rule of strict adherence to statutory requirements in enforcing the payment of taxes and street assessments may be sometimes relaxed where it clearly appears from all the acts done under the proceedings that no substantial right of the owner of the property charged with the payment of such taxes or assessment has been affected. * * *" In Stege v. City of Richmond, 194 Cal. 305, 228 P. 461, the court characterized as "irregular" group sales of lots sold for delinquent special assessments under a statute requiring that the lots be sold separately. In the present case the regularity of the sales is unchallenged, and the complaint is directed solely at the form of the certificate of sale. That irregularity must be judged in the light of the statement in the Pozzi case, supra, and particularly the express mandate of the ordinance that the provisions thereof "shall be liberally construed to promote the objects thereof, and no error, omission, or irregularity in connection with the proceedings thereunder not affecting a substantial right of a party in interest shall invalidate any such proceedings."

The certificate refers to the ordinance and contains the name of the purchaser. It sets forth a description of each lot sold, and opposite each description appears the itemized unpaid portion of the bond executed thereon, the interest accrued on such bond, the advertising costs for the sale of such lot, and the total amount due on each lot. While it does not state that these total amounts due represented the sum for which each parcel was sold, the aggregate of those totals equals the sum set forth as having been bid for the seventy-eight lots. Moreover, the sale authorized by each bond was a sale for the amount due on that bond plus the expenses of sale. These facts support the contention that the single certificate of sale covering all the lots was the substantial equivalent of separate certificates of sale for each lot. Plaintiff contends, however, that the issuance of a

single certificate imposed upon it an unwarranted burden to redeem all the parcels sold, and that it was therefore deprived of the right under the ordinance to redeem separately any of the parcels. It claims that the certificate of sale and the sales were therefore void.

The right of redemption is a substantial right of the owner (San Diego County v. Childs, 217 Cal. 109, 17 P.2d 734; Los Angeles Olive Growers' Ass'n v. Pozzi, supra; Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194), and the ordinance in question undoubtedly confers upon the owner the right to redeem any or all of the parcels. There is no impairment of that right by the issuance of a single certificate of sale. In fact plaintiff redeemed three of the seventy-eight parcels before the commencement of this action. Section 37 provides: "At any time before the expiration of one year from the date of the certificate of sale, any property sold under the provisions of the preceding sections may be redeemed by any person having an interest in the property sold by the payment to the Board of the amount for which the property was sold, with an additional penalty of 15% of the amount for which the same was sold; all redemption money shall be paid by the Board to the holder of the proper original certificate of sale, upon delivering up the same and receipting for the amount received." Reference to the certificate of sale is made only in fixing the time for redemption and providing for the payment of the redemption money to the holder of the certificate. Redemption from execution (Leet v. Armbruster, 143 Cal. 663, 77 P. 653; Phillips v. Hagart, 113 Cal. 552, 45 P. 843, 54 Am.St.Rep. 369; Hershey v. Dennis, 53 Cal. 77; see Code Civ.Proc. § 704) and tax sales is ordinarily provided for in this manner (Los Angeles Olive Growers' Ass'n v. Pozzi, supra; Cooper v. Shepardson, 51 Cal. 298; List v. Sandell, 42 Cal.App.2d 505, 109 P.2d 376; Laist v. Nichols, 139 Cal.App. 202, 33 P.2d 866; see Leet v. Armbruster, supra; 24 Cal.Jur. 342). It is also the general rule that a proper tender is equivalent to payment and effects a redemption of the land sold. Leet v. Armbruster, supra; O'Grady v. Barnhisel, 23 Cal. 287; see 24 Cal.Jur. 339, 534; Civ.Code, § 1504. Accordingly, had plaintiff wished to redeem, he could have done so by making a payment or by a tender in good faith. Had he done so, whatever interest the certificate holder had in the property would pass to the plaintiff. San Francisco, etc., L. Co. v. Banbury, 106 Cal. 129, 39 P. 439; Cooper v. Shepardson, supra; Laist v. Nichols, supra. If the certificate holder refused to deliver up the certificate, the plaintiff would have the same remedies as if separate certificates had been issued for each parcel and the holder refused to relinquish them. The trial court found, however, that "neither the whole nor any part or parcel of the property described in the complaint was redeemed by plaintiff" and that plaintiff did not "offer to redeem any part or parcel of the property * * * at any time from the date of sale to the date of the complaint."

The only difficulty presented by the issuance of a single certificate is that the purchaser's right to receive the money paid on redemption is conditional upon the delivering up the certificate of sale. § 37. If, however, the purchaser were unwilling to relinquish the certificate of sale because it represented his rights in the parcels not redeemed, he would be entitled to have the first certificate cancelled and proper certificates issued to him under the same rule that entitles a purchaser at a tax sale to have a corrected deed where all the proceedings leading up to and including the sale are valid. See Webster v. Somer, 159 Cal. 459, 114 P. 575; Fox v. Townsend, 152 Cal. 51, 91 P. 1004, 1007; Grimm v. O'Connell, 54 Cal. 522, 523; Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1; Smart v. Peek, 213 Cal. 452, 2 P.2d 380.

It should also be noted that the bonds provided that the sales authorized thereunder "shall be made in the manner and form provided by law for the sale of real property on execution," and that defects in the form and content of a certificate of sale do not affect the validity of an execution sale or the proceedings thereafter taken. Anthony v. Janssen, 183 Cal. 329, 191 P. 538. It is contended, however, that the contrary rule applicable to defects in the certificate of a tax sale (Hinds v. Clark, 173 Cal. 49, 159 P. 153; Preston v. Hirsch, 5 Cal.App. 485, 90 P. 965; cf. O'Grady v. Barnhisel, supra) is controlling, since assessments for street improvements are in invitum and, in effect, tax proceedings. Walton v. Moore, 58 Or. 237, 113 P. 58, 114 P. 105, is cited for the proposition that there should be stricter compliance with the statute in the case of a tax sale where the liability is involuntary, than in the case

of a sale on execution which usually results from the voluntary contract or act of the debtor. In the present case, however, the bonds under which the sales were held represent the voluntary contracts of the debtor. Furthermore, it has been held that defects in certificates of tax sales may be cured by retroactive legislation. Stanton v. Hotchkiss, 157 Cal. 652, 108 P. 864; Fox v. Townsend, supra; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936; Baird v. Monroe, 150 Cal. 560, 89 P. 352; Carter v. Osborn, 150 Cal. 620, 89 P. 608. The curative provisions in the ordinance itself serve that purpose.

For the foregoing reasons I think the judgment should be affirmed.

EDMONDS, J., concurred.



21 Cal.2d 83

POHLE v. CHRISTIAN, Member of State Personnel Board, et al.

Sac. 5489.

Supreme Court of California.

Oct. 30, 1942.

Rehearing Denied Nov. 27, 1942.

1. Appeal and error ⇐781(4)

Where one appealing from judgment denying writ of mandate to compel his reinstatement in state civil service position does not question validity of State Personnel Board's order abolishing such position after institution of mandamus proceeding, case is "moot" as to question of reinstatement. St.1913, p. 1035, § 14a, as added by St. 1933, p. 712.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Case".

2. Officers ⇐2

Under provision of Civil Service Act that no proceeding commenced or right accrued before such act takes effect is affected by provisions thereof, but that all procedure thereafter taken therein shall conform to provisions of act so far as possible, all procedure taken after effective date of such act in proceeding commenced before such date or respecting any right accrued prior thereto must conform to provisions of act so far as possible without affecting substance of accrued right, but where such procedure cannot conform to such act, procedure under previous law applies. St.1937, p. 2111, § 231.

3. Officers ⇐101

The limitation period prescribed by provision of Civil Service Act in effect when state civil service employee was laid off, that such an employee cannot be compensated for time after date of layoff, unless he brings action against appointing power or State Personnel Board for such compensation within 90 days after such date, governs his right to such compensation, though such act was subsequently repealed and supplanted by act fixing same limitation period, but excepting from its operation causes of action arising before its enactment. St.1913, p. 1035, § 14a, as added by St. 1933, p. 712; St.1937, pp. 2092, 2111, §§ 52, 231; Const. art. 24, § 1 et seq.

4. Officers ⇐101

The right of state civil service employee, laid off because of abolition of his position, to salary for vacation days accumulated at time of layoff, is not barred by provisions of Civil Service Act in effect at time of layoff as to times for filing of actions by employees laid off, as such provisions apply only to rights incident to layoff, not to vacation allowances authorized by other statutes and governed by three-year statute of limitations. St.1913, p. 1035, § 14a, as added by St.1933, p. 712; Pol.Code, §§ 359c, 359d; Code Civ.Proc. § 338.

5. Officers ⇐94

The provisions of Political Code that state officers and employees shall be entitled to vacations do not mean that state civil service employee laid off because of abolition of his position is not entitled to vacation, and hence do not deprive him of right to compensation for vacation days accumulated before layoff under State Personnel Board's rule. Pol.Code, §§ 359c, 359d.

6. Mandamus ⇐187(4)

In mandamus proceeding to compel payment of salary for vacation days accumulated by petitioner when laid off as state civil service employee, where respondents did not plead in their answer defense of waiver of right to vacation allowance by petitioner's refusal to take vacation before being laid off, such waiver is not available to respondents on petitioner's appeal from judgment denying writ.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Edwin W. Pohle against E. H. Christian, as a member of the State Personnel Board, and others, for a writ of mandate to compel petitioner's reinstatement in a state civil service position and payment to him of compensation for accumulated vacation days and unpaid salary earned during period of his employment. From so much of the judgment rendered as denied reinstatement and payment for vacation days, petitioner appeals.

Reversed with directions.

For prior opinion, see Cal.App., 111 P.2d 670.

Rehearing denied; GIBSON, C. J., not participating.

Anthony J. Kennedy, of Sacramento, for appellant.

Earl Warren, Atty. Gen., Jess Hession, Asst. Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., E. H. Christian in pro. per., of Oakland, Ivan C. Sperbeck and E. Vayne Miller, both of Sacramento, and Fred B. Wood, of San Francisco, for respondents.

EDMONDS, Justice.

Edwin W. Pohle has appealed from that portion of a judgment denying his application for a writ of mandate by which he sought reinstatement to his civil service position and also payment for accumulated vacation days. In the same proceeding the petitioner was allowed as unpaid salary earned during the period of his employment the sum of $660, representing the difference between the amount paid to him and the amount of $205 per month fixed by the State Personnel Board as the minimum salary for his position. No appeal was taken from that part of the judgment, and it has now become final.

The petitioner was appointed to the permanent civil service position of Property Auditor in the Department of Finance of the State of California in 1931 and thereafter served continuously in that capacity until June 30, 1937. At the latter date, he had accumulated 24½ days vacation. On June 15, 1937, he was notified in writing by the Director of Finance that his position would be abolished in the interest of economy effective July 1, 1937, and that his name would then be placed on the lay-off list in accordance with the requirements of the State Civil Service Act of 1913. Stats.1913, ch. 590, p. 1035, as amended by Stats.1933, ch. 214, p. 712. On October 5, 1937, a report of separation, stating the reason for the lay-off and signed by the Deputy Chief of the Division of Budgets and Accounts in the Department of Finance, was filed with the State Personnel Board. No further action was taken with reference to the matter until August 6, 1938, at which time the position and classification of Property Auditor was abolished by the State Personnel Board.

On May 8, 1938, the petitioner instituted the present proceeding, naming as respondents the members of the State Personnel Board, the State Controller, the State Treasurer and the Director of Finance. He alleged the facts concerning his accumulated vacation days and asked judgment for one month's vacation allowance in the sum of $205. As a second cause of action, and after setting forth the facts which have been stated, the petitioner alleged that it was not necessary on July 1, 1937, or at any time thereafter, to abolish the position of Property Auditor because of lack of funds or in the interest of economy; that the purported abolition of the position was a mere subterfuge adopted for the purpose of circumventing the provisions of the State Civil Service Act, article XXIV of the state Constitution, and the rules and regulations of the State Personnel Board; that the purported lay-off and abolition of the position was not approved by the State Personnel Board; that the Deputy Chief of the Division of Budgets and Accounts was not authorized by law to separate petitioner from his position; that at all times since July 1, 1937, the petitioner has been ready, willing and able to perform the duties of the position of Property Auditor but was prevented from so doing by the respondent Director of Finance; and that his demand upon the respondents for the payment of his salary of $205 per month for the period commencing July 1, 1937, was refused. Under these circumstances, the petition concludes, the appellant is entitled to reinstatement in his position and a judgment for the amount of salary which has accrued from July 1, 1937.

The attorney general, on behalf of the respondents, filed an answer denying these allegations of the petition. By way of affirmative defense, the answer alleged that both the claim for reinstatement and the claim for vacation allowance are barred by the provisions of section 14a of the State Civil Service Act, supra.

After a trial upon these issues, the court found that on June 30, 1937, petitioner was placed on the lay-off list and his position was abolished; that he had accumulated 24½ days vacation, but that prior to July 1, 1937, he had refused to take any vacation. With respect to the claim for reinstatement and for salary since July 1, 1937, the court made findings contrary to the allegations of the petition. The court also found that each of the causes of action sued upon by the appellant is barred by the provisions of section 14a of the State Civil Service Act of 1913, supra. Judgment was accordingly entered in favor of the respondents.

Petitioner contends that his removal from the position of Property Auditor was illegal and void because the provisions of the State Civil Service Act, supra, then in force required as a condition precedent to any lay-off that the approval of the State Personnel Board be first obtained. He challenges, as unsupported by the evidence, the finding that such approval was given, and also the finding that it was necessary for reasons of economy to abolish the position of Property Auditor. With reference to his claim for vacation allowance, he concedes that such issue is moot if he is entitled to reinstatement as of July 1, 1937, with the right to salary accruing since that time. However, if the lay-off was valid, he asserts, he should have judgment for the amount of his vacation allowance. He also contends that the trial court erred in ruling that the causes of action were barred by the provisions of section 14a of the State Civil Service Act of 1913, supra.

Among other points presented in support of the judgment, the attorney general insists that each of the appellant's causes of action is barred by the provision of section 14a of the State Civil Service Act of 1913, supra, and that by refusing to take his vacation prior to the lay-off, Pohle waived his claim to any allowance therefor. He also asserts that, under article XXIV of the Constitution, only the executive officer may approve lay-offs, a position contrary to that of the State Personnel Board, which has filed a brief in which it claims exclusive authority in that regard.

[1] Assuming that the lay-off of the appellant on July 1, 1937, was illegal, his reinstatement to the position of Property Auditor has been rendered impossible because that position and classification have been abolished. As he does not question the validity of the order made in that respect, on August 6, 1938, so far as the question of reinstatement is concerned, the case is moot. However, the court must determine whether or not the appellant is entitled to any salary after the date of the lay-off and until August 6, 1938, for if the lay-off was invalid, and if the claims now asserted by him are not barred under the provisions of section 14a of the Civil Service Act of 1913, he would have been entitled to reinstatement to his position during that period, and should now recover the amount of salary which would have accrued during that time. There is also the question as to his right to a vacation allowance.

Section 14a of the Civil Service Act of 1913, supra, which was in effect at the time of the lay-off order reads, in part, as follows: "Any action brought against the appointing power or the Civil Service Commission by an employee laid off must be brought and served within one year, but in the event of such action said employee can not be compensated for the time subsequent to the date of lay off unless such action is filed and served within ninety days from the date of lay off." (Note: Under article XXIV of the Constitution, adopted in 1934, the State Personnel Board succeeded to all the powers and duties of the State Civil Service Commission, which was abolished.)

The petitioner was laid off on July 1, 1937, but did not commence the present proceeding until May 8, 1938. However, he contends that the limitation of ninety days imposed by section 14a is not applicable to his claim because on August 27, 1937, fifty-seven days after his lay-off, the Civil Service Act of 1913 was repealed and supplanted by the Civil Service Act of 1937. Stats.1937, ch. 753, p. 2085. And since the section prescribing the period in which one may seek relief under the 1937 act specifically provides that "any such cause of action or complaint or ground for issuance of any complaint or legal remedy or wrongs or grievances arising prior to the effective date of this act shall be exempt from the provisions of this section" (§ 52), the period of limitation fixed by the new act does not apply to his claim. Therefore the only period of limitations applicable to his claim, he continues, is subdivision 1 of section 338 of the Code of Civil Procedure, which requires an action upon a liability created by statute to be brought within three years. As the present proceeding was commenced within the three-year

period, concludes the petitioner, his cause of action for salary is not barred.

The question, then, is: What period of limitations is applicable to a cause of action already accrued at the time of the effective date of the 1937 act?

[2] It is significant that section 52 of the 1937 act and section 14a of the earlier statute both prescribe the same period of limitation, that is, a one-year period with the qualification that the employee may not be compensated for the time subsequent to the date his cause of action accrued unless his action be filed and served within ninety days from that date. The only difference between the two sections is that section 52 is much broader in scope than section 14a, which applied only to lay-offs, whereas the 1937 section relates to all causes of action or grievances arising under or in relation to the civil service law of the state. Section 231 of the 1937 act provides that "No action or proceeding commenced before this act takes effect and no right accrued, is affected by the provisions of this act, but all procedure thereafter taken therein shall conform to the provisions of this act so far as possible."

Section 231 is not without ambiguity, as the first and last clauses are, to some extent, contradictory. A reasonable interpretation, however, requires a construction that all procedure taken subsequent to its effective date in any action or proceeding commenced before that date or with respect to any right which accrued prior thereto shall conform to the provisions of the new statute so far as may be possible without affecting the substance of such accrued right. But, where the procedure thereafter taken cannot conform to the provisions of the 1937 act, then, said the Legislature, "No action or proceeding commenced before this act takes effect and no right accrued, is affected by the provisions of this act," and the procedure existing under the former law applies to such action, proceeding or right.

[3] Since section 14a and section 52 provide the same period of limitation for the petitioner's cause of action, the application of the new section does not effect any change in his rights, and but for the provision excepting from its operation causes of action arising before its enactment, section 231 would require him to comply with its terms. By express legislative fiat, the 1937 section on limitations shall not apply to a right accrued prior to the effective date of the new law; therefore such a right, according to section 231, shall be governed by the procedure existing under the former law. No reasonable basis, therefore, exists for the construction urged by the petitioner that the Legislature intended neither the limitations of the new act nor the former statute to apply, especially where, as in the present proceeding, the periods of limitation provided in both statutes are identical. Accordingly, the period of limitations prescribed in section 14a governs the right of the petitioner to compensation, and as the present proceeding was not filed within the ninety-day period specified, he has not stated a cause of action for salary accruing after July 1, 1937.

[4] Concerning the appellant's right to an allowance for the period of vacation which he had accumulated at the time of his lay-off, the trial court was in error in concluding that his claim in this respect is barred by the provisions of section 14a of the Civil Service Act of 1913, supra. That section applies only to rights incident to a lay-off, and the time limitation therein imposed does not govern vacation claims. Furthermore, the right to vacation allowance is not given by that section but by sections 359c and 359d of the Political Code. There is no statute providing a period of limitation within which an action for vacation allowance must be commenced, except section 338 of the Code of Civil Procedure, which declares that an action upon a liability created by statute must be brought within three years applies. The present proceeding was commenced within that time.

[5, 6] Prior to his lay-off petitioner had accumulated 24½ days vacation. Section 4 of rule 13 of the rules and regulations of the State Personnel Board provides: "When an employee is separated from the service and has not been granted his vacation, he shall be entitled to unused portions of vacation on the basis of one and one-quarter days for each month or major portion of a month of service from the first of the calendar year until the date of his separation, but not to exceed thirty working days." The respondents argue that under sections 359c and 359d of the Political Code, a person who is not in the service of the state cannot have a vacation. They point to language in these sections declaring that "officer[s] and employee[s] of the

State of California shall be entitled to a vacation." Since the appellant is no longer an employee of the state, they maintain, he is not entitled to a vacation, and section 4 of rule 13, being inconsistent with these code provisions, must be held invalid.

The applicable sections of the Political Code may not reasonably be so interpreted. They do not expressly or otherwise provide that an employee having the right to a vacation loses his right to compensation for that time upon being separated from the service. The rule and the code provisions are in complete harmony, and the appellant is entitled to the vacation allowance claimed by him unless he waived it by refusing to take a vacation before he was laid off. But as the respondents did not plead a defense of waiver in their answer, it is not now available to them. Wienke v. Smith, 179 Cal. 220, 176 P. 42; Wood v. Jotham Bixby Co., 29 Cal.App.2d 294, 84 P.2d 204; Kadow v. City of Los Angeles, 31 Cal.App.2d 324, 87 P.2d 906; 25 Cal.Jur. 931.

The judgment is reversed with directions to the trial court to issue a writ of mandate requiring the payment of the amount to which the appellant is entitled as salary for 24½ days accumulated vacation.

SHENK, CURTIS, CARTER, TRAYNOR, JJ., and SCHAUER, J., pro tem., concurred.

GIBSON, C. J., did not participate herein.



21 Cal.2d 135

BEKINS VAN LINES, Inc., v. JOHNSON, State Treasurer.

Sac. 5508.

Supreme Court of California.

Nov. 2, 1942.

1. Appeal and error ⇐846(5)

Where findings of fact and conclusions of law were waived by written stipulation of counsel after trial judge had ordered judgment, every intendment was in favor of the judgment and it was presumed that every fact essential to the support of the judgment was proved and found by the trial court.

2. Automobiles ⇐98

The phrase "gross receipts from operation of motor vehicles" as used in statute imposing a license fee for transportation of property on state highway, based on a percentage of the gross receipts from the operation of motor vehicles, is plain, needs no interpretation and is intended to be limited to the transportation activities of a company which might be engaged in warehousing, selling, or other business not strictly related to transporting goods or persons. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Receipts from Operation of Motor Vehicles".

3. Automobiles ⇐98

The statute imposing license fee for transportation of property by motor vehicle on state highways, based on a percentage of the "gross receipts from the operation of motor vehicles", is not limited in its application to that proportion of the gross receipts from operation of motor vehicles which is derived from the actual use of the motor vehicles on public streets and highways, but included activities preparatory to loading and unloading of vehicles, and from which it was claimed that at least 50% of gross proceeds from the operation of vehicles was derived. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16.

4. Constitutional law ⇐70(1)

In construing a statute, court may not supply any language which the legislature must be deemed to have omitted intentionally.

5. Automobiles ⇐73

The Motor Vehicle Transportation License Tax Act imposing license fee for transportation of property by motor vehicle on state highways, based on a percentage of the gross receipts from the operation of motor vehicles, is not unconstitutional as "discriminatory" as applied to a van company which derived at least 50% of the proceeds of transportation from services preparatory to loading and unloading the vehicles. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

6. Automobiles ⇐98

The fact that in determining the fixed rate to be charged for transportation operations or services, the Railroad Commission computed that 40 per cent. of transportation operations was attributable to accessorial services, was not a factor bearing on the legislative intent in adopting definition of the phrase "gross receipts from operation" as used in the statute imposing a license tax for the transportation of property by motor vehicle on the state highways, based on a percentage of the gross receipts from the operation of the motor vehicles. St. 1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16; St.1935, p. 878, § 10.

7. Automobiles ⇐65

Though the license tax imposed by the Motor Vehicle Transportation License Tax Act is not, strictly speaking, a so-called "in lieu tax", it may be considered in the nature of an in lieu tax, in view of the statutory provisions limiting the total taxes payable on property usable in the business of transportation, including license taxes, to five per cent. of gross receipts from operation as defined by the act. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16.

See Words and Phrases, Permanent Edition, for all other definitions of "In Lieu Tax".

8. Automobiles ⇐98

A van company was properly taxed under the Motor Vehicle Transportation License Tax Act on its intracity pickup and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business, notwithstanding that the act provides that it does not apply to motor vehicles operating exclusively within incorporated cities or towns. St. 1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14, 16.

CURTIS and EDMONDS, JJ., dissenting.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On rehearing.

Prior opinion affirmed.

For prior opinion, see 121 P.2d 3.

Harry A. Encell, of San Francisco, for appellant.

Harry H. McElroy and George B. Campbell, both of San Francisco, amici curiae, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and R. L. Chamberlain and Adrian A. Kragen, Deputy Attys. Gen., for respondent.

PER CURIAM.

[1] This is an appeal from the judgment in favor of the defendant. After the trial judge had ordered the judgment, findings of fact and conclusions of law were waived by written stipulation of counsel. On this state of the record every intendment is in favor of the judgment, and it is presumed that every fact essential to the support of the judgment was proved and found by the court. Gray v. Gray, 185 Cal. 598, 197 P. 945; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 104 P.2d 1069; Gordon v. Mount, 125 Cal.App. 701, 13 P.2d 932; 24 Cal.Jur. p. 956, and cases there cited. The applicable rule requires the assumption that the proof showed and that the court found and concluded that the services out of which the disputed tax arose were so much a part of the business of the plaintiff, were so customarily rendered in that connection, and so directly contributed to the transportation which was the plaintiff's principal business, that money derived therefrom must be regarded as part of the "gross receipts from operations of said operator" and taxable as such.

On the original hearing it was assumed that the trial court had in effect so found and the appeal was considered in the light of that assumption. A reconsideration of the questions involved has persuaded us that the opinion on the former hearing correctly and adequately disposed of the appeal. That opinion is therefore adopted as the opinion of the court on rehearing. It is as follows:

The plaintiff sued to recover additional taxes assessed for the years 1935 and 1936 under the provisions of the California Motor Vehicle Transportation License Tax Act, Stats.1933, p. 928, as amended, Stats. 1935, p. 2176, Deering's Gen.Laws, 1937, Act 5130d, and paid under protest.

The plaintiff was and is engaged in the business of transporting property for hire over the public highways of the state by motor vehicle and was therefore taxable for the years involved pursuant to the provisions of said act. The act is entitled, "An act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the public streets, roads and highways in the State of

California by motor vehicle." It requires operators of motor vehicles within the state engaging in the business of transporting persons or property over any public highways within the state for compensation or hire to obtain a license. The operator is required by section 4 to make a monthly report "showing the gross receipts from operation of said operator for the preceding calendar month." The section also provides that a "license tax equal to three per cent of gross receipts from operation" shall be assessed, payable monthly. § 5. Section 6 provides that every operator must keep an accurate record of all gross receipts from operation. Section 9 provides that if the total taxes paid by any operator, including license and all other taxes on property used exclusively in the business of transporting persons or property for hire over the public highways of the state exceed five per cent of the gross receipts from operation of such operator in this state, the difference between the amount paid and five per cent is credited on license taxes thereafter accruing and the balance refunded. Section 14 provides that the act does not apply to motor vehicles operated exclusively within incorporated cities or towns or operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of the cities or towns is traversed.

Section 1(a) provides that the word "operator" shall include all persons or corporations who operate motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation either directly or indirectly.

Section 1(d) reads: "The term 'gross receipts from operation' shall include all receipts from the operation of such motor vehicle or motor vehicles beginning and ending entirely within this State and a proportion based upon the proportion of the mileage within this State to the entire mileage over which such business is done of gross receipts of such operator on all business passing through, into or out of this State, or partly within and partly without this State."

In its return for the years 1935 and 1936 to the Board of Equalization the plaintiff reported its gross receipts from all transportation business in the state exclusive of hauls excepted by section 14 of the act. In said returns, however, the plaintiff claimed as deductions 40 per cent of the gross receipts which it computed was derived from loading and unloading operations, also additional sums derived from pick-up and delivery service within municipalities. The Board of Equalization disallowed deductions of $25,533.32 for loading and unloading operations and $1,010.68 for pick-up and delivery service on the 1935 returns; and $25,570.28 loading and unloading operations, and $1,400 pick-up and delivery service on the 1936 returns. It assessed an additional tax of $2,016.63 for those years, which the plaintiff paid under protest.

It is the plaintiff's contention that inasmuch as the Motor Vehicle Transportation License Tax Act was formulated and enacted for the purpose of raising revenue for construction of public highways (§ 16; In re Bush, 6 Cal.2d 43, 56 P.2d 511; Bacon Service Corp. v. Huss, 199 Cal. 21, 29, 248 P. 235; Valley Motor Lines, Inc., v. Riley, 23 Cal.App.2d 208, 73 P.2d 288), only that portion of the gross receipts which is derived from actual transportation activities over the highways is subject to the tax of three per cent on "gross receipts from operation." No deduction was claimed by the plaintiff for the loading and unloading time consumed between the truck and the sidewalk. The plaintiff argues that the definition contained in section 1(d) confines the word "operation" to the actual transporting of the goods over the public highways, including sidewalk loading and unloading, as distinguished from the loading and unloading of such goods between the sidewalk and the house. The record shows that whenever packing and crating labor was required as distinct from dismantling and moving furniture and goods between the house and the sidewalk preparatory to loading and unloading, a separate charge was made and the paid charges for such labor were not included by the Board of Equalization in the gross receipts subject to the tax. But the plaintiff claims that it should be allowed a deduction for a proper proportion of the gross receipts which represents the revenue from operations between the sidewalk and the house, estimated by it at about 56 per cent; also that it should be permitted deductions for the amounts separately indicated on its way bills received from pick-up and delivery service within municipalities. In intercity hauls of small consignments the plaintiff found it more convenient to pick up and deliver with the use of smaller trucks between the point of pick-up or delivery and the larger

truck or van which was to transport or which had transported the goods over the public highways. In other intercity hauls the van or truck received and discharged the load directly at the door. The plaintiff contends that receipts from such separate pick-up and delivery service within municipalities in connection with intercity hauls should be excepted from assessment under the act because that service is conducted entirely within municipalities and does not employ any part of the public highways.

[2-4] Both sides concede that there is no decided case which directly involves the point considered under the first claimed deduction. However, we are of the opinion that the plain language of the act determines the issue. This court has heretofore held that "gross receipts from operation" is plain language which requires no interpretation. Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 167 P. 845. See, also, McHenry v. Alford, 168 U.S. 651, 666, 18 S.Ct. 242, 42 L.Ed 614; State v. United Electric Light & Water Co., 90 Conn. 452, 97 A. 857. In the case of Pacific Gas & Electric Co. v. Roberts, supra, somewhat similar provisions adopted in section 14 of Article XIII, applying to public service corporations, were denominated "perfectly plain, unequivocal language," [176 Cal. 183, 167 P. 847], and the contention that "gross receipts" meant "gross earnings" was rejected. It was held that the language did not contemplate any deduction from the "gross receipts from operation." In the case of McHenry v. Alford, supra, a similar phrase was said to mean "earnings (receipts) which arise because of its operation," [168 U.S. 651, 18 S.Ct. 248, 42 L. Ed. 614], without any undesignated exceptions. Likewise in the present case "gross receipts from operation" must be taken in its plain sense without limitation or deduction save as expressly modified by the Legislature. The only modification pertinent in this case is that contained in the definition of "gross receipts from operation" which adds to the foregoing quoted phrase the words "of such motor vehicle or motor vehicles beginning and ending entirely within this State * * *", etc. The plaintiff seeks to have this court interpret the legislative language as applying only to that proportion of the gross receipts from its operation of motor vehicles which is derived from the actual use of the truck on the public streets and highways. "Gross receipts from operation of motor vehicles" is language sufficiently plain. It was undoubtedly intended to be limited to the transportation activities of a company which might also be engaged in warehousing, selling, or other business not strictly related to transportation of goods or persons. The plaintiff concedes that the words "operation of motor vehicles" as used in the definition include loading and unloading activities at the sidewalk. However, the goods must be taken to and from the sidewalk as an inseparable preparatory activity connected with the loading and unloading operations. We therefore fail to see how the plaintiff can be excused from the payment of a proportion of the license tax based on its claim that more than 50 per cent of gross receipts from operation of motor vehicles was derived from time devoted to such preparatory activities. The preparatory activities sought to be excepted are just as much a part of and essential to transportation, and therefore to operation of motor vehicles, as are actual loading and unloading operations which are also preparatory to the rolling of the vehicle along the highways. To adopt the plaintiff's suggestion would be to add to the language of the definition a limitation which the Legislature did not express and which it must be deemed it did not intend. If the Legislature intended to exclude from "operation" as defined every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire, it could easily have said so. By failure to use any such limiting words the Legislature indicated its intention of not so limiting or circumscribing the meaning or scope of the act. In re Bush, 6 Cal.2d 43, 56 P.2d 511. Under the applicable rules of construction this court may not supply any language which the Legislature must be deemed to have omitted intentionally.

[5, 6] There is no constitutional objection urged or which could be urged to the application of the plain language of the act. All of the required safeguards have been afforded by the Legislature in the exercise of the taxing power. No unreasonable discriminations are involved and in the absence of any such unlawful classification the act is constitutional. Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235. It is not urged that imposition of a tax equal to a percentage of gross receipts from operation of the business of transportation including all of its connected in-

cidental operations and so-called "accessorial" services or operations for the purposes stated in the act is not a proper exercise of the taxing power. The fact that in determining the fixed rate to be charged for transportation operations or services the Railroad Commission of the state computed that 40 per cent of transportation operations was attributable to accessorial services (see § 10, Highway Carriers Act, Stats.1935, pp. 878, 881), is not a factor bearing upon the legislative intent in adopting the definition here under consideration. The fact that the Legislature in the present act did not distinguish between actual rolling on the public highways and any accessorial services is an argument that it intended no such distinction.

[7] No special significance may be given the fact that the license tax under the present act is not, strictly speaking, a so-called "in lieu" tax, insofar as any applicability of the case of Pacific Gas & Electric Co. v. Roberts, supra, is concerned. It is true the license tax here involved is not an all-purpose tax and that ad valorem taxes are assessable; but it may be considered in the nature of an "in lieu" tax because of the provisions of section 9 of the act which limit the total taxes payable on property usable in the business of transportation, including license taxes, to five per cent of gross receipts from operation as defined by the act.

[8] Nor may any distinction be made by the plaintiff on its returns between intercity hauls which require for convenience an intracity pick-up and delivery service, and those which do not require such service in the convenient method of initiating or terminating such intercity transportation. The plaintiff in this connection relies on Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663. In that case the plaintiff's activities were confined exclusively to intercity hauls. Another company, formerly a competitor of the plaintiff, abandoned all intercity activities and confined itself to intracity business exclusively, including the pick-up and delivery service required by the plaintiff. It appeared that the plaintiff in that case in good faith did not engage in intracity pick-up and delivery service as part of its intercity hauls. It was held that it had paid its tax in full, based on the report of intercity operations as conducted by it. No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intracity pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business. In re Bush, supra. The trial court in the present case properly concluded that receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation.

It is shown that receipts from intracity business as excepted from the act were not included in the computation of gross receipts from operation as defined by the act. Nor were charges for labor furnished for the purpose of packing and crating goods, or warehousing, included in the gross receipts subject to taxation. All exceptions and limitations provided by the act were contemplated in the additional assessment paid under protest by the plaintiff. The trial court correctly concluded that the assessment of the additional tax was in accordance with the statute.

The judgment is affirmed.

TRAYNOR, J., did not participate herein.

CURTIS, Justice (dissenting).

I dissent.

The tax which is the subject of this action is claimed by the state under the provisions of "An act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the *public streets, roads and highways* in the State of California by motor vehicle," etc. (Italics ours.) California Motor Vehicle Transportation License Tax Act, Stats.1933, p. 928, as amended Stats.1935, p. 2176.

Under section 1(a) of said act "The word 'operator' shall include all persons, firms, * * * who operate motor vehicles upon any public highway in this State and thereby engage in the transportation of * * * property for hire or compensation," etc.

Section 1(d) reads as follows: "The term 'gross receipts from operation' shall include all receipts from the operation of * * * motor vehicles * * *." Section 2 of said act provides that "Each operator of a motor vehicle within this State who transports or desires to transport for compensation or hire * * * property upon or over any public highway within

this State shall make application to the State Board of Equalization * * * for a license to operate motor vehicles for the transportation of * * * property for hire or compensation over public highways in this State."

Under section 2 of the act, the Board of Equalization "shall issue to such applicant a license to transport for compensation or hire * * * property upon or over any public highway within this State." Section 3 of said act makes it unlawful after the effective date of the act for any person, firm, etc., to operate any motor vehicle for the transportation of persons or property for hire or compensation over the public highways of the state without obtaining such license.

Under section 4 of said act each operator is required to file on or before the tenth day of each month with the Board of Equalization "a verified report * * * showing the gross receipts from operation of said operator for the preceding calendar month, and such other information relating to his or its operations as said board may require to enable the board to make the assessment for which provision is herein made. A license tax equal to three per cent of gross receipts from operation derived on and after the first day of the month after the effective date of this act, shall be levied and assessed by said board."

It will thus be seen from the title of said act and from each of the sections thereof, where the subject is mentioned that the operations of a licensed operator under the provisions of this act, are confined to the transportation of persons or property for hire or compensation over the *public highways of this state*. It is upon such operations, and upon such operators only that the license tax is assessed. Whatever services are rendered by the operator over and above such services, are not made subject to any tax. These excepted operations would include any and all services rendered by the operator before the property to be transported over the highway reaches the highway and such services as may be rendered after the transported property leaves the highway.

The majority opinion strongly relies upon the case of Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 167 P. 845, 847, for a proper construction of the words "gross receipts from operation." In that case, section 14 of article 13 of the Constitution, under which the tax enacted in that case was levied, provided that the levy of the tax was upon "gross receipts from operation of such companies," while in the present case the statute provides that the tax is levied upon "gross receipts from the operation of motor vehicles." Comparing these two enactments, it is apparent that the section of the Constitution in the Roberts case providing for the levy of the tax upon the "gross receipts from the operation of such companies" was much broader than the present statute which limits the tax to be levied to "gross receipts from the operation of the motor vehicles." In one case the gross receipts of *the company* are taxed while in the other only the gross receipts from *the motor vehicles* are the subject of the tax. As a motor vehicle is defined as a vehicle "operated upon or over the public highway" it seems clear that the legislative intent was to levy a tax only on those receipts from operation of vehicles upon the public highway.

For the reasons stated herein, I think the judgment should be reversed.

EDMONDS, J., concurred.



21 Cal.2d 91

NOBLE et al. v. BEACH et al.

S. F. 16183.

Supreme Court of California.

Oct. 30, 1942.

1. Descent and distribution ⇐75
Wills ⇐627(1), 722

The estate of a decedent vests, subject to administration, in his heirs or devisees and legatees immediately upon his death, and a devise given to more than one person generally vests in them as owners in common. Probate Code, §§ 28, 29, 300.

2. Execution ⇐44, 45
Judgment ⇐780(7)

Before distribution a creditor may obtain a judgment lien on interest of his debtor as heir or devisee and legatee of an

estate and may execute upon debtor's interest at that time. Code Civ.Proc. § 688.

3. Execution ⇐264

Upon a sheriff's sale of land, purchaser is substituted to and acquires all right, title, interest and claim of judgment debtor thereto at date of levy or sale. Code Civ.Proc. § 700.

4. Execution ⇐260, 264

A "sheriff's sale" under writ of execution has same force and effect as conveyance by judgment debtor in form of a quitclaim deed at the date of such sale but does not convey any after-acquired title or interest of judgment debtor. Code Civ. Proc. § 700.

See Words and Phrases, Permanent Edition, for all other definitions of "Sheriff's Sale".

5. Execution ⇐265

Purchaser at execution sale of interest of one of several devisees in land acquires an undivided fractional interest therein.

6. Execution ⇐265

Where undivided fractional interest of devisee in land in two counties was sold to same purchaser at execution sales, and on partition, devisee's interest in land in one county was transmuted to sole ownership of land in second county, execution purchaser's acquisition of additional interest of devisee in land in second county could not be predicated on execution sale in second county as such interest constituted "after-acquired title" and as such did not inure to benefit of purchaser. Probate Code, §§ 28, 29, 300; Code Civ.Proc. § 688, 700.

See Words and Phrases, Permanent Edition, for all other definitions of "After-Acquired Title".

7. Partition ⇐116(1)

"Partition" does not create or convey a new or additional title or interest but merely severs the unity of possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Partition".

8. Partition ⇐116(2)

Upon partition of land held in cotenancy, lien existing on an undivided interest attaches solely to land allotted to cotenant against whose interest lien was a charge. Code Civ.Proc. § 769.

9. Estoppel ⇐47

Under the doctrine that partition does not create or convey a new or additional title but merely severs the unity of possession, a cotenant who undertakes to convey his interest in a particular portion of a general tract and subsequently receives such portion on partition is "estopped" from asserting title thereto against his grantee.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Partition ⇐116(1)

The doctrine that partition does not create or convey a new or additional title but merely severs the unity of possession will not be mechanically applied to confer upon purchaser at execution sale of a cotenant's undivided interest in specific land any additional interest therein subsequently allotted to former owner on partition in place of his undivided interest in another parcel.

11. Partition ⇐116(1)

Technically, a "partition deed" or decree does not confer upon a cotenant a new title or interest since original grant embraced an undivided interest in and title to entire tract or estate, but, practically, such title is created where fractional interest of cotenant in one parcel is transmuted to sole ownership of another as a result of partition.

See Words and Phrases, Permanent Edition, for all other definitions of "Partition Deed".

12. Executors and administrators ⇐314(11)

The probate court has no power, on distribution, to pass on rights and claims of a judgment lien creditor of devisee or an execution purchaser or assignee of devisee's interest. Probate Code, §§ 1100 et seq., 1106.

13. Executors and administrators ⇐315(6)

Decree of distribution after partition vesting sole ownership of one parcel of land in a devisee of a fractional interest therein and divesting him of fractional interest in other lands was not "impeached" by holding in collateral suit of purchaser of devisee's interest at execution sale, that at time of execution sale only undivided one-third interest was vested in devisee, as lack of power of probate court on dis-

tribution to pass on rights and claims of judgment lien creditor of devisee or execution purchaser of devisee's interest, authorized assertion of such claim in collateral suit. Probate Code, §§ 1100 et seq., 1106.

See Words and Phrases, Permanent Edition, for all other definitions of "Impeach".

14. Partition ⇐116(2)

Purchaser at execution sale of devisee's undivided fractional interest in particular land acquired interest subject to contingency of loss thereof if, on partition, that particular land were allocated to one of the cotenants, and decree of distribution disposing of such land in accordance with terms of partition decree allocating such land to a cotenant concluded execution purchaser's rights therein. Probate Code, §§ 1100 et seq., 1106.

15. Execution ⇐265

Execution purchaser of devisee's undivided fractional interest in one parcel of land acquired devisee's entire interest therein and was entitled, on partition of estate, to additional interest given devisee in second parcel in lieu of interest in first parcel. Code Civ.Proc. § 769.

16. Execution ⇐302
Partition ⇐116(1)

Where same execution purchaser acquired devisee's undivided fractional interest on separate execution sales in two parcels of land, and on partition, interest in one parcel was given to cotenant and entire ownership of second parcel was acquired, grantee of devisee's interest in second parcel acquired devisee's equity of redemption of devisee's original interest in second parcel and on redemption execution purchaser still retained after-acquired interest therein. Code Civ.Proc. §§ 766, 769.

17. Executors and administrators ⇐315(6)

Decree of distribution awarding land to devisees without mention of claims or interest of execution purchaser of interest of one devisee was not "res judicata" as to rights of execution purchaser, since probate court had no authority to determine rights of a judgment lien creditor or execution purchaser in devisee's share of estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

18. Executors and administrators ⇐315(6)

Failure of execution purchaser of devisee's interest in decedent's estate to assert his rights therein at time of distribution did not constitute basis for an "estoppel" or make purchaser guilty of "laches", since probate court was without power to pass upon claim of such execution purchaser.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Laches".

19. Executors and administrators ⇐315(6)

Decree of distribution awarding certain personalty of estate to devisee who was also a judgment debtor and providing for delivery thereof to sheriff pursuant to writ of execution did not determine any rights or claims of judgment creditor and acceptance by judgment creditor of benefits of that portion of decree did not "estop" judgment creditor from asserting rights against real property awarded devisee. Code Civ.Proc. § 561.

20. Executors and administrators ⇐315(1)

The statute providing for delivery to sheriff under writ of execution of estate personalty awarded to judgment debtor was designed to protect judgment creditor in whatever rights he may have but was not exclusive. Code Civ.Proc. § 561.

21. Trial ⇐404(3)

In action for declaratory relief finding of trial court that special defenses of res judicata, estoppel and laches that all allegations of cross complaint and all affirmative defenses interposed were true and supported by evidence was a "legal conclusion" and a finding that factual matters alleged in support of such defenses were true but was not a finding of "ultimate fact" necessary to support a judgment on an appeal taken on judgment roll alone.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding of Ultimate Fact" and "Legal Conclusion".

22. Appeal and error ⇐907(3)

Where appeal was taken on judgment roll alone, and finding of ultimate fact for defendant was based upon and adduced from findings of probative facts, which did not justify ultimate fact found, probative facts were controlling and judgment was unsupported.

In Bank.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Mary Noble and others against Frank Beach and others for declaratory relief to secure an adjudication of rights of plaintiffs as judgment creditors in certain realty. Defendants cross complained. From an adverse judgment, plaintiffs appeal on the judgment roll.

Affirmed in part and reversed in part.

For prior opinion, see 120 P.2d 110.

Booth B. Goodman and Lionel B. Benas, both of Oakland, for appellants.

Frank J. Fontes, of San Francisco, for respondents.

TRAYNOR, Justice.

In 1934, appellants obtained a judgment against Milton J. Wiren in Alameda County, and there recorded an abstract of the judgment. In 1935, the judgment debtor's mother, Amanda W. Wiren, died testate and by her will devised a parcel of real property situated in Alameda County and a parcel situated in San Francisco County to respondents Milton J. Wiren, Mildred Tellier, and Ruth A. Williams in equal undivided shares. Appellants then recorded an abstract of their judgment in San Francisco County and levied execution upon the debtor's interest in the San Francisco property. In 1936, one of the devisees filed a petition in the estate proceedings to partition the real property. Thereafter, appellants levied execution on Wiren's interest in the Alameda real property, and at sheriff sales in Alameda and San Francisco counties they purchased his interest in the Alameda property for $700 and his interest in the San Francisco property for $750. Following the execution sales, an order for partition was entered by the probate court in the estate of Amanda W. Wiren whereby the Alameda property was allocated to Milton J. Wiren in sole ownership, and the San Francisco property was allocated to the other devisees. Wiren then sold his interest in the Alameda property to respondent Frank Beach, who purported to redeem that parcel from the execution sale by paying to appellants the sum of $700 plus interest and penalties. A decree of final distribution in the estate of Amanda W. Wiren was subsequently entered by the probate court, ordering distribution of the Alameda County property to Frank Beach as assignee of Milton J. Wiren, and distribution of the San Francisco County property to Mildred Tellier and Ruth A. Williams.

Appellants brought this action for declaratory relief to secure an adjudication of their rights in the Alameda and San Francisco real property. At the commencement of the action, a balance of $4,619.49 remained unpaid on their judgment, and they claimed ownership of either an undivided two-thirds interest in the Alameda property or an undivided one-third interest in the San Francisco property. As an alternative, appellants contended that either an undivided two-thirds interest in the Alameda property was subject to the lien of their judgment or that they had a lien on an undivided one-third interest in the San Francisco property. From a judgment determining that appellants have no interest in either parcel and quieting the title of certain respondents to the property, this appeal is taken on the judgment roll.

[1-6] The main issue is the nature and extent of the interest in the Alameda County property acquired by appellants as purchasers at the execution sale held in that county. It is well settled that the estate of a decedent vests, subject to administration, in his heirs or devisees and legatees immediately upon his death (Schade v. Stewart, 205 Cal. 658, 272 P. 567; In re Estate of Yorba, 176 Cal. 166, 167 P. 854; Prob.Code, §§ 28 and 300), and a devise given to more than one person generally vests in them as owners in common. Prob. Code, § 29. Before distribution, a creditor may obtain a judgment lien on the interest of his debtor as heir or devisee and legatee of an estate (McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459), and he may execute upon the debtor's interest at that time. McGee v. Allen, supra; In re Estate of Lind, 1 Cal.2d 291, 34 P.2d 486; Code Civ.Proc. § 688. Upon a sheriff's sale of real property the purchaser is "substituted to and acquires all the right, title, interest, and claim of the judgment debtor" thereto at the date of the levy or sale. Code Civ. Proc. § 700. A sale by the sheriff has the same force and effect as a conveyance by the judgment debtor in the form of a quitclaim deed at the date of the sale (Freelon v. Adrian, 161 Cal. 13, 118 P. 220; Frink

v. Roe, 70 Cal. 296, 11 P. 820; Kenyon v. Quinn, 41 Cal. 325; In re Estate of Pierce, 28 Cal.App.2d 8, 81 P.2d 1037), and it does not operate to convey any after-acquired title or interest of the judgment debtor. Rupert v. Jones, 119 Cal. 111, 51 P. 26; Frink v. Roe, supra; Emerson v. Sansome, 41 Cal. 552. From these established principles it follows that title to an undivided one-third interest in the Alameda and San Francisco property immediately vested in Milton J. Wiren upon the death of Amanda W. Wiren. By recording abstracts of their judgment, appellants obtained a lien on Wiren's interest as devisee, and as purchasers at the execution sales they acquired the interest that Wiren then had in the parcels of realty, representing an undivided one-third interest in the Alameda property and a similar interest in the San Francisco property. As a result of the subsequent partition, Wiren's undivided one-third interest in the San Francisco property was transmuted into an undivided two-thirds interest in the Alameda property. Appellants did not acquire this additional interest in the Alameda property allotted to Wiren on partition by virtue of the Alameda execution sale alone, for it constituted an "after-acquired" title or interest that does not inure to the benefit of the purchaser.

[7-11] Respondents seek to avoid this conclusion by the argument that inasmuch as a partition deed or decree does not create or convey any new or additional title or interest the undivided two-thirds interest in the Alameda property was not "after-acquired" property within the rule. The broad doctrine that partition does not create or convey a new or additional title or interest but merely severs the unity of possession is widely accepted and variously applied. In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27; Rose v. Mesmer, 142 Cal. 322, 75 P. 905; Lloyd v. Davis, 123 Cal. 348, 55 P. 1003; Wade v. Deray, 50 Cal. 376; Potrero Nuevo Land Co. v. All Persons, 29 Cal.App. 743, 156 P. 876; see Tiffany, Real Property, 3d Ed., vol. 2, 470. The following rules are often described as resulting from an application of the doctrine: One who has a mortgage upon an undivided interest acquires upon partition a mortgage on the portion allocated in severalty to the mortgagor. Betts v. Ward, 196 Ala. 248, 72 So. 110; Baltzell v. Daniel, 111 Fla. 303, 149 So. 639, 93 A.L.R. 1259; Webb v. Rowe, 35 Mich. 58; see Lloyd v. Davis, supra. Upon partition of property held in cotenancy the lien existing on an undivided interest attaches solely to the land allotted to the cotenant against whose interest the lien was a charge (Code Civ. Proc. § 769; see Freeman, Cotenancy and Partition, 415), and a cotenant who undertakes to convey his interest in a particular portion of a general tract and subsequently receives such portion on partition is estopped from asserting title thereto against his grantee. East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999; Emeric v. Alvarado, 90 Cal. 444, 27 P. 356; Wade v. Deray, supra. Considerations of policy must, however, determine the application of the doctrine. See Baltzell v. Daniel, supra; Loomis v. Riley, 24 Ill. 307. It will not be mechanically applied to confer upon the execution sale purchaser of a cotenant's undivided interest in specific property any additional interest in that property subsequently allotted the former owner on partition in place of his undivided interest in another parcel. Because the original grant to a cotenant embraces an undivided interest in and title to the entire tract or estate, a partition deed or decree technically does not confer upon him a new title or interest. Practically it does, however, as the present case illustrates, for before the partition Wiren could convey only an undivided one-third interest in the Alameda property, but thereafter he was able to convey the entire property. He had the power to make that conveyance because he acquired by partition that which he did not previously have. See Tiffany, Real Property, 3d Ed., vol. 2, p. 470.

[12, 13] Respondents also contend that the decree of distribution vested the sole ownership of the Alameda property in Milton J. Wiren upon the death of his mother, and a court of equity cannot hold that only an undivided one-third interest in the property was vested in him at the date of the sale without overstepping its bounds and attempting to impeach the decree of distribution by means of the will. That argument is dispelled, however, by the fact that the probate court has no power, on distribution, to pass on the rights and claims of a judgment lien creditor of the devisee (McGee v. Allen, supra; Martinovich v. Marsicano, supra) or an execution purchaser or assignee of the devisee's interest. McGee v. Allen, supra; Kings-

bury v. Ross, 217 Cal. 484, 19 P.2d 784; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; In re Estate of Crooks, 125 Cal. 459, 58 P. 89; In re Burton, 93 Cal. 459, 461, 29 P. 36; Chever v. Ching Hong Poy, 82 Cal. 68, 22 P. 1081. Those claims may be asserted in a collateral suit, and it would be unfair to the debtor to hold that he lost by the execution sale not only his then interest in the specific property sold but also any additional interest in that property thereafter allotted to him on partition in place of his undivided interest in other property merely because the Probate Code (§ 1100 et seq.) makes provision for partition before distribution and states that an allotment made therein shall control upon proceedings for distribution. § 1106.

[14] The next inquiry concerns the interest acquired by appellants as purchasers at the San Francisco execution sale. Before partition, Wiren had an undivided one-third interest in the San Francisco property, and as a cotenant he held that interest subject to the contingency of its loss if on subsequent partition that parcel were allocated to one of his cotenants. East Shore Co. v. Richmond Belt Ry., supra; Emeric v. Alvarado, supra. Appellants, as purchasers at the execution sale, acquired Wiren's interest in the property subject to that contingency (East Shore Co. v. Richmond Belt Ry., supra; Emeric v. Alvarado, supra), and when by partition the entire San Francisco property was allocated to Mildred Tellier and Ruth A. Williams, appellants lost their interest in that property. The decree of distribution disposing of the property in accordance with the terms of the partition decree also concluded appellants' rights therein. William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; In re Estate of Lux, 149 Cal. 200, 85 P. 147.

[15] Before partition, however, appellants were substituted to the claims of the debtor and they acquired Wiren's entire interest in the San Francisco property. That interest necessarily included the right to have an additional interest in the Alameda land allocated to him by the probate court, in the event the court made such an allocation, in lieu of his undivided interest in the San Francisco land. If on partition Wiren had been allotted a fractional interest in severalty in the San Francisco property, that interest would have inured to the benefit of appellants (East Shore Co. v. Richmond Belt Ry., supra; Emeric v. Alvarado, supra; Wade v. Deray, supra), and the same result should follow when by partition Wiren's undivided interest therein was transferred to a different parcel. If appellants had merely a lien on Wiren's interest in the San Francisco property, they would be entitled to look to the property assigned to their debtor in the partition proceedings under section 769 of the Code of Civil Procedure which reads: "When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party * * *." The diligent creditor who causes the debtor's interest to be sold on execution and purchases that interest should be in no less favorable position, and section 766 provides that "if * * * any of the cotenants has conveyed to another person his interest * * * such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty * * *." This after-acquired interest of the debtor represented, and was dependent upon, his previous interest sold on execution (see Wade v. Deray, supra), and the San Francisco execution sale and the Alameda execution sale are readily distinguishable on this basis. Since the devisee's entire interest in the two parcels of realty comprising the estate of the testatrix was sold before distribution at successive execution sales, the purchaser who took subject to administration also took the interest in the real property thereafter allocated to the devisee in the partition proceeding.

[16] It follows that respondent Beach, as Wiren's grantee, acquired merely the debtor's equity of redemption, and that by paying to appellants the sum bid at the Alameda County execution sale, he redeemed only an undivided one-third interest in the Alameda property. Appellants remained owners, subject to redemption, of an undivided two-thirds interest in the property.

[17-20] The special defenses interposed by respondents are not supported in the facts. Respondents contend that the decree of distribution awarding the property to respondents without mention of the claims or interest of appellants therein is res judicata as to their rights, and that by their failure to assert their rights at the time of

distribution, appellants are guilty of laches and are estopped from claiming an interest in the property. There is no provision in the Probate Code, however, for determining the rights of a judgment lien creditor or execution purchaser in the devisee's share of a decedent's estate. McGee v. Allen, supra; Martinovich v. Marsicano, supra. A judgment creditor or grantee of a devisee may urge his claims in a separate suit. McGee v. Allen, supra; Kingsbury v. Ross, supra; Martinovich v. Marsicano, supra; Cooley v. Miller & Lux, supra; In re Estate of Crooks, supra; In re Burton, supra; Chever v. Ching Hong Poy, supra. Since the probate court was without power to pass upon the claims of a creditor or grantee of the devisee, the filing of a written request for, and waiver of, notices in the estate proceedings by appellants did not confer that power upon the court. Similarly, the failure of appellants to assert their rights at the time of distribution cannot constitute the basis for an estoppel or make appellants guilty of laches. The decree of distribution awarding the sum of $508.12 and certain shares of stock, representing Wiren's share of personalty in the estate, to the debtor and providing for delivery to the sheriff pursuant to appellants' execution did not determine any rights or claims of the judgment creditor. It merely recognized the procedure set forth in section 561 of the Code of Civil Procedure, which is designed to protect the creditor in whatever rights he may have. It follows that the acceptance by appellants of the benefit of that portion of the decree did not estop them from asserting their rights against the real property.

[21, 22] Respondents rely upon the fact that this appeal is taken on the judgment roll alone, and that the present inquiry is therefore limited to a consideration of whether the findings support the judgment. Ward v. Ward, 15 Cal.2d 234, 236, 100 P.2d 773; Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5; Hollywood Cleaning & P. Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709. They contend that the findings of res judicata, estoppel, and laches support the judgment. With respect to these special defenses the trial court found that all the allegations of the cross-complaints and all the affirmative defenses interposed by respondents are true and supported by the evidence. This finding can only be construed as a legal conclusion and a finding that the factual matters alleged in support of such defenses are true. The facts alleged, even if accepted, do not support the defenses, and even if the finding be deemed one of ultimate fact, a reversal of the judgment is nonetheless required, for the case is brought within the rule that "where it clearly appears that the ultimate fact found is based upon and adduced from the findings of probative facts, and it is plain that the latter do not justify nor support the ultimate fact found, that the findings of probative facts will control * * * and so deprive the judgment of support." Whitney v. Redfern, 41 Cal.App.2d 409, 106 P.2d 919, 921; Geer v. Sibley, 83 Cal. 1, 23 P. 220; Lamanet v. Lamanet, 18 Cal. App.2d 402, 63 P.2d 1195. The trial court's alleged finding of the ultimate fact that respondent Beach was and is the owner of the Alameda property and that appellants have no right, title, interest, or claim in or to said property clearly falls within this rule.

That part of the judgment quieting the title of respondent Mildred Tellier to the San Francisco property is affirmed; that part of the judgment quieting the title of respondent Frank Beach to the Alameda County property and decreeing that appellants have no interest therein is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., and SCHAUER, J. pro tem., concurred.

55 Cal.App.2d 258

PEOPLE v. BEATTY.

Cr. 3606.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

1. Infants ⇐20

Conflicting evidence sustained conviction of violation of statute relating to crimes against children. Pen.Code, § 288.

2. Criminal law ⇐1159(3)

A reviewing court will not reverse a conviction solely because of contradictory testimony.

3. Infants ⇐13

Proof of a licentious act is sufficient to justify conviction of violation of statute relating to crimes against children. Pen. Code, § 288.

4. Infants ⇐20

In prosecution for violation of statute relating to crimes against children, fact that testimony of two of prosecution witnesses differed in some particulars was not fatal to a conviction. Pen.Code, § 288.

5. Infants ⇐20

Testimony of seven-year old girl which was clear and intelligible and which was not impeached by uncertainties or contradictions was sufficient to sustain conviction of violation of statute relating to crimes against children. Pen.Code, § 288.

6. Sodomy ⇐6

Evidence sustained conviction of violation of statute relating to sexual perversion. Pen.Code, § 288a.

7. Sodomy ⇐7

Where there was positive and direct testimony of defendant's violation of statute relating to sexual perversion, jury could reject any testimony offered and any reason suggested for holding defendant not guilty. Pen.Code, § 288a.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

William E. Beatty was convicted of two violations of the statutes relating to sexual offenses. From the judgments of conviction and from an order denying his motion for a new trial, he appeals.

Judgments and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order denying his motion for a new trial and from two judgments of conviction for violation of sections 288 and 288a of the Penal Code. The sole ground of appeal is the insufficiency of the evidence.

The facts established by the witnesses for the prosecution are as follows: On September 21, 1941, one William Buckham, accompanied by his wife and two little girls, and defendant and his two children, visited Elysian Park for a picnic. Before departing for the park both Buckham and defendant imbibed two cans of beer. Upon their arrival at their destination they found it necessary to return some of the beer purchased at a store along the way. Thereupon the entire party entered the automobile. Defendant took his place on the back seat with the two little girls, Irene and Viola Roberts, and his own two sons. He sat next to Irene, a child seven years of age. On the way to the store he put his hand inside her slacks near the groin, and in a whisper asked her if it felt good. On observing such act of defendant Mrs. Buckham asked Irene to come over onto the front seat. That the child did so was admitted by defendant.

Upon reaching the store Mr. Buckham entered the establishment. Defendant then told Mrs. Buckham that he was going behind the market to cover a drunk man with some boxes so the police would not catch him. Having remained in the store about thirty minutes, Buckham returned to his car, from which, after he had changed its position, he and his wife witnessed defendant and the drunk man behind the store engaged in an act forbidden by section 288a. On being called by Buckham, defendant joined the party and they drove home.

[1, 2] As to the violation of section 288, defendant and his thirteen-year-old son gave testimony contradictory to that of the prosecution's witnesses, from which fact it is contended that such adverse testi-

mony should upset the verdict. However, such contradictions were resolved by the jury against defendant. The reviewing court will not alter or reverse a conviction solely because of contradictory testimony. People v. Marble, 8 Cal.2d 139, 141, 64 P.2d 135.

[3] Next it is asserted that a mere licentious act was not sufficient to justify a conviction, citing People v. Stouter, 142 Cal. 146, 75 P. 780, and People v. Grinnell, 9 Cal.App. 238, 98 P. 681. These authorities are not in the slightest degree applicable. In the Stouter case the child victim testified that defendant did not do the act alleged in the information. The jury, having reported that they could not agree, were then instructed that they might find him guilty of an attempt to commit the crime. Such instruction, given under the circumstances detailed, was held to be a most dangerous interference with the right of a defendant to a fair trial and reversed the conviction of attempt to commit the act. In the Grinnell case the decision determined merely the insufficiency of the indictment for a violation under section 288.

Appellant arrays a series of circumstances in proof of a lack of vicious intent. Not only circumstances but spoken testimony also may be recited as proof of defendant's innocence. But such evidence does not avail appellant where it was met in the trial court with an array of circumstances as well as with credible testimony not inherently improbable. It is argued that because the rear seat of the automobile was exposed to the view of all of the occupants of the car as well as to the public it is unthinkable that a person of reasonable intelligence and in defendant's position would be so bold as there to commit so reprehensible an act. But men possessed of criminal tendencies do not always exercise cunning. One who is so vile as to perpetrate vicious acts condemned by his contemporaries and denounced by statute seldom proceeds like the "paragon of animals." His blundering effort instantly to consummate his wicked impulse or design usually impels him to scorn discretion and abjure prudence. Folly is the hand maiden of perverted instincts. The only difference between those who find out secret places for their villainies and those who act without restraint is that the former are timid while the latter are bold. But boldness in execution does not erase the guilt from a criminal act.

[4, 5] That the testimony of Mrs. Buckham differed in some particulars from that of Irene is not fatal or unusual. It is a constant fashion that truthful witnesses differ in their recitals of the details of an event. Memories do not function perfectly. Some matured persons often gather impressions inaccurately and many of them report occurrences differently. Irene's testimony was both clear and intelligible. Coming from the lips of an innocent child it was persuasive. It bore neither the badge of insincerity nor was it impeached by uncertainties or contradictions. Such testimony is sufficient to warrant a conviction. People v. Asavis, 27 Cal.App.2d 685, 81 P.2d 595. The jury heard her testimony from the stand, and as triers of the facts their verdict is final when supported by such testimony as she gave. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Newland, 15 Cal.2d 678, 104 P.2d 778. But she was corroborated by Mrs. Buckham, who testified that upon witnessing the act, she asked Irene to join her in the front seat of the automobile.

[6, 7] Defendant's violation of section 288a is established by positive and direct testimony. Both Mr. and Mrs. Buckham witnessed the act. If the jury believed them, any number of arguments as to the manner in which defendant might otherwise have chosen the place for the commission of such an act is of no avail. The jury was constitutionally empowered to reject not only any testimony offered but also any reason which might have been suggested for holding the defendant not guilty. People v. Quinn, 12 Cal.App.2d 752, 754, 55 P.2d 1277. Because contradictions may have appeared in the testimony of Mrs. Buckham with reference to either crime, or because slight inconsistencies may have appeared in the testimony of the child concerning the act in which she was involved, affords no occasion for rejecting the testimony of either of them. People v. Quinn, supra.

The order denying the motion for a new trial and the judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

55 Cal.App.2d 396

LADY v. WORTHINGHAM.

Civ. 13814.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

1. Appeal and error ⇐761

In order to comply with the requirements of rule that brief must present each point separately under an appropriate heading showing the nature of the question to be presented or the point to be made, appellant's assignments of error should take the form of propositions which if sustained would lend substantial support to appellant's request for a reversal of the judgment of lower court. Rules for the Supreme Court and District Courts of Appeal, rule 8, § 2.

2. Appeal and error ⇐767(1)

Appellant's opening brief containing only the headings "preliminary statement, statement of the case, argument, disqualification of the trial judge, conclusion", did not comply with rule requiring that brief must present each point separately under an appropriate heading showing the nature of the question to be presented or the point to be made and brief would be stricken and appellant allowed a reasonable time within which to file an opening brief complying with the rule. Rules for the Supreme Court and District Courts of Appeal, rule 8, § 2.

3. Appeal and error ⇐766

Where appellant's opening brief was stricken from the files because of failure to comply with court rule, respondent's motion to dismiss or affirm on the ground that the appeal was sham, frivolous and unsubstantial would be denied since it could not be assumed that appellant would file a brief which would be sham, frivolous, or unsubstantial.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action between William Ellis Lady and Catherine A. Worthingham. From the judgment rendered, William Ellis Lady appeals. On motions of respondent to strike the opening brief of appellant, and to dismiss or affirm the appeal.

Motion to strike opening brief granted with a reasonable time within which to file another brief, and motion to dismiss or affirm denied.

William Ellis Lady in pro. per., and Webster Hazlehurst, both of Los Angeles, for appellant.

Howe & Finch, of Palo Alto, and Horowitz & McCloskey, of Los Angeles, for respondent.

McCOMB, Justice.

These are motions:

(1) To strike the opening brief of appellant on the ground that it does not present each point separately under an appropriate heading showing the nature of the question or point to be made as required by the last paragraph of section 2, rule VIII, Rules for the Supreme Court and District Courts of Appeal (Larmac Consolidated Index to Constitution and Laws of California [1941] 1623);

(2) To dismiss or affirm the appeal on the ground that the appeal is sham, frivolous, and unsubstantial.

These are the facts:

[1] August 17, 1942, appellant filed in this court a document denominated "Opening Brief on Behalf of Plaintiff and Appellant." This brief contained the following headings only:

(1) Preliminary statement.

(2) Statement of the case.

(3) Argument.

(4) Disqualification of the trial judge.

(5) Conclusion.

I. Section 2, rule VIII, Rules for the Supreme Court and District Courts of Appeal reads as follows:

"The brief or petition must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." Larmac Consolidated Index to Constitution and Laws of California [1941] 1623.

[1,2] It has been repeatedly held that, in order to comply with the requirements of the foregoing rule, appellant's assignments of error should take the form of propositions, which if sustained would lend substantial support to appellant's request for a reversal of the judgment of the lower court. (Chichester v. Bank of America, 51 Cal.App.2d 146, 148, 124 P.2d 99). It

is obvious that appellant's brief in the instant case does not meet the requirements of the foregoing rule. Therefore, pursuant to section 4 of rule VIII, supra, the brief should be stricken and appellant allowed a reasonable time within which to file an opening brief meeting the requirements of the court rule.

[3] II. The second motion must be denied, for the reason that we assume that appellant will not file a brief which is sham, frivolous, or unsubstantial.

For the foregoing reasons appellant's opening brief is stricken from the record and appellant is allowed twenty days from the date of the filing of this opinion within which to file an opening brief which will comply with the rules of this court.

The motion to dismiss or affirm is denied.

MOORE, P. J., and W. J. WOOD, J., concurred.



GUARANTEE INS. CO., LIMITED MUTUAL, v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 13804.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

Hearing Granted Dec. 31, 1942.

1. Workmen's compensation ⇐1426

Mere proof that a person had obtained from insurer a workmen's compensation policy would support a finding that such person was a "soliciting agent", if anything, for insurer but not a finding that he had any authority to write, issue, or deliver another insurance policy binding on insurer.

See Words and Phrases, Permanent Edition, for all other definitions of "Soliciting Agent".

2. Insurance ⇐87

A mere soliciting agent or other broker operating between the insured and the insurer has only authority to initiate contracts and does not have authority to consummate them, and neither can he bind the principal by anything he may say or do during the preliminary investigations.

3. Workmen's compensation ⇐1384

Where there was no evidence that one undertaking to procure workmen's compensation policy had any authority to write, issue or deliver policy binding on insurer, evidence that such person stated when he accepted a check as a deposit on premium, that employer would be covered, was immaterial.

4. Workmen's compensation ⇐1426

Evidence was insufficient to support finding of Industrial Commission that person undertaking to make an oral contract of insurance was the agent of insurer with authority to make an oral contract of insurance.

5. Workmen's compensation ⇐208

The real test of what constitutes a "special employer" lies in the character of the control exercised by the alleged special employer over the work and the employee engaged in the performance, and it must appear either by terms of contract or during the course of its performance that employee of general employer came under the control of the other party to the contract, and suffered injury as the result of such direction and control.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employer".

6. Workmen's compensation ⇐208

Where deceased employee while engaged on work resulting in fatal accident was taking his directions exclusively from his employer, and there was no evidence that by terms of agreement, or during performance of his work, employee came under control of another, or that injury was result of control of such other person, latter was not the "special employer" of deceased employee, and his dependents could not avail themselves of compensation insurance carried by such other person.

MOORE, P.J., dissenting.

Petition by Guarantee Insurance Company, Limited Mutual, to review an order of the Industrial Accident Commission awarding compensation for death to the dependents of Lowell Havener, which was opposed by Bessie Novak and another.

Award annulled.

* Subsequent opinion 139 P.2d 905.

J. L. Kearney and Herbert S. McCartney, Jr., both of Los Angeles, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Fransisco, for respondents.

McCOMB, Justice.

Petitioner seeks to annul an order of respondent Industrial Accident Commission directing petitioner to pay compensation benefits to the dependents of Lowell Havener, which order is predicated upon a finding that petitioner was the insurance carrier for respondent Al Novak.

The evidence being viewed in the light most favorable to respondents, the essential facts are:

Respondent Bessie Novak operated a junk business known as the Gate City Junk Company in the city of San Bernardino. Respondent Al Novak, Bessie Novak's son, operated a similar business known as the Gate City Wrecking Company, in the city of Ontario. Respondent Bessie Novak, learning that a quantity of pipe was to be sold at auction in the city of Sacramento, asked respondent Al Novak to go to said city and attempt to buy some of the pipe for her. This the latter did, purchasing a quantity of pipe at the auction sale. He then telephoned his mother, telling her the facts and asking her to send a conveyance to take the material to San Bernardino. She told him that she had no truck available and asked him to have one of his trucks operated by men regularly in his employ go to Sacramento and transport the material to San Bernardino. This her son objected to, for the reason that he had no workmen's compensation insurance. His mother then asked him why he was operating his business without workmen's compensation insurance, to which he replied he was short of money. Mrs. Novak then told him that she would pay the premium on a workmen's compensation insurance policy for him and that he could reimburse her later. After the telephone conversation Mr. Novak telephoned his place of business at Ontario and told his manager to arrange for two of his employees to come to Sacramento with one of his trucks to transport the purchased material for his mother. This was done, Mr. Novak's manager sending two employees named Mike Williams and Lowell Havener. The understanding between the respondents Novak was that the employees were to be paid for their work by Mrs. Novak.

October 14, 1941, Mrs. Novak telephoned Mr. Carroll Strachota, an agent who had sold her a policy of workmen's compensation insurance covering her business, in which petitioner was the insurer. She requested Mr. Strachota to write a policy of workmen's compensation insurance for her son covering her son's business, and gave him a check for $195 on account of the premium.

October 16, 1941, while the pipe which Mr. Novak had purchased was being brought to San Bernardino on one of Mr. Novak's trucks, an accident occurred resulting in the death of Lowell Havener. October 17, 1941, Mr. Strachota wrote petitioner asking it to write a workmen's compensation insurance policy dated October 14, 1941, with respondent Mr. Novak as employer. This petitioner declined to do.

It is necessary for us to determine two questions, which will be stated and answered hereunder seriatim.

First: Was there substantial evidence to support the finding of respondent commission that Carroll Strachota was the agent of petitioner with authority to make an oral contract of insurance?

[1-3] This question must be answered in the negative. The record is devoid of any evidence that Mr. Strachota was the agent of petitioner or that he had any authority to write, issue, or deliver an insurance policy binding petitioner. It is true that he had obtained from petitioner as insurer a workmen's compensation insurance policy for Mrs. Novak. However, this fact could only support a finding that he was a mere soliciting agent, if anything, for petitioner. The rule is established in California that a mere soliciting agent or other broker operating between the insured and the insurer has only authority to initiate contracts and does not have authority to consummate them, neither can he bind the principal by anything he may say or do during the preliminary negotiations. (Iverson v. Metropolitan Life Insurance Co., 151 Cal. 746, 751, 91 P. 609, 13 L.R.A., N.S., 866). It is therefore immaterial that Mr. Strachota told Mrs. Novak that "her son would be covered," when he accepted a check for $195 as a deposit on the premium for the insurance policy she had requested. Stark v. Pioneer Casualty Co., 139 Cal.App. 577, 34 P.2d 731, is inapplicable in the present case, for the reason that in such case it was conceded that the alleged agent was in

fact an agent of the alleged insurer, while in the present case the very question in issue is whether or not the alleged agent was in fact an agent of petitioner.

Second: Was respondent Al Novak the general employer and respondent Bessie Novak the special employer of Mr. Havener at the time of his death, thereby causing petitioner to be liable by the terms of the workmen's compensation insurance policy they had issued to Mrs. Novak?

[4] This question must likewise be answered in the negative and is determined by the following rule which is succinctly and accurately stated in Campbell's Workmen's Compensation (1935), volume 1, 410, section 454, as follows:

[5] "The real test of what constitutes special employment lies in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in its performance. *It must appear, either by the terms of the contract or during the course of its performance, that the employee of the general employer came under the direction and control of the other party to the contract and suffered injury as the result of such direction and control.* The right to or the actual exertion of control must exist. *The alleged employer must be in control of the work so that he can at any time stop or continue it and determine the way in which it shall be done, not merely in reference to the result to be reached but as to the method of reaching the result.*" (Italics added.)

Applying the foregoing rule to the facts of the instant case, it is apparent that the deceased employee Mr. Havener went to Sacramento at the direction of respondent Al Novak, and received and took his instructions from the same respondent at all times to and including the time of the injury which resulted in his death.

There is no evidence that either by the terms of an agreement with her son or during the performance of his work did Mr. Havener come under the direction or control of Mrs. Novak.

[6] There is likewise a total absence of evidence that the injury he suffered was the result of the direction or control of Mrs. Novak. It is therefore clear that Mrs. Novak was not the special employer of the deceased employee, and his dependents may not avail themselves of the Workmen's Compensation Insurance policy petitioner had issued in favor of Mrs. Novak.

For the foregoing reasons the award of the Industrial Accident Commission dated March 24, 1942, against petitioner is annulled.

GOULD, J., concurred.

MOORE, Presiding Justice (dissenting). I dissent. Stark v. Pioneer Casualty Co., 139 Cal.App. 577, 34 P.2d 731.



55 Cal.App.2d 199

MILLER v. MILLER et al.

Civ. 13666.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

As Amended on Denial on Rehearing Nov. 20, 1942.

Hearing Denied Dec. 24, 1942.

1. Appeal and error ⇐1010(1)

The power of an Appellate Court to upset a judgment arises only after it has decided that there is no substantial evidence to support the judgment.

2. Trusts ⇐44(2)

In action by daughter by former marriage of deceased against surviving widow and daughter by second marriage to declare a trust and to determine adverse interests in certain real properties which had been conveyed by deceased to surviving wife and daughter by second marriage finding that properties were so conveyed not merely to qualify grantees as sureties on supersedeas bond given by deceased but also to avoid creation of a trust and that defendants were absolute owners in fee simple of the properties and that plaintiff had no right, title and interest in them was sustained by the evidence.

3. Husband and wife ⇐266

As "community partners" husband and wife were free of restrictions to make a gift of all they owned to the other and decedent's gift of the community estate to his wife or with her consent to his daughter met with no inhibition in the law, and love and affection was a "sufficient considera-

tion" for such conveyance. Civ.Code, §§ 678, 682, 687.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Partners" and "Sufficient Consideration".

4. Evidence ⇐313

Declarations by decedent that he preferred not to deed properties to surviving wife and daughter because of fear they might not be returned to decedent after litigation had terminated and that conveyance would not be made unless they reconveyed the properties to decedent were of no value where undisputed proof showed that decedent had been advised by counsel that the conveyance must be absolute, that grantees would not hold the properties in trust, that after clearly understanding the matter conveyance was made, and that no mistake, accident, fraud or duress existed.

5. Trusts ⇐44(3)

A parol agreement to create a trust of properties conveyed by grant deed can be established only by clear, convincing, and conclusive evidence.

6. Trusts ⇐342

Equity will not subject trust property to the satisfaction of judgments against the trustees personally.

7. Trusts ⇐44(2)

Declarations by decedent that he wanted no reconveyance of property theretofore deeded to wife and daughter, since property was where he wanted it, that he saw no reason for asking for a deed back and paying another gift tax and that he was going to leave the property where it was overcame the evidentiary value of circumstances tending to show that the decedent was real owner of property and that a trust existed in his favor and constituted an "affirmance" of absolute deed theretofore given.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmance".

8. Wills ⇐433

Reference in will as belonging to testator, property theretofore absolutely deeded to wife and daughter was not binding upon grantees, and did not require court to believe that decedent thereby intended to annul all that he had done in the execution of conveyance to wife and daughter.

9. Deeds ⇐177

A grantor of lands is "estopped" to repudiate his grant by a subsequent declaration either in his will or by a parol utterance to third parties, and a solemn instrument, such as a grant deed, cannot be defeated by an informal statement to which the grantee was not even a witness.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Wills ⇐6

The last will of a testator has its own sphere of operations and when drawn with statutory precision is potent in effecting the succession of an estate, but if the author has seen fit to make gifts of his property inter vivos, his final testament becomes only a flourish, and perhaps only the expression of his heart's desire on day of its execution.

W. J. WOOD, J., dissented.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Emma Miller against Agnes Miller and another to declare a trust and to determine adverse interests in certain real properties. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Willcox & Judson and Rupert B. Turnbull, all of Los Angeles, for appellant.

John C. Mead and Fred W. Heatherly, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant commenced this action to declare a trust and to determine adverse interests in certain real properties. Upon all material issues the findings of the court were against her contentions. She brings this appeal to test the merit of the judgment pronounced thereon.

The assignments of error are as follows: (1) the findings of fact have no substantial support in the evidence; (2) the decision is not supported by the findings and is against the law.

Plaintiff is a daughter of decedent Robert Miller by a former marriage. Respondent Agnes Miller is his surviving wife and Louise is his daughter by Agnes. For the

sake of brevity they will be referred to by their first names.

After 1885 Robert was married to the mother of Emma. About 1907 he was married to Agnes. Prior to his first marriage he engaged in the curled hair business on Avenue 20 in Los Angeles and continued in the operation of that business until his decease October 3, 1935. Subsequent to his marriage to Agnes, they accumulated a large amount of property including the properties involved in this action. In December, 1932, he incorporated the Robert Miller, Inc. which managed all properties until Robert's decease, and transacted all business theretofore done by him. He caused all of its capital stock to be issued to himself and thereafter transferred two shares to qualify Agnes and Louise as directors.

In 1930 Robert became involved in litigation with one Rosenfeld. This action resulted in a judgment against Robert in the sum of $16,968. On April 12, 1932, appeal was taken to the Supreme Court. Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161. To stay execution a supersedeas bond was executed by two sureties who failed to justify on July 18, 1932. Twenty-six days later execution was issued and levied upon the property on Avenue 20. Five days later the chief justice granted a writ of supersedeas requiring Robert to file a bond in the Supreme Court in the sum of $34,000 to be approved by the court. Judge Archbald of the superior court was commissioned to justify the sureties upon the bond to be filed. On the 4th of August, a bond by Franklin Bond & Indemnity Corporation was held insufficient. Again decedent applied for a writ of supersedeas which was granted.

On the 23rd day of December he posted a bond executed by Agnes and Louise, which was likewise referred to Judge Archbald for justification. Findings by Judge Archbald were reported to the Supreme Court upon which the bond signed by Agnes and Louise was approved. In order to indemnify the Franklin Bond and Indemnity Corporation, Robert and Agnes conveyed to it by deed all of the property involved in this action. Upon the failure of that bonding company to qualify, it reconveyed to Robert by quitclaim deed. In order to qualify Agnes and Louise upon the supersedeas bond which they had given in the Rosenfeld case, on December 23, 1932, Robert conveyed to them all of the property involved in this action. During the period in which the Rosenfeld judgment was entered and appealed, another judgment was entered in the Superior Court of Los Angeles County against Robert for the sum of $3,316.64 in favor of the Carsten's Packing Company. This case likewise was appealed and a stay bond was executed by Agnes and Louise as sureties. Carstens Packing Co. v. Miller, 10 Cal.App.2d 48, 51 P.2d 161.

Robert died October 3, 1935. The Rosenfeld judgment was reversed and terminated prior to his decease. The judgment in the Carsten's Packing Company action was affirmed two months after the death of Robert and thereafter satisfied. By his last will executed on the 19th day of September, 1935, Robert bequeathed all of his property in equal shares to Emma and Louise. By the same instrument he referred to the Sierra Madre property as "my property" and directed disposition of it after his demise. The executor named by decedent in his will having declined to sue for the recovery of the property described in the complaint, Emma filed this action on March 12, 1938, to recover for the estate all of the property conveyed by Robert to Agnes and Louise, upon the theory and claim that they were not the actual owners but that they held the titles in trust for Robert and for his use and were resulting trustees by reason of the circumstances under which they received the property. All of the material allegations of the complaint were put in issue by the answer of respondents.

The findings of the court are substantially as follows: that the title of the twenty-one parcels of realty described in the complaint stood of record in the name of respondents at the time of the decease of Robert; that they are now the actual owners; that they never held the title as trustees for Robert; that upon Robert's request, Agnes and Louise qualified and justified as sureties upon a supersedeas bond; that the conveyance of the properties was not made solely for the purpose of qualifying respondents as sureties; that at the time of justifying as sureties, defendants testified in the presence of Robert that they were the owners in fee simple of said properties; that there was never an agreement to reconvey the properties to Robert; that the conveyance of said properties was intended by Robert to vest the legal and equitable title to the properties in respondents and to make them absolute owners thereof; that it was not agreed that the conveyance

was for the purpose solely of qualifying respondents to justify on the supersedeas bond; that Agnes and Louise never agreed at any time to reconvey the properties to Robert; that the Rosenfeld action was appealed, reversed and terminated; that prior to the death of Robert, Agnes and Louise did not by deed reconvey the properties to him; that at all times after the conveyance to respondents, they were the owners and are now the owners in fee simple of all the properties and the deed is of record in the official records of Los Angeles County; that at the time of the conveyance Robert and Agnes were husband and wife and lived together and continued to so do until his decease; that Robert considered respondents to be the owners in fee simple; that after the conveyance he did not exercise undisputed, uncontrolled and absolute dominion over the properties until his death; that Robert published his last will and testament September 19, 1935; that it was probated in the Superior Court of Los Angeles County; that the executor named was made a party defendant herein because he refused to be a plaintiff; that Louise was substituted as administratrix with will annexed and she likewise properly refused to bring the action; that by the terms of his last will, Robert expressed no intention that he considered the properties to belong to him; that the properties were conveyed for a good consideration; that there is no obligation upon the part of respondents to reconvey the properties to Robert's estate; that the conveyance was made for the consideration of love and affection for the reason that Robert expressly desired to avoid the creation of a trust in respondents; that the conveyance to respondents was not made to hinder, delay or defraud creditors; that it was made for the purpose of creating a freehold interest in Agnes and Louise and with the avowed intention of avoiding the creation of a trust; that after the receipt of the conveyance respondents executed a supersedeas bond in the Rosenfeld case and were required to justify; that at the time of the justification Rosenfeld contended that Robert could not qualify sureties by a conveyance to them of his own property; that such contention was argued before the Supreme Court of California which thereafter decided contrary to such contention and approved the bond executed by respondents as sureties. Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161.

Upon such findings, the court concluded that respondents are absolute owners in fee simple of the properties and that their titles should be quieted to all of the properties; that they have never held the properties in trust for decedent or for anyone, and never reconveyed them to decedent prior to his decease; that at the time of the conveyance Robert did not intend to impress a trust and did not impress a trust of any kind upon the properties; that the actions are barred by the statute of limitations; that plaintiff is barred from claiming an interest in any portion of the properties; that she is estopped from claiming ownership; that she has no right, title or interest in or to any portion of the properties.

The evidence concerning the events which were given in proof for the purpose of establishing a trust and for the purpose of defeating it is sharply conflicting. The position of appellant as an heir at law of decedent appeals strongly to every sentiment of the human breast. She is kin of the first degree, in fact, the first born of the decedent. She came to him in the early years of his manhood and was the child of his first mate. There is no intimation that she was ever disloyal to, or neglectful of, the interests of her father. To decree that she is an outcast and entitled to no share in the estate of her father, contrary to his express bequest and under such circumstances as above recited appeals to us to operate an injustice.

[1, 2] But the power of the appellate court to upset a judgment arises only after it has decided that there is no substantial evidence to support the judgment. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Albaugh v. Mt. Shasta Power Corporation, 9 Cal.2d 751, 773, 73 P.2d 217; Shapiro v. Shapiro, 127 Cal.App. 20, 14 P.2d 1058. Therefore, since we find that there is such evidence we can do no more than certify that the findings have substantial, evidential support and that the judgment must accordingly be approved. We cannot say upon a consideration of the whole case, that the judicial discretion has been abused.

[3] Prior to his conveyance of the properties to respondents, decedent was absolute owner thereof except as his ownership was qualified by the community interest of his wife. Civ.Code, §§ 678, 682, 687. As absolute owner he was at liberty to dispose of his property as he wished. As community

partners he and his wife were free of restrictions to make a gift of all they owned. Decedent's gift of the community estate to his wife, or with her consent, to his daughter Louise, meets with no inhibition in the law. Love and affection is a sufficient consideration for such conveyance. 26 C.J.S., Deeds, p. 193, § 18.

Appellant contends that because of the occurrences immediately preceding and at the time of the execution and delivery of the deed to respondents, and by reason of the necessitous circumstances of decedent at the time of the conveyance requiring a supersedeas bond, and because of the conduct of decedent with reference to the properties following the conveyance, all of the testimony of respondents to the effect that the conveyance was intended as a gift to them is of no substantial value.

[4, 5] It is true that there was some evidence that prior to the execution of the conveyance decedent declared his preference not to deed the properties to Agnes and Louise because of his fear that they would not be returned to him after his litigation had terminated and that he would not do so unless they reconveyed to him. Also there is evidence that both respondents stated at the time of the negotiations that they would reconvey the properties if requested to do so by decedent. Agnes denied the statements attributed to decedent but appellant advanced no sufficient proof, argument or authority to meet the uncontradicted evidence that decedent was advised that if a contemporaneous reconveyance were made to him by respondents, the deed to them would be of no value and they could not justify as sureties. He was instructed that the conveyance must be absolute; that he might not regain title to his property; and at the time he stated that he understood the significance of the conveyance but that it was the only thing he could do. Thus, it was made clear to the grantor that his grantees would not hold the properties in trust but that his deed would vest title absolutely in them. The discussions preceding the conveyance, including the advice of competent counsel, leave no doubt that decedent acted with knowledge; that he was not under duress; that he was not the victim of a mistake, accident or fraud. Of course if a promise had been made in order to obtain the deed and that promise had been violated by the grantees, such would have been a situation that would require a different conclusion. In the absence of such showing, it must be held that so far as the declarations made by the parties prior to the conveyance, the instrument was intended to be what it purports to be. Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543. A parol agreement to create a trust of properties conveyed by grant deed can be established only by clear, convincing and conclusive evidence. Ibid.

[6] Acting under the advice of counsel, decedent must have known, and he did know, that if he should convey the property in trust, respondents could not qualify as sureties on his appeal bond. Equity will not subject trust property to the satisfaction of judgments against trustees personally. Murphy v. Clayton, 113 Cal. 153, 161, 45 P. 267; Breeze v. Brooks, 71 Cal. 169, 9 P. 670, 11 P. 885.

Appellant proposes that where a continuing promise is made in good faith, its breach effects a constructive trust by operation of law, citing Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430, and Cooney v. Glynn, 157 Cal. 583, 108 P. 506. Under the findings here, however, neither her proposition nor her authorities are apropos. In the Lauricella case the defendant took title from her husband in trust for the benefit of herself and her husband's parents. She attempted to defeat the trust on the theory that it was void as being in violation of statutes then existing, 847, 857, Civ. Code, forbidding an express trust in real estate whose purpose was to have the trustee convey to a third person. It was held however that a constructive trust was created by reason of her false promise to perform the agreement admittedly made with her husband. In the Cooney case, Glynn had taken title to the property of his mother who resided with him with the express understanding that he should hold the property in trust for his sister, the plaintiff. For years he frankly avowed the trust, only later to repudiate it after he conceived that time had eliminated all evidences of his obligation. It was his violation of his parol promise out of which the trust arose.

With reference to the occurrences subsequent to the delivery of the deed, it is argued that there was no change in the behavior of the decedent toward the properties; that he told Mr. Beuttler that he made the conveyance to respondents so they could qualify on his bond; that, although he conveyed the properties to respondents, he caused all of the collections from the properties to be entered on the books of his corporation and all payments for taxes and

other expenses of the properties to be made by the corporation; that not only did Louise keep the books of the corporation and make the entries of collections and disbursements but that neither did she nor her mother ever assert control over the properties; that practically the only money from the properties received by Louise was that paid her for keeping books; that neither she nor her mother had a separate bank account; that the widow stated to Judge Archbald, when justifying on the supersedeas bond, that she would deed the properties back to decedent "if he asked me." From these facts it is contended that an absolute alienation could not have been intended by either the grantor or the grantees.

[7] But in spite of these circumstances, it appears to have been established to the satisfaction of the trial court: that decedent was advised, prior to the conveyance, that the deed was irrevocable; that his counsel stated to him their fears that if the trust relation should appear it would defeat the purpose of the conveyance; that at the hearing before Judge Archbald, decedent and his counsel heard the testimony of Agnes to the effect that she had made no agreement with or promise to decedent to reconvey the properties to him; that decedent never asked for a reconveyance of the properties; that decedent paid a gift tax; that in discussions with reference to a reconveyance decedent objected to the payment of another gift tax in order to regain title and ownership and he declared to his counsel that "the property was where he wanted it anyhow, he saw no reason for asking for a deed back and paying another gift tax on it; that he was going to leave the property where it was." If this was the attitude of his mind after the conveyance, it was sufficient evidence, if believed, to overcome the evidentiary value of all the circumstances recited by appellant in support of her contention. Such declarations by decedent were sufficient to evince an affirmance of the absolute grant to his wife and daughter. In view of such disclosures it was not an unreasonable inference that after thus confirming his grant, decedent chose to devote his remaining years to the preservation of the estate which he and his wife had accumulated and that it was the preference of his two beneficiaries that he continue in the exercise of his experienced judgment rather than that they should too hastily embark upon a joint managerial career.

Because the widow testified that she would have given the properties back to decedent if he had asked her to do so appellant fallaciously concludes that an agreement by respondents with decedent to reconvey has been established and that therefore under such agreement the estate is entitled to such reconveyance, citing Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294. But in that case the decedent made a conveyance of his properties to his son under the latter's promise to reconvey if the grantor should request it after the threatened litigation should have run its course. He never thereafter confirmed his deed as a gift, hence the promise constituted an agreement. In the instant case, under conflicting testimony, the court found specifically that decedent intended by his deed "to vest the legal and equitable title * * * and to make them absolute owners thereof."

[8-10] Referring to the reference in his will to one of the parcels as "my Sierra Madre property" it was not incumbent upon the court to believe that decedent intended by such reference to annul all that he had done in the execution of the conveyance to respondents. Such statement was not binding upon his grantees. Chard v. O'Connell, 7 Cal.2d 663, 667, 62 P.2d 369; Bollinger v. Bollinger, 154 Cal. 695, 706, 99 P. 196. It may be declared to be the rule that a grantor of lands is estopped to repudiate his grant by a subsequent declaration either in his will or by a parol utterance to third parties. A solemn instrument, such as a grant deed, cannot be defeated by an informal statement to which the grantee was not even a witness. If so, no title would be secure against attack if the author survived the last conveyance or ex parte declaration. The last will of a testator has its own sphere of operations and when drawn with statutory precision is potent in effecting the succession of an estate. But if the author may have seen fit to make gifts of his properties inter vivos, his final testament becomes only a flourish and perhaps only the expression of his heart's desire on the day of its execution.

From the foregoing we must conclude that the findings have substantial support in the evidence and that the decision based thereon is in accordance with law. In view

of such holding, it will be unnecessary to discuss the other points raised by appellants.

Judgment affirmed.

McCOMB, J., concurred.

W. J. WOOD, J., dissented.



55 Cal.App.2d 226

DE LA MOTTE et al. v. RUCKER.

Civ. 13764.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

Hearing Denied Dec. 24, 1942.

1. Appeal and error ⇐931(1)

In viewing evidence supporting trial court's finding, appellate court must accept all evidence and legitimate reasonable inferences therefrom tending to establish correctness of finding, consider evidence in aspect most favorable to prevailing party, and resolve every substantial conflict therein favorable to trial court's decision, regardless of appellate court's opinion as to weight of evidence.

2. Appeal and error ⇐1010(1)

The appellate court is without power to disturb trial court's findings supported by material credible evidence.

3. Appeal and error ⇐989

The appellate court's power in considering evidence begins and ends with determination as to whether there is any substantial evidence supporting trial court's judgment.

4. Appeal and error ⇐1012(1)

The trial court's judgment will not be upset by appellate court because preponderance of evidence is on losing party's side, but only where there is total absence of competent evidence supporting judgment.

5. Appeal and error ⇐1012(1)

The trial judge, in trial without jury, has sole right to believe or reject witnesses' testimony, and his judgment will not be disturbed on appeal because fact findings contrary to those made by him might have been upheld.

6. Automobiles ⇐244(11)

In action for damages sustained in collision between automobiles when defendant made U turn across highway in front of plaintiff's automobile, evidence *held* sufficient to support trial court's conclusion that it was defendant's duty to stay on side of highway opposite that on which plaintiff's automobile was approaching until it and other automobiles approaching from same direction had passed on and made it reasonably safe for defendant to cross highway. Vehicle Code, § 543, St.1935, p. 185.

7. Evidence ⇐589

A judge trying case without jury may select, in exercise of judicial discretion, any statement or testimony of defendant as basis of finding against him.

8. Automobiles ⇐201(1)

Where motorist has knowledge of another motorist's approach on public highway within distance rendering it impossible for first motorist to avoid collision with approaching automobile if he makes U turn directly in front of it, such a turn by him constitutes sole cause of ensuing collision therewith.

9. Automobiles ⇐244(36)

In action for damages sustained in collision between parties' automobiles, evidence that when plaintiff, driving at reasonable speed, reached point 100 feet from defendant's automobile, headed in opposite direction, defendant suddenly left position of safety on opposite side of highway and arched across highway into place of peril directly in front of plaintiff's automobile, without giving warning of such intention, warranted trial court's finding that defendant alone was responsible for collision. Vehicle Code, §§ 543, 544, 546, St.1935, pp. 185, 186; § 671, St.1937, p. 169.

10. Automobiles ⇐171(9)

A motorist, before starting U turn across highway in front of approaching automobile elsewhere than at intersection, must see that there is sufficient space for such movement to be made in safety. Vehicle Code, § 543, St.1935, p. 185.

11. Automobiles ⇐244(57)

In action for damages sustained in collision between parties' automobiles when

defendant made a U turn across highway in front of plaintiff's automobile, evidence *held* to warrant trial court's finding that plaintiff's conduct in applying his brakes intermittently, then gunning his motor to swerve sharply to right, and finally applying brakes solidly when about 50 feet from defendant's automobile was that of reasonably prudent person trying to avoid collision in emergency.

12. Appeal and error ⇐1008(1)

Whether a person acted with reasonable care under all circumstances in emergency created by another is question for trier of facts.

Appeal from Superior Court, Los Angeles County; Paul Palmer, Judge pro tem.

Action by Carl De La Motte and wife against Lyle W. Rucker for damages sustained in an automobile collision. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Lyle W. Rucker, in pro. per., of Los Angeles, for appellant.

Laurence B. Martin, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendant appeals from a judgment in favor of each of the plaintiffs who are husband and wife, in the aggregate amount of $4,450. The action arose out of a collision of the automobiles of the plaintiffs and defendant. The husband only will herein be referred to as the plaintiff. Defendant grounds his appeal upon the claim that the record shows no negligence on his part, but that on the contrary it establishes the contributory negligence of the plaintiff. The case was tried before a judge pro tempore without a jury.

The accident occurred on the 27th of August, 1940, about 6:35 o'clock p. m. on the Highway 101, 12 miles north of Oceanside. At the locus of the collision, the highway runs north and south; is level for several hundred yards. The paved portion is marked off into three lanes, each of which is 10 feet in width. The two outer lanes are constructed of concrete; the center lane, which is used for passing only, is made of black asphalt. On each side of the pavement is an oiled shoulder eight feet wide. Outside of each shoulder is a dirt apron of about 45 feet in width. The 27th of August was a holiday, and many people had congregated to witness the races at Del Mar. Following that event, an extra stream of traffic poured onto the highway in addition to the normal traffic flow. Plaintiff with his wife had attended the races, and was driving his Chevrolet northwards. Defendant perceived that the traffic was unusually heavy as he searched for a wide open space in the highway where he might effect a turn across the boulevard in order to direct his travel northward. He knew that he had to deal with a continuous stream of automobiles returning from the south. In search of a place for turning, defendant had stopped on the westerly oil shoulder with his lights burning and his car headed southward. When plaintiff reached a point at which he was 200 feet south of defendant, a continuous procession of automobiles followed him, each about 75 or 100 feet behind the other, all going at the same speed, except that of the witness Decker who attempted to pass the procession. When defendant first saw the Chevrolet approaching from the south, the latter car was about 150 or 200 feet distant. Without estimating its speed, without giving a signal for entering the boulevard or for making a "U" turn, and without blowing his horn defendant proceeded to describe the arc across the boulevard. After starting he did not look to see plaintiff's course. His drive across was continuous. Upon beholding defendant's car arching across the highway, plaintiff had no idea of its speed. But by the time the Chevrolet reached a point 100 feet from the De Soto, plaintiff became conscious of his peril; applied his brakes intermittently, thinking defendant would yield. Then, as if in a frenzy to avoid the De Soto, plaintiff gunned his motor in order to swerve sharply to the right of defendant's car. Feeling that such effort would fail, when about 50 feet away, he applied his brakes solidly. He skidded 41 feet on the pavement, and 50 feet on the shoulder to the point of impact on the dirt apron where the Chevrolet turned over two and a half times.

Defendant contends that such behavior of plaintiff proves that he had ample time to ponder over the matter. Such is an erroneous conclusion. Plaintiff was necessarily confused if not terrified by the emergency. Moreover, the time consumed in travelling the 50 feet before applying his brakes solidly was no longer than a flash—

no time to ponder. The testimony as to the speed of the De Soto, as it crossed the pavement differed. However, by the time it had reached the easterly oiled shoulder and headed northward, defendant had shifted to second gear, apparently to accelerate his speed. While the testimony as to the speed of plaintiff as he approached the locus of the impact varies, it was established by Mr. Decker, a disinterested witness, to have been about 45 miles per hour. When Decker attempted to pass the north-bound procession, he saw the De Soto 800 feet away, standing in its position on the west shoulder. It appeared at first to be the driver's intention to continue southerly. Although he did not watch the De Soto complete its "U" turn, he observed that its speed across the pavement was rapid. Following the impact, defendant stated to Officer Piper that at the time he started across the pavement, the Chevrolet was 150 or 200 feet to the south of him.

Under the situation as above described, plaintiff contends that he was confronted with an unexpected peril and that he acted in a reasonably prudent manner when he applied his brakes and swerved to the right in the effort to avoid a collision; that the impact resulted solely by reason of defendant's suddenly turning his De Soto in a "U" turn across the pavement into the midst of heavy traffic. On the other hand, defendant contends that not only did plaintiff's negligence contribute to cause the collision but that by reason of his excessive speed plaintiff was solely responsible for his misfortunes. Defendant's observations as to the unreliability of plaintiff's conflicting testimony will not receive further consideration for the reason the trial court disposed of such conflicts by making its own choice of his divers declarations as was done with respect to defendant's contrary declarations as to his distance when he first saw plaintiff.

[1-5] In viewing the evidence in support of a finding, it is incumbent upon the appellate court to accept all evidence and the inferences arising therefrom which tend to establish the correctness of the finding; also, it is required to consider the evidence in its most favorable aspect toward the prevailing party; it must accept the evidence in support of the finding as true and resolve every substantial conflict as favorable to the decision of the court (2 Cal.Jur. § 515, p. 879) whatever may be the opinion of appellate court as to the weight of evidence. Rules followed for the guidance of juries do not control reviewing courts. If there is material credible evidence in support of the findings of the trial court, the appellate court is without power to disturb them. Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 773, 73 P.2d 217. All conflicts here must be resolved in favor of respondent and all legitimate, reasonable inferences must be drawn in support of the findings below. The power of the appellate court "begins and ends with a determination as to whether there is any substantial evidence" in support of the judgment. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P. 2d 183, 184. Judgment of the trial court will not be upset because a preponderance is on the side of the losing party, but only where there is a total absence of competent evidence. Shapiro v. Shapiro, 127 Cal. App. 20, 14 P.2d 1058. The trial judge has the sole right to believe or reject the testimony of witnesses. Although contrary findings might have been upheld, the judgment for that reason will not be disturbed. Caldwell v. Taylor, 4 Cal.2d 686, 52 P.2d 213; Dellarowe v. Kirchner, 99 Cal.App. 599, 279 P. 210; C. I. T. Corp. v. Lawson, 23 Cal.App.2d 4, 72 P.2d 210.

[6] If the Chevrolet was proceeding at a speed of 40 to 45 miles per hour, as found from the testimony there was no negligence on the part of plaintiff with respect to his speed. Defendant told Officer Piper, immediately following the accident, that plaintiff was 150 feet to the south as defendant started across the highway and that the north-bound traffic was "exceedingly heavy." After observing the Chevrolet approaching him, defendant did not look again to observe the distance of the Chevrolet just as he started across the pavement and he did not look thereafter. Neither did he have a "definite opinion" as to its speed while it was approaching. He did not pause but his travel across the pavement was continuous. Moreover, plaintiff testified that, when he was 100 feet south of defendant while driving at 45 miles per hour, defendant quickly proceeded across the pavement and turned northerly in front of plaintiff; that he was not certain that defendant intended to continue across until he was within 55 feet of the De Soto; that he then applied his brakes and strove to avoid the collision.

Under such testimony it was incumbent upon the trial court to determine whether

defendant was cautious in crossing the boulevard or negligent and, if negligent, whether his negligence was the sole proximate cause of the collision. The court concluded that under the circumstances it was defendant's duty to maintain his station on the west side of the highway until the automobiles approaching him from the south should have passed on and have made it reasonably safe for him to cross the highway. Such decision finds substantial support in the evidence.

"No person shall start a vehicle stopped, standing or parked on a highway unless and until such movement can be made with reasonable safety." § 543, Veh.Code, St.1935, p. 185. Moreover, the evidence established it as a fact that defendant undertook to cross the highway without giving a signal. "No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after giving appropriate signal in the manner provided herein * * *." Veh.Code, § 544. Signals are to be given by the arm from the left side of vehicle (Veh.Code, § 546) and the driver must give an audible warning with his horn "when reasonably necessary to insure safe operation." Veh. Code, § 671, St.1937, p. 169. In view of the defendant's own testimony, as to the distance of the Chevrolet the first time he saw it, and its travelling speed, defendant cannot successfully contend that it was reasonably safe for him to undertake to cross the highway from his standing position on the westerly side, much more unreasonable would it have been for him to attempt the crossing if the Chevrolet had been proceeding at a speed of 60 miles per hour as contended by defendant.

[7] Defendant apparently conceived that because he corrected his statement to witness Piper as to the distance of plaintiff when first seen by defendant, this corrected distance should have been the basis of the court's finding. But it was the privilege of the court in the exercise of a judicial discretion to select any statement or testimony of defendant as the basis of a finding against him. However, the labors of the court were lessened by the testimony of plaintiff that defendant did not begin his turn until the Chevrolet was 100 feet south of the De Soto.

[8-10] From a consideration of only the statements and testimony of the defendant the trial court might reasonably have concluded that the defendant could not have attempted his crossing with reasonable safety to himself or to the motorists approaching from the south. Especially was the court's problem made easy of solution by the testimony of the witness Decker who made it clear that the heavy traffic made it perilous for a driver to attempt a "U" turn there. All measures for his safety required of defendant were omitted by him. Veh.Code, §§ 544, 546, 671. Where motorist A has knowledge of the approach of motorist B on a public highway within a distance which makes it impossible for B to avoid a collision, A's turn directly in front of B's oncoming automobile constitutes the sole cause of the collision. Sinclair v. Harp, 18 Cal.App.2d 167, 63 P.2d 876. If the court believed from all the evidence that when plaintiff reached a point 100 feet away while driving at a reasonable speed toward defendant and that defendant suddenly left his position of safety and arched across the highway into a place of peril without first giving a warning of his intention, we cannot say that the evidence does not warrant the court's finding that defendant alone was responsible. Dwelly v. McReynolds, 6 Cal. 2d 128, 56 P.2d 1232. If a motorist at an intersection is bound to exercise "great care" to avoid colliding with vehicles across whose paths he must travel over a highway (Donat v. Dillon, 192 Cal. 426, 429, 221 P. 193) then how much greater care is to be exercised by one who is not at an intersection, but who, none the less, moves onto the highway. Before starting to turn he must first see "that there is sufficient space for such movement to be made in safey." That defendant, at the scene of his "U" turn, faced a "very, very heavy stream of traffic" proceeding northerly, is his own confession. That each car in its line, including that of plaintiff, maintained a reasonable speed is a fact fairly deducible from the evidence.

In his very excellent brief defendant does not stress any care on his own part, but generously emphasizes the negligence of the plaintiff. He contends:

(1) That the excessive speed of plaintiff is established by the damage to the Chevrolet and the 91 feet of skid by plaintiff and his overturn after the impact;

(2) That if plaintiff had had his Chevrolet under control he could have stopped it behind the De Soto;

(3) That no signal was necessary to warn plaintiff of defendant's intention to cross the pavement. We have already disposed of defendant's failure to give a signal of his intention to cross the pavement.

Defendant argues that it is unreasonable to believe that plaintiff could have performed his skid and overturn two and one-half times while going at only 45 miles per hour. He was keeping his place in a procession that travelled about 45 miles per hour. The fact that he skidded 41 feet on the pavement and 50 feet on the shoulder is not in itself conclusive of his speed for the reason that 50 feet of the 91 feet of the skid was on the shoulder.

[11, 12] As to the control of his car by plaintiff, he testified that when he first observed defendant, the latter was 200 feet to the north, headed south standing on the extreme west side of the west oiled shoulder; that suddenly, without a signal, defendant started his movement across the pavement when plaintiff was about 100 feet away; that as he braked the Chevrolet he swerved sharply to the right to go round defendant and to get off the highway. In truth, so wide was the sweep of defendant that in swerving to avoid him plaintiff finally struck the De Soto on the dirt apron. In his final brief appellant takes umbrage at the language used by respondent in describing his drive across the boulevard as a "U" turn. Not only does the testimony of the witnesses prove a "U" turn by appellant, but exhibit 1, a chart prepared by Officer Piper, graphically portrays an acute arch embracing the pavement and portions of the shoulders. It further emphasizes the negligence of appellant in that he made a wide sweep across the highway, instead of "hugging" the center and leaving the easterly half of the road, for the use of the stream of approaching traffic as required in making a left-hand turn at an intersection. § 540, Veh.Code.

Plaintiff having been confronted with his sudden peril, it was not unreasonable for the trial court to find that his conduct in the situation was that of a reasonably prudent person trying to avoid a collision. If, as viewed now, he might have been more successful in acting otherwise than he did, such failure so to act is not proof of negligence because it did not turn out to be the wisest possible course open to him. In every such emergency it is a question for the trier of fact to determine whether the person acted with reasonable care under all the circumstances. In view of the finding and the evidence we cannot say that the plaintiff was negligent in the course he pursued. He had less than a second to consider his dilemma. Gamalia v. Badillo, 53 Cal.App.2d 375, 378, 128 P.2d 184.

The appeal from the order denying motion for a new trial is dismissed.

Judgment affirmed.

W. J. WOOD, and McCOMB, JJ., concurred.



55 Cal.App.2d 216

FAIRMAN v. MORS.

Civ. 13733.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

1. Automobiles ⇐181(1)

In construing automobile guest statute, it is the court's duty to ascertain the statute's meaning. Vehicle Code, § 403, St. 1935, p. 154.

2. Automobiles ⇐181(1)

The intention of the lawmakers in enacting the automobile guest statute was to prevent recovery on account of mere negligence of a motorist by those persons who accept gratuitous rides in vehicles. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles ⇐181(1)

Under the automobile guest statute, the operator of an automobile becomes liable only where the injury to the guest proximately results from the operator's intoxication or willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

4. Pleading ⇐214(3)

In action against driver of automobile by occupant for injuries, wherein it was merely alleged that occupant was riding in automobile involved in accident, general demurrer to complaint did not impute to the complaint the inference that the occupant was a passenger rather than a guest within

meaning of automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

5. Pleading ⇐48

A pleader has the duty to present by appropriate allegation those facts by virtue of whose proof he expects to recover.

6. Automobiles ⇐181(1), 238(1)

If a person is a passenger for hire in a vehicle on a highway, he is entitled to recover for injuries proximately resulting from the mere negligence of the operator, but in presenting his pleading in an action based on the operator's negligence, it is the passenger's duty to allege that he was a passenger, in order that the issue of negligence may be directly created by the pleading. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles ⇐181(2)

A driver of a sedan automobile which was towing a roadster was the "driver" of the roadster and the occupant thereof who was sitting behind its steering wheel was the "guest" of the driver of the sedan and not entitled to recover for injuries sustained in the absence of proof of sedan driver's intoxication or willful misconduct, since the towed automobile was not being "driven" by the occupant thereof but was being impelled forward by the sedan automobile. Vehicle Code, §§ 69, 403, St.1935, pp. 98, 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Driver", "Driven" and "Guest".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by John E. Fairman, a minor, etc., against Hal S. Mors to recover for injuries received by plaintiff while plaintiff was riding in an automobile which was being towed by an automobile driven by defendant. From a judgment of dismissal, the plaintiff appeals.

Judgment affirmed.

Joseph W. Pierce, of Los Angeles, for appellant.

Hunter & Liljestrom, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision in this case is whether, in the absence of an allegation either (1) of facts showing that he was a passenger for hire or (2) of facts amounting to wilful misconduct or intoxication, a complaint for personal injuries received by an occupant of an automobile owned and operated by another states a cause of action.

After a demurrer to plaintiff's original complaint had been sustained, his amended complaint stated substantially as follows: that in June, 1941, "defendant was driving, operating, managing, and controlling" a sedan automobile on a business highway; that plaintiff was then and there riding in a Ford roadster "which was attached to and was being towed and propelled by" the sedan; that the roadster "was being driven, steered and operated by one Gaines Mors"; that the sedan was negligently "driven, operated, managed, and controlled" by defendant; that as the direct and proximate result thereof the roadster was thrown off the highway and over a steep bank at the left side; and that plaintiff was thereby seriously injured.

The demurrer to the amended complaint was sustained without leave to amend, following which a judgment of dismissal was entered.

Section 403 of the Vehicle Code, St.1935, p. 154, provides as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

[1-3] In construing this statute, it is the paramount duty of the court to ascertain its true meaning, that is, to understand the purposes and objects of the act. Perry v. Gross, 172 Cal. 468, 156 P. 1031. To us it is crystal clear that the intention of the lawmakers in enacting this section was to prevent recovery on account of mere negligence of a motorist by those persons who, on the highway, accept gratuitous rides in vehicles traveling there. The section contemplates that the only circumstance under which the operator of a vehicle becomes liable for his act is: (1) when the injury to the guest proximately results from the intoxication of the operator, or (2) from his wilful misconduct. Although ei-

ther guest or passenger for pay had the right of action at common law against the operator of a vehicle in which he was transported, the section is such a distinct modification of the ancient rule that it must be considered a part of the law fixing one's right of recovery.

[4] Plaintiff contends that since the general demurrer admits all of the material allegations, such facts as may be inferred therefrom must be imputed to the complaint the same as though they had been directly charged. McKay v. New York Life Insurance Co., 124 Cal. 270, 56 P. 1112. He insists that the mere allegation that plaintiff was riding in one of two vehicles involved in the accident is consistent with the theory that he was a "passenger" rather than a "guest," and that he had paid for his ride. But such cannot be the rule in the application of section 403, in the enactment of which it was clearly the purpose of the Legislature to prevent recovery by the guest except in cases of intoxication or wilful misconduct of the driver. Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 649, 120 P.2d 672.

[5, 6] It is the duty of the pleader in all cases to present by appropriate allegation those facts by virtue of whose proof he expects to recover. If a person is a passenger for hire in a vehicle on a highway, he is entitled to recover for injuries proximately resulting from the mere negligence of the operator. But in presenting his pleading as such passenger in an action based on the negligence of the operator it is his duty to allege that fact in order that the issue of negligence may be directly created by the pleadings. On the contrary if he was a guest of the operator of the vehicle which caused his injuries, it is his duty to allege such fact together with the fact of the intoxication or of wilful misconduct of the operator so that an issue may be drawn as to the intoxication or wilfulness. If plaintiff was a guest, the negligence of the operator was immaterial. If he was a passenger for hire, the negligence was material. Hence the status of the plaintiff who seeks damages on account of the conduct of the motorist who drove the automobile in which the plaintiff was riding, is indispensable to a complete statement of his cause of action against such motorist. Upon the allegations of the complaint herein no issue could be joined upon those facts which plaintiff must prove in order that he might recover because he failed to allege his own understanding of such facts. If he intended to prove that, as a passenger, he gave compensation for his ride, those facts should have been alleged in order to elicit a confession and thereby effect a prompt conclusion of the controversy or a denial which would present a clear-cut issue for proof.

[7] Notwithstanding his allegation that defendant operated and drove the sedan which towed the roadster, plaintiff contends that defendant was not the driver of the roadster and that because thereof section 403 has no application. Two vehicles were involved, to wit: the towing sedan and the towed roadster and plaintiff was riding in the roadster. Because a third party sat at the steering wheel of the roadster, appellant contends that defendant was not its driver but that he was driver only of the sedan. In this he overlooks two controlling facts, namely, that the driver of the sedan applied the force which impelled the roadster and that he directed and controlled its movements. Those facts certainly constituted defendant driver of the roadster. If the roadster was towed by the sedan, it was "impelled forward" by the application of the force of the latter. (Webster's New International Dictionary.) The only force mentioned is that which came from the sedan. The allegation that the roadster was "driven, steered, and operated" by Gaines Mors stultifies the pleader. It does not obviate the effect of the declarations that the sedan was driven and controlled by defendant; that it "towed and propelled" the roadster. Because Gaines Mors sat at the steering wheel of the roadster did not make him its driver any more than plaintiff who sat by his side. A driver is one who "is in actual physical control of a vehicle." (§ 69, Veh.Code.) An operator is one who directs or superintends it. Bosse v. Marye, 80 Cal.App. 109, 118, 250 P. 693. Gaines neither actually controlled the movements of the roadster nor directed its course. One sitting behind a steering wheel of a towed car is utterly helpless so far as directing the course or conduct of such car. He is not the driver either in the statutory sense or in any sense. No amount of turning of the steering wheel by him will alter its course. The allegation that the roadster was towed warrants the inference that it had no power to propel itself. An automobile incapable of moving under its own power is not "driven" by any of its occupants when being towed

by another automobile. People v. Kelley, 27 Cal.App.2d Supp. 771, 70 P.2d 276. Appellant cites Smith v. Pope, 53 Cal.App.2d 43, 127 P.2d 292, in support of his argument that the burden was cast upon defendant to plead his nonliability under the guest statute. That case is not authority upon the point before us. The plaintiff there was injured by reason of the negligent act of the defendant in knocking plaintiff to the ground before she had entered defendant's vehicle and was therefore allowed recovery. She was not injured "during such ride" as required by statute. Since a guest has the right of recovery under the common law, for injuries wrongfully inflicted, the court there held that since the guest statute lessened such right, it must be given a strict construction. McCann v. Hoffman, 9 Cal. 2d 279, 70 P.2d 909.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



55 Cal.App.2d 942

PASKAL et al. v. NESTERENKO et al.

Civ. 13904.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1942.

Appeal and error ⇐611

Where appellants failed to file a transcript supported by a certificate of clerk of superior court setting forth the required facts, the appeal was dismissed. Rules of the Supreme Court and District Courts of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by John A. Paskal and others against Thomas Nesterenko and others. From a judgment for defendant, plaintiffs appeal. On respondents' motion to dismiss.

Appeal dismissed.

No appearance for appellants.

C. F. Jorz, of Los Angeles, for respondents.

PER CURIAM.

Respondents having served and filed their motion to dismiss the appeal in the above entitled matter on the ground that appellants have failed to file a transcript as provided in the Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the Clerk of the Superior Court setting forth the facts required by rule VI of this Court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and the authorities cited,

It is hereby ordered that the appeal from the judgment be, and the same hereby is, dismissed.



55 Cal.App.2d 942

MOREY et al. v. GOODWIN.

Civ. 13902.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1942.

Appeal and error ⇐611

Where respondent's motion to dismiss appeal for failure to file a transcript was supported by a certificate of the clerk of superior court setting forth the facts, appeal was dismissed. Rules of the District Courts of Appeal for the Second District, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Mabel V. Morey and others against R. J. Goodwin. From an adverse judgment, plaintiffs appeal and respondent moves to dismiss the appeal.

Appeal dismissed.

No appearance for appellants.

C. F. Jorz, of Los Angeles, for respondent.

PER CURIAM.

Respondent having served and filed his motion to dismiss the appeal in the above entitled action on the ground that no transcript has been filed as provided in the Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the Clerk of the Superior Court setting forth the facts as required by rule VI of this Court, and it appearing that all of the grounds stated in the motion are supported by said certificate and the authorities cited,

It is hereby ordered that the appeal from the judgment be, and the same hereby is, dismissed.



55 Cal.App.2d 194

SAMSON v. STATE et al.

Civ. 13770.

District Court of Appeal, Second District, Division 1, California.

Oct. 28, 1942.

1. Insurance ⇐18

Insurance companies organized in other states are permitted to transact business in the state upon complying with requirements of Insurance Code designed to secure an examination by insurance commissioner to determine, among other things, the solvency of such organizations. St.1935, p. 512, § 700.

2. Automobiles ⇐55, 144

In suit by motorist to restrain Department of Motor Vehicles from taking up his driver's license and automobile license plates for failure to pay judgment against him for damages caused by his negligent operation of an automobile on ground that he was insured against casualty, complaint which disclosed that insurer was a foreign corporation which was in receivership and which did not allege that insurer had been authorized to transact business in the state was insufficient. Vehicle Code, § 411.5, St. 1939, p. 2321; St.1935, p. 512, § 700.

3. Automobiles ⇐55, 144

Provisions of Insurance Code permitting a surplus line broker to place insurance with nonadmitted insurers under certain circumstances as an exception to provisions requiring out of state insurers to procure a certificate of authority before doing business within the state, does not modify Vehicle Code provision allowing motorist to avoid suspension of driving privileges for failure to pay judgment against him for damages caused by his negligent operation of an automobile by having his automobile insured by an insurer authorized to transact insurance business in the state. Vehicle Code, § 411.5, St. 1939, p. 2321; St.1935, p. 512, § 700; pp. 585–588, §§ 1760–1779, as amended; St. 1937, p. 2034, § 1763.

4. Automobiles ⇐55, 144

The purpose of chapter of Vehicle Code relating to suspension of driving privileges of motorist who fails to pay a judgment against him caused by his negligent operation of an automobile is to insure victims of negligence compensation for their loss and damage. Vehicle Code, §§ 410–418, St.1935, p. 155 et seq., as amended; St.1935, p. 498, § 24.

5. Automobiles ⇐55, 144

"Authorized" as used in Vehicle Code provision allowing motorist to avoid suspension of driving privileges for failure to pay a judgment against him caused by his negligent operation of a motor vehicle by having his automobile insured with an insurance company authorized to transact business in the state, means a person admitted to transact insurance business in the state having complied with laws imposing conditions precedent to transaction of such business. Vehicle Code, §§ 410–418; St.1935, p. 155 et seq., as amended; St.1935, p. 498, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Authorize".

6. Automobiles ⇐55, 144

A motorist may not circumvent purpose and intent of Vehicle Code provisions relating to suspension of driving privileges for failure to pay a judgment caused by negligent operation of an automobile by insuring with an out of state financially unstable insurance concern through the instrumentality of a surplus line broker. Vehicle Code, §§ 410–418, St.1935, p. 155 et seq., as amended; St.1935, p. 498, § 24; p. 512, § 700; pp. 585–588, §§ 1760–1779, as amended; St.1937, p. 2034, § 1763.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by John Samson against the State of California and others to restrain the Department of Motor Vehicles from taking up his driver's license and automobile license plates for failure to pay a judgment for damages caused by plaintiff's negligent operation of his automobile. From a judgment for defendant after demurrer to complaint was sustained without leave to amend, plaintiff appeals.

Affirmed.

C. V. Eberhard, Elizabeth Eberhard, and Ray C. Eberhard, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondents.

DRAPEAU, Justice pro tem.

By his amended complaint the plaintiff alleges that the defendant, the State of California, and its officers in the Department of Motor Vehicles, have demanded the surrender of his driver's license, and the license plates for his automobile, because of his failure to pay a judgment against him for damages caused by his negligent operation of said automobile; that he was insured against this casualty in a Nevada corporation, which has failed to pay the judgment, and which is now in receivership; that when the state officers demanded the surrender of his license and of his plates, he filed with the Department of Motor Vehicles an affidavit setting forth that he was insured by said corporation; that notwithstanding this the department still insists on the surrender of his license plates and threatens to proceed against him in the criminal courts if he does not do so. The prayer of the complaint is for injunctive relief.

Demurrer was sustained without leave to amend, with judgment for the defendant, from which plaintiff has appealed.

The only question involved is whether plaintiff by his complaint brings himself within the provisions of section 411.5 of the Vehicle Code, and particularly within that portion of the section reading as follows: "If the department is satisfied from such papers that such insurer was authorized to issue such policy of insurance in the State of California at the time of issuing such policy and that such insurer is liable to pay such judgment, at least to the extent and for the amounts hereinbefore provided in this chapter, the department shall not suspend such license or licenses and such certificate or certificates, or if already suspended, shall reinstate them." (§ 411.5, Motor Vehicle Code, as amended Stats.1939, p. 2321.)

[1] The Insurance Code provides that "A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue." (Ins.Code, § 700, St.1935, p. 512.) Insurance companies organized in other states are permitted to transact business in California upon complying with the requirements of the Insurance Code, designed to secure an examination by the insurance commissioner to determine, among other things, the solvency of such organizations.

[2] The complaint in this case does not allege that the plaintiff's insurance company had been authorized to transact business in this state. The demurrer was therefore well taken unless some legal exception can be found which will permit plaintiff to keep his operator's license and number plates.

[3] Plaintiff maintains that this exception is to be found in that portion of the Insurance Code having to do with surplus line brokers. (§§ 1760-1779, Ins.Code, St. 1935, pp. 585–588, as amended.) Insurance Code, section 1763, St.1937, p. 2034, provides that a surplus line broker may place insurance with nonadmitted insurers under certain circumstances prescribed in the section. Conceding that plaintiff has adequately pled these circumstances in his complaint, an analysis of the pertinent provisions of the Vehicle Code and of the Insurance Code requires us to hold that the claimed exception does not modify section 411.5 of the Vehicle Code.

[4, 5] The purpose of chapter 2, sections 410 to 418 of the Vehicle Code, St. 1935, pp. 155 et seq., as amended, is to insure that victims of negligence in the operation of motor vehicles shall be compensated for their loss and damage. When a defendant fails to pay a judgment against him, caused by his negligent operation of a motor vehicle, the code requires that of-

ficers of the Department of Motor Vehicles shall see to it that he is denied the privilege of thereafter operating motor vehicles upon the highways of this state. To avoid this penalty all that any motor operator need do is to see that his car is insured with an insurance company authorized to transact business in California. The word "authorized" as used in the Vehicle Code means a person admitted to transact insurance business in this state, having complied with the laws imposing conditions precedent to transaction of such business. (Ins.Code, § 24.)

[6] No one may circumvent the purpose and intent of the law by contracting insurance with some out-of-state fly-by-night concern, through the instrumentality of a surplus line broker. The sections of the Insurance Code relative to surplus line brokers are not in conflict with, nor do they modify in any manner the provisions of the Vehicle Code which require the operator of a motor car who negligently damages another to either pay such judgment as may be rendered against him, or show that the casualty was insured against by an insurance company authorized to do business in the State of California, or thereafter keep off the highways of the state. This conclusion is compelled by familiar rules of statutory construction. Johnston v. Baker, 167 Cal. 260, 139 P. 86.

The judgment is affirmed.

YORK, P. J., concurred.

DORAN, Justice.

I dissent. However, I concede that the great weight of authority sustains the conclusion reached in the prevailing opinion. But it is my conviction that such authority is the product of an unwarranted assumption in several particulars. For the sake of brevity, Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481, and Sheehan v. Division of Motor Vehicles, 140 Cal.App. 200, 35 P.2d 359, may be regarded in substance and in general as examples supporting the prevailing opinion which is in accord with the weight of authority. First, it is my opinion that there is an inherent right upon the part of every citizen to drive a car, provided reasonable conditions therefor are met. While the license to drive may be considered a privilege, every citizen possesses the right to that privilege upon satisfying the conditions on which it is to be granted. Second, although properly the subject of police power regulation, such regulation must be reasonable. Third, only reasonable regulations need be obeyed in order to enjoy that right.

Subject only to such regulations as are permitted by a valid exercise of the police power, it is my opinion that there is an inherent right to a license to operate a motor vehicle, based on the proposition that the license is a mere incident to a form of transportation that permits the people to go about the daily affairs of life in a lawful manner that cannot be, without reason, interfered with by any governmental agency, executive, legislative or judicial. Although it may be more hazardous, there is no difference in principle between transportation in an automobile and transportation in a horse and buggy. Before the perfection and use of the automobile, could it have been urged successfully that horseback riding was not a right or that driving a horse attached to a cart was anything but a natural right? Although the methods may have changed, the applicable doctrine remains the same. Government is not the custodian of the people and their welfare and no government is called upon to remove or prevent all of the hazards of life. The argument in support of the weight of authority, to the effect that to deny a license to one unable to pay a judgment will tend to prevent accidents, is only an opinion or assumption. Notwithstanding what the authorities contend to the contrary, in the final analysis, denying the right to operate an automobile because of an inability to pay a judgment accomplishes nothing but hardship for a particular class whereas others in similar circumstances may, in effect, purchase immunity from such hardship. Moreover, to deny an individual a license to operate an automobile in the circumstances here presented, is a form of punishment, not only unusual in form but also one constituting punishment for debt, both of which are denounced by the Constitution. If the operator of an automobile were deprived of a license for a reasonable length of time for having caused an avoidable accident the above argument would not apply. But appellant is not punished for having caused the accident but for being unable to pay a judgment. That such a situation is discriminatory there can be no question. Logic and reason will not support an argument to the contrary.

The fact that the victim of an accident may have suffered physically or financially affords no justification for the denial of the natural right of another. Moreover, the state neither guarantees nor assures safety for all who utilize the public highways.

In my judgment, to deprive appellant of the right to operate an automobile, which deprivation in the circumstances is permanent, is an unwarranted exercise of the police power, is discriminatory and in violation of the clear mandate of the Constitution.



55 Cal.App.2d 943

ROSENFELD v. HOSPITAL OF THE GOOD SAMARITAN et al.

Civ. 13792.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1942.

Appeal and error ⇐611

Where appellant failed to file a transcript or record on appeal, appeal was dismissed. Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Saline Rosenfeld against the Hospital of the Good Samaritan, a corporation, and others. From an adverse judgment, plaintiff appeals, and defendants move to dismiss the appeal.

Appeal dismissed.

No appearance for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents.

PER CURIAM.

Respondents having filed their motion herein to dismiss the appeal on the ground that appellants have failed to file a transcript or any record on appeal as provided in the Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the clerk of the Superior Court setting forth the facts as required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by said certificate and the authorities cited.

It is hereby ordered that the appeal from the judgment be and the same hereby is, dismissed.



FUNERAL DIRECTORS ASS'N OF LOS ANGELES AND SOUTHERN CALIFORNIA v. BOARD OF FUNERAL DIRECTORS AND EMBALMERS OF CALIFORNIA et al. (ARMSTRONG et al., Interveners).*

Civ. 13713.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

As Corrected Nov. 20, 1942.

Hearing Granted Dec. 24, 1942.

1. Judgment ⇐540

The basis of "res judicata" is to prevent vexatious litigation and to rest upon one decision of a controversy. Code Civ. Proc. §§ 1908, 1963, subd. 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⇐725(1)

Where facts vital to the controversy have been determined as between the parties litigant a judgment based upon such finding is forever binding in every court between the parties and their privies, and a fact alleged in a pending action is "adjudicated" in a former action if the same fact is necessary to the first decision. Code Civ.Proc. §§ 1908, 1963, subd. 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Adjudicate".

3. Judgment ⇐724

A judgment is conclusive as to every matter coming within the legitimate purview of the action in which the judgment

* Subsequent opinion 136 P.2d 785.

was rendered. Code Civ.Proc. §§ 1908, 1963, subd. 17.

4. Courts ⇐104

The constitutional provision requiring "decisions" of the Supreme Court to be given in writing and the grounds of the decision stated applies to decisions where the court has assumed jurisdiction and to controversies that have been tried in an inferior court and transferred by appeal to the Supreme Court. Const. art. 6, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision".

5. Courts ⇐104

Where an original proceeding is presented to the Supreme Court upon a declaration of all facts favorable to petitioner and relief is denied the order of denial is "final" notwithstanding that no opinion is written. Const. art. 6, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

6. Judgment ⇐563(1), 951(1)

If an order denying relief is not based upon consideration of the merits of a controversy, the order is not an "adjudication" of pleaded matters, and they may be subsequently presented to a proper court, but where all the facts are pleaded and the court has jurisdiction, it must be presumed that a denial of relief is a "judgment" upon such facts, and the denial is an adjudication. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Adjudication" and "Judgment".

7. Judgment ⇐552

The Supreme Court's ex parte denial of petition for a writ of mandate was not a "dismissal" because of absence of hearing and written decision, but was "res judicata" of subsequent petition for writ of mandate to a superior court where the parties, issues, and exhibits were identical, the records were substantially identical, and no evidence was suggested that might have altered the conclusion and the exhibits disclosed conclusively that the Supreme Court had jurisdiction and that the pleadings were not defective. Code Civ.Proc. §§ 1908, 1963, subd. 17; Const. art. 6 § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Dismissal".

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by the Funeral Directors Association of Los Angeles and Southern California, an incorporated nonprofit association, against the Board of Funeral Directors and Embalmers of the State of California and others to require the respondent board to desist from attempting to revoke, modify, suspend or alter a judgment suspending the license of respondent in intervention for 90 days. Burton H. Armstrong and others intervened. From a judgment discharging the alternative writ and denying the peremptory writ, plaintiff appeals.

Affirmed.

W. L. Pollard, of Los Angeles, for appellant.

Frank J. Barry, of Los Angeles, for respondents.

Morse Craig, of Los Angeles, and Moody & Whitney, of Glendale, for interveners and respondents.

MOORE, Presiding Justice.

The question for decision in this case is whether the Supreme Court's ex parte denial of a petition for a writ of mandate containing substantially the same allegations and exhibits as those later presented in the petition to the superior court is res judicata of the subsequent action.

Pursuant to its statutory duty upon the filing of a complaint, the respondent board, as then constituted, ordered the "Armstrong Family," respondents in intervention herein, to appear before the board on the 28th day of July, 1938, to show cause why their license should not be revoked. Following a hearing, they were found guilty as charged, and their license was suspended for ninety days. On the following twelfth day of September, the Armstrongs petitioned the superior court (action No. 431-959) for a writ of mandate directing the board and its members to cease interfering with the conduct of their business. The alternative writ was issued but after trial on May 5, 1939, a hostile judgment was entered against the Armstrongs on December 14, 1939, denying the writ of mandate. An appeal was taken to the District Court of Appeal, was dismissed on the 18th day of March, 1941, pursuant to the motion of appellants there. On the same day the Board of Funeral Directors modified its original "sentence" imposed

upon the Armstrongs by suspending their license for ninety days, and holding in abeyance the execution of such suspension for one year upon terms prescribed in the order of modification.

Thereafter, on July 2, 1941, appellant herein filed its petition for writ of mandate in the Supreme Court (L.A., 17996). Such action, as stated in the petition, was brought to contest the right of the board to modify a sentence imposed by it. The petition recited all of the facts commencing with the complaint filed against the Armstrong family, included the citation issued thereon, the findings and "Judgment and Sentence" of the board; recited the filing of, and attached as exhibit, the petition for writ of mandate to the superior court (No. 431959); recited the trial of the action in department 33 of the superior court and the findings and decision thereon denying a peremptory writ; recited the appeal from the last mentioned judgment (action No. 431959) to the District Court of Appeal and the dismissal of such appeal on motion of appellants; recited the action of the board on the 18th of March, 1941, in modifying its original judgment as above outlined. In the same petition appellant alleged that at the time of the order of the modification of the sentence no evidence was taken and that during the intervening years the personnel of the board had changed with the exception of Director Howell. Attached to the petition to the Supreme Court was a copy of the findings of the decision of the superior court in action No. 431959 as well as the excerpt from the minutes of the meeting of the board held on the 18th day of March, 1941, showing that at the time of the modification of the original judgment, the executive secretary of the Funeral Directors Association, appellant here, protested the action of the board in making such modification. On July 17, 1941, the Supreme Court denied the petition.

Thereafter on the 22d day of August, 1941, appellant presented its petition to the superior court demanding that a writ of mandate issue against respondent board directing that it desist from attempting to revoke, modify, suspend or alter its judgment of July 30, 1938. The petition so presented contained substantially all of the facts alleged in the petition of appellant to the Supreme Court in (L.A., 17996) and nothing more. A hearing upon the alternative writ was set for the 24th day of September, 1941.

Upon the day of the hearing on the alternative writ, respondents filed a special answer alleging that the order made by the Supreme Court on the 17th day of July, 1941, was res judicata of the matters contained in the petition about to be heard by the superior court. Thereafter by stipulation of the parties, the Armstrong family were allowed to file a plea in intervention whereby they denied a portion of the complaint and included the plea of res judicata by virtue of the Supreme Court's order. On the 24th day of February, 1942, the superior court determined that the Supreme Court's order denying the mandate was res judicata and ordered that the alternative writ be discharged and that the peremptory writ be denied.

In considering the question presented it is to be observed that the parties to the present action and in that before the Supreme Court were identical; the issues were identical; the exhibits attached to the petition in the Supreme Court are attached to the petition before us. There is substantially no difference between the record presented to the Supreme Court and that before this court, except that the petition now under consideration has attached to it a copy of the petition filed in the Supreme Court. No evidence is suggested that might have altered or varied the conclusion to be derived from the pleadings and exhibits. In this state of the record can we say that, because the Supreme Court did not write an opinion at the time of denying the petition, its order was not a final judgment?

[1-3] It is urged that the Supreme Court might have based its order upon any one of seven possibilities, namely: (1) that it did not regard mandate a proper remedy; (2) that it might have considered that a trial on the merits in the superior court was the proper remedy; (3) that it might have deemed the matter lacking in importance for the exercise of original jurisdiction; (4) that it might have considered the pleadings defective; (5) that it might have considered the action prematurely brought; (6) that it might have held that it was without jurisdiction, and (7) it might have found other technical defects. But a judgment upon or in respect to the legal condition or relation of a person is conclusive upon such condition or relation. (§ 1908, Code Civ.Proc.) It is presumed that a judicial record correctly determines

the rights of the parties. (§ 1963, subd. 17, Code Civ.Proc.) The basis of the doctrine of res judicata is to prevent vexatious litigation and to rest upon one decision of a controversy. Miller & Lux, Inc., v. James, 180 Cal. 38, 179 P. 174. Where facts vital to the controversy have been determined as between the parties litigant a judgment based upon such finding is forever binding in every court between the parties and their privies. In re Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am.St.Rep. 118. A fact alleged in a pending action was adjudicated in the former action if the same fact was necessary to the first decision. People v. City and County of San Francisco, 27 Cal. 655. A judgment is conclusive as to every matter "coming within the legitimate purview of the original action." In re Estate of Bell, 153 Cal. 331, 95 P. 372, 376; Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715. The exhibits attached to the petition presented to the Supreme Court disclose conclusively that it had jurisdiction and that the pleadings were not defective. Also, the brief order of denial indicated that it was with prejudice.

[4, 5] It is true that in the determination of causes decisions of appellate courts should be in writing containing the grounds of decision. (Const., art. VI, § 24.) But such requirement applies to decisions where the court has assumed jurisdiction and to those controversies that have been tried in an inferior court and transferred by appeal to the appellate court. In the exercise of its original jurisdiction the Supreme Court is not an appellate court. Where an original proceeding is presented to that court upon a declaration of all of the facts favorable to the petitioner, and relief is denied, no amount of words or reasons can render more effective such order of denial. If his petition is granted a trial follows the return on the alternative writ when the court's decision is evidenced by an opinion.

[6, 7] Appellant argues that in the absence of a hearing and written decision the denial of the petition by the Supreme Court was a mere dismissal and therefore could not be res judicata, citing Campanella v. Campanella, 204 Cal. 515, 269 P. 433; and Gonsalves v. Bank of America, Nat. T. & S. Ass'n, 16 Cal.2d 169, 105 P.2d 118. But each of these cases was dismissed in the superior court before a trial on the merits. The holding in each was that a mere dismissal is not a judgment on the merits. In the case of Goddard v. Security Title Insurance & Guarantee Co., 14 Cal.2d 47, 92 P.2d 804, the action was dismissed following the sustaining of a demurrer because of technical defects and not because of irremedial substance. Of course, if an order denying relief is not based upon a consideration of the merits it is not an adjudication of the pleaded matters, but they may be subsequently presented to a proper court. Where all of the facts are pleaded and the court had jurisdiction, it must be presumed that a denial of relief was a judgment upon such facts. § 1908, supra; In re Estate of Bell, supra. The denial was necessarily an adjudication. The court's failure to file an opinion did not affect the quality or finality of its order; neither was the efficacy and force of its judgment diminished thereby. People v. Hadley, 66 Cal.App. 370, 226 P. 836; Reilly v. Police Court, 194 Cal. 375, 228 P. 860; Napa Valley Electric Co. v. Railroad Comm., 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310. The Reilly case held that the denial ex parte and without a written opinion of an original application for a writ, other than of habeas corpus, is a final adjudication that upon the facts alleged in the application the petitioner is not entitled to the writ prayed for.

It was subsequently recognized as the rule by this court in Gubin v. Superior Court, 104 Cal.App. 331, 333, 285 P. 1071, 1072, which held that the conclusion in Reilly v. Police Court, supra, "cannot be doubted." Such method of adjudicating the meaning of statutes and constitutional provisions is the frequent practice of the Supreme Court.

Judgment affirmed.

W. J. WOOD, J., and McCOMB, J., concurred.

55 Cal.App.2d 220

DAVIS v. WEST SHORE CO.

Civ. 13750.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

1. Appeal and error ⇐927(1)

The record was required to be viewed in light most favorable to plaintiff in reviewing a judgment predicated on granting of defendant's motion for judgment on ground that plaintiff's opening statement failed to disclose any liability on part of defendant.

2. Trial ⇐109

Where, at close of plaintiff's opening statement, defendant's counsel moved for judgment on the pleadings, and, in event that such motion should be denied, moved for a directed verdict on plaintiff's opening statement, and after argument, trial judge stated that motion was granted and thereupon discharged jury, it was not prejudicial error for the trial judge thereafter to enter judgment in favor of defendant on ground that opening statement of plaintiff's counsel failed to show that defendant was liable to plaintiff.

3. Negligence ⇐32(1)

An invitee is not entitled to recover from an invitor for alleged negligence of invitor in not using reasonable care for protection of its invitees where the injury did not occur on portion of premises where the invitor actually conducted its business with its invitees but occurred on property adjacent thereto owned by the invitor and used by the general public for sidewalk purposes.

4. Trial ⇐109

In action by customer against operator of grocery store for injuries sustained in fall, trial court properly granted judgment for operator on customer's opening statement which showed that customer's injury occurred after leaving store and while on a portion of operator's land used by the public but not a part of store into which customer had been invited.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Marie E. Davis against the West Shore Company to recover for personal injuries. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Ben W. McLendon, of Long Beach, for appellant.

De Forrest Home, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment entered in favor of defendant in an action to recover damages for personal injuries. The judgment was predicated upon the granting of defendant's motion for a judgment in its favor upon the ground that the opening statement of counsel for plaintiff failed to disclose any actionable negligence upon the part of defendant.

[1] The record being viewed in the light most favorable to plaintiff, which we must do in reviewing a judgment predicated upon the granting of defendant's motion for a judgment, because plaintiff's opening statement fails to disclose any liability upon the part of defendant, the material facts are:

After a jury was duly impaneled, plaintiff's counsel made to the jury the following opening statement:

"Ladies and gentlemen of the jury, this is the case of Mrs. Davis, plaintiff, against West Shore Company, a corporation, wherein Mrs. Davis claims that she was injured upon the property of the West Shore Company on West Jefferson near the corner of Clinton avenue.

"We expect the evidence to show that Mrs. Davis, who resided in that neighborhood, went to this store in an automobile, got out and went into the grocery store and did a little shopping there; she came around the store—the front of the store to the east—where her children had parked their car. She was going to her car and crossing the property of the West Shore Company, as they admit in their answer. The portion of the ground that she was crossing was paved. We will show by the evidence it was level with the floor of the store, level with the sidewalk, level with the pavement in front of the little restaurant which was alongside of the grocery store, and that that was painted green. *That when she came out of the store she turned the corner* to go to her car, which was just south of the corner, crossing this

green walk. There was a drop-off of some two or three inches, apparently buildings had been there at one time and had been removed—at least there were some indications of that. There was no indication at all of the drop-off from the direction in which she was coming and from the other one you could see the drop-off. *She lost her footing* at that particular place where the drop-off was and fell and was injured. She was under the care of physicians and had numerous treatments and was under treatment for a considerable time, and has had numerous X-rays and is even at this time suffering from the effects of the fall.

"We expect the evidence to show this was a public market where the general public was invited to come and trade. That this property where she fell is a portion of the market property outside of the building, and that a portion of that same lot, back near the alley and the sidewalk on Jefferson, is used for parking space for the Sel-Rite cars. That she was an invitee upon those premises and that it is customary for customers to walk across these premises and that they were negligent in not giving some notice of repairing that, and it was obvious to them that the defect was there, and it was not obvious to the person who had not come through it from the east side or the opposite direction. She was an invitee upon those premises." (Italics added.)

At the close of plaintiff's opening statement, defendant's counsel made the following motion:

"If the Court please, at this time, before the introduction of any evidence, the defendant moves for a judgment on the pleadings, on the grounds:

"(1) That the complaint does not state facts sufficient to constitute a cause of action against the defendant; and,

"(2) On the ground that the complaint affirmatively shows contributory negligence on the part of the plaintiff.

"In the event that the motion should be denied, and only in that event, the defendant moves for a directed verdict on plaintiff's opening statement upon the ground that counsel's opening statement has purported to relate the facts that he expects to prove, and the facts show, first, that the plaintiff was not an invitee, and there was no wilful injury. Second, that if she was an invitee, this is an open and obvious danger (if it may be called a danger at all) against which there was no duty and no obligation on the part of defendant to warn the plaintiff. Third, upon the ground that his opening statement affirmatively shows it was there for the plaintiff to see if she had looked. There is no reason or excuse either for her not looking and it affirmatively appears that she is guilty of contributory negligence."

After argument the trial judge stated, "The motion is granted," and thereupon discharged the jury, subsequently signing a judgment in favor of defendant, reading in part as follows:

"* * * plaintiff having made an opening statement to jury of all facts which he expected to prove in said action, and the defendant having thereupon moved the Court to enter judgment for the defendant against the plaintiff upon the ground: * * *

"(2) That the opening statement of counsel for plaintiff was insufficient to disclose any liability on the part of the defendant, and also that it showed contributory negligence on the part of the plaintiff as a matter of law, and said motions having been duly argued and authorities considered and being submitted by both parties to the Court for decision, and the Court having concluded that said motions, and each of them, should be granted, the first motion upon the ground that said complaint failed to state facts constituting a cause of action against the defendant, and the second motion on the ground that the opening statement of counsel for plaintiff showed: * * *

"(2) That the place where she fell, if it could be considered a defect at all, was an open and obvious defect against which defendant was not required to give warning or notice to the plaintiff."

There are two questions presented for our determination, which will be stated and answered hereunder *seriatim.*

First: Since, from the facts set forth above, it appears that at the time of the argument upon defendant's motion for a judgment on the pleadings, defendant's motion was granted by the trial judge, was it prejudicial error for the trial judge to render a judgment in favor of defendant on the ground that the opening statement of plaintiff's counsel failed to show that defendant was liable to plaintiff?

[2] This question must be answered in the negative. The oral statement made by the trial judge at the time of the trial,

"The motion is granted," is to be construed in the light of the formal judgment subsequently entered wherein it appears that the trial court meant by its statement to grant defendant's motion for a directed verdict, and, since the court was empowered to enter judgment in favor of the defendant even though no verdict was returned by the jury, the procedure followed was not erroneous. (Reay v. Reay, 97 Cal. App. 264, 271, 275 P. 533; Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 657, 275 P. 980.)

Second: Did the opening statement of plaintiff's counsel disclose that plaintiff did not have a cause of action against defendant?

[3] This question must be answered in the affirmative. The law is established in California that an invitee is not entitled to recover damages from an invitor for alleged negligence of the latter in not using reasonable care for the protection and safety of its invitees, where the injury did not occur upon the portion of the premises where the invitor actually conducted its business with its invitees but occurred on property adjacent thereto owned by the invitor and used by the general public for sidewalk purposes. (Gabriel v. Bank of Italy, 204 Cal. 244, 246, 267 P. 544, 58 A.L. R. 1039.)

[4] Applying the foregoing rule to the facts of the instant case, it is evident from the opening statement of plaintiff's counsel, which is italicised in the excerpt set forth above that the injury which plaintiff suffered occurred after she had left defendant's store where its business was conducted and while she was on a portion of defendant's land used by the public but not a part of the store into which she had been invited, and thus there was no liability upon the part of defendant to plaintiff.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion the court has incorrectly applied the rule pertaining to opening statements. It has placed upon plaintiff's counsel a burden that is far too onerous.

The Sel-Rite Market is made a party defendant in the complaint, in which plaintiff alleges that defendants owned, maintained and operated a food market upon the premises where the "drop-off" was located. Plaintiff further alleged that she was a customer upon said premises; that the "drop-off" caused her to lose her balance by stumbling, resulting in her injuries; that defendants, well knowing the premises, negligently left them unguarded and without warning signs.

The practice of ordering judgment for the defendant upon an opening statement by counsel for the plaintiff was characterized as "dangerous" in Bias v. Reed, 169 Cal. 33, 145 P. 516. Such an order should not be made unless it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts to be proved will not constitute a cause of action. "We would observe that it would be much better not to nonsuit on an opening statement, unless it is clearly made, and it is plainly evident therefrom that no case can be made out." Emmerson v. Weeks, 58 Cal. 382, 384. The opening statement of counsel for plaintiff is far from a model. It unquestionably lacks clarity. It is difficult to discover from the opening statement the exact location of the "drop-off" which caused plaintiff's injuries. However, it is alleged in the complaint that the "drop-off" was on the premises operated by defendants and it does not appear from the opening statement that the "drop-off" was on any other property. Indeed, in the first part of his statement counsel told the jury that "Mrs. Davis claims that she was injured upon property of the West Shore Company" and that she was a customer of defendant. Counsel further stated that the property where plaintiff fell was "used for parking space for the Sel-Rite Market." Counsel did not purport to state all of the facts concerning the point at which the accident occurred or all of the facts concerning the use which was being made of the property. It does not appear from the statement that the accident occurred at a place used as a public sidewalk or on a portion of defendants' land used by the general public.

55 Cal.App.2d 262

SHARPE v. SHARPE.

Civ. 6638.

District Court of Appeal, Third District, California.

Oct. 28, 1942.

1. Divorce ⇐312

Where grounds of husband's motion to modify interlocutory decree granting wife divorce and awarding her monthly sum for minor son's support were same as those of husband's previous motion to set aside his default in divorce suit, and he relied on same facts as those urged before entry of such decree, he should have appealed from decree, as authorized by statute, and not from subsequent order refusing to set aside decree.

2. Divorce ⇐309

Denial of husband's motion to modify interlocutory decree granting wife divorce by striking out portion ordering husband to pay specified sum monthly for minor son's support *held* not abuse of trial court's discretion under evidence.

3. Appeal and error ⇐945

An appellate court will not substitute its opinion for that of trial court, thereby divesting such court of discretionary power reposed therein, unless clear abuse of such discretion appears.

4. Appeal and error ⇐948

The burden is on appellant to establish abuse of trial court's discretion.

5. Appeal and error ⇐945

An appellate court is never justified in substituting its discretion for that of the trial court, unless there has been a miscarriage of justice.

6. Divorce ⇐297, 308

In wife's divorce suit, it was within trial court's province to provide for support of parties' minor child, regardless of any agreement of parties, and to require husband to give reasonable security for such support. Civ.Code, §§ 139, 140.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Suit for divorce by Frida G. Sharpe against Howard G. Sharpe, who filed a cross-complaint. From an order denying defendant's motion to modify an interlocutory decree granting plaintiff a divorce, defendant appeals.

Affirmed.

John T. Wentz, of Oakland, for appellant.

No appearance for respondent.

ADAMS, Presiding Justice.

Appeal from an order denying motion to modify interlocutory decree of divorce.

Plaintiff filed suit for divorce from defendant on July 8, 1938. On September 15th defendant filed an answer and cross-complaint. On March 10, 1939, the parties entered into a separation agreement wherein they divided their community property, the husband taking some 200 acres of land, and the wife about 30 acres upon which was located a small store. All of the real property was covered by a mortgage for about $4,000. Personal property was also divided, the husband taking a Packard automobile and the wife a Ford delivery-body automobile. Community debts amounting to approximately $8,500 (including the mortgage) were set forth in the agreement, and the parties agreed to be equally liable for them, together with any increase therein due to costs, fees or interest, either party paying a part of same to be reimbursed one-half, by the other. The wife also agreed to pay $10 per month on the finance contract for the Ford car. The husband agreed to keep the mortgages and liens existing on the combined property from being foreclosed, but one-half of any moneys advanced by him in carrying out this provision was to be repaid by the wife upon the first accounting between the parties. As to two minor children of the parties their care and custody was agreed to be in the wife, no provision being made as to their support and maintenance. Also there was no provision for costs or attorney's fees in the action for divorce.

On March 28, 1939, the divorce action came on for trial and there being no appearance by defendant and cross-complainant his default was entered. The court indicated that it would order the payment to plaintiff by defendant of $50 per month for the support of the minor son as prayed in the complaint (it appearing at the hearing that the daughter was employed at $30 per month) and would make said payment a lien upon the real property conveyed to defendant. Said defendant, before an interlocutory decree had been entered, moved the court for an order setting aside his default and

permitting a hearing upon the merits insofar as the support money, defendant's ability to pay same, and the lien therefor were concerned. Hearing on said motion was had at which time both parties appeared. Defendant there contended that his sole income consisted of $172.50 retired pay and that payments required to be made by him under the separation agreement consisted of about $60 per month on the original mortgage, $35 per month on a second mortgage, taxes, insurance on the store property and payments on the automobile awarded to the wife, amounting in all to about $143 per month; that he had tried to sell his part of the property and had quoted it at $20,000, but it was impossible to sell it; that he had given the store to his wife and that it had in the past brought an average profit of $143 a month for eighteen months and the family had had their living out of it also. However defendant's records showed that during the year 1938 the average monthly profit was approximately but $85. As to the value of defendant's share of the real property, in reply to a statement by the judge that if defendant was willing to sell it for $9,000 he would guarantee to sell it within a week, defendant said he would have to think that over. Mrs. Sharpe testified he had been asking $40,000 for his part of it. She also testified that in the past three months she and the children had had a living out of the store, but that she had run behind $80; that she had no funds except what she was trying to make.

The court denied defendant's motion and on April 25th entered an interlocutory decree awarding the wife the $50 per month for the support of the son, and making same a lien on defendant's real property. No appeal was taken from the decree.

On May 3, 1939, defendant Sharpe filed a notice of motion to modify the interlocutory decree by striking therefrom the portion ordering paying of the $50 per month for the support of the minor son, and the portion making same a lien, said motion to be made upon the pleadings, files and records in the action, the notice of motion and the affidavit of defendant filed therewith. In his affidavit Sharpe set forth the property settlement, the testimony taken at the hearing in the divorce action, and the testimony on the prior motion to set aside his default. On this motion he made the same contentions made by him on the previous motion, that is, that the monthly payments which he was required to make under the agreement were such that he could not pay the $50 per month out of his income, and that the property settlement had been entered into with the understanding that the wife should support the children. The motion was submitted on Sharpe's affidavit and a reply affidavit by Mrs. Sharpe's attorney. The court denied the motion on June 2, 1939. This appeal is taken from the order of denial, it being contended that the trial court abused its discretion in denying the motion.

The records on file in this court show that on May 2, 1940, defendant filed in the superior court action on affidavit for final judgment of divorce in which he alleged that all the requirements of the interlocutory decree of divorce had been complied with by him, and that he was not in default thereof; that no motion to set aside or annul said decree or suit brought therefor was pending undetermined, that no appeal had been taken or was pending therefrom, and that said judgment had become final.

On May 22, 1940, defendant filed in the Supreme Court (to which this appeal was originally taken) a notice of motion to submit the appeal and reverse or modify the judgment on the ground that respondent had refused to appear in court or file any brief within the time required by law; that she had in writing released her attorney of record and declared that she had decided not to contest said appeal or make any appearance on said appeal. Said notice having been served on plaintiff, she wrote a letter to the clerk of the Supreme Court stating that she had no money to hire lawyers or to go to San Francisco, and that her daughter had become utterly dependent upon her, on account of illness. When defendant's motion came on for hearing in the Supreme Court there was no appearance for the moving party and his motion was denied. Respondent has filed no brief herein.

[1] In view of the foregoing the rule that a party aggrieved by a judgment must take his appeal from such judgment itself, when an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside, should be applied. 2 Cal.Jur. 166, § 30; Reynolds v. Reynolds, 191 Cal. 435, 216 P. 619; Steinberg v. Jacobs, 21 Cal.App. 765, 132 P. 1060; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459. The grounds for defendant's motion to modify the decree are not different from the grounds upon which he based his mo-

tion to set aside his default, and the facts upon which he relies are the same as those urged prior to the entry of the interlocutory decree, from which no appeal was taken.

[2-6] But regardless of the foregoing rule we cannot say that the trial court abused its discretion in denying defendant's motion to modify the decree. Unless a clear case of abuse is made to appear, an appellate court will not substitute its opinion and thereby divest the trial court of the discretionary power reposed in it. 2 Cal.Jur. 896, 897, § 527. The burden is on appellant to establish an abuse of discretion (Wilder v. Wilder, 214 Cal. 783, 7 P. 2d 1032), and an appellate court is never justified in substituting its discretion for that of the trial court unless there has been a miscarriage of justice. Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301. It was within the province of the trial court to provide for the support of the minor child regardless of any agreement of the parties (§ 139, Civ.Code), and to require defendant to give reasonable security therefor. (§ 140, Civ.Code.) And in view of all the evidence in the case we cannot say that there has been a miscarriage of justice.

The order appealed from is affirmed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concurred.



McCORDIC v. CRAWFORD et al.*

Civ. 13783.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

Hearing Granted Dec. 31, 1942.

1. Appeal and error ⇐659(3)

Motion was granted for diminution of record to have included in the record a notice of motion by appealing defendant to strike a notice of entry of judgment, and an order denying the motion.

* Subsequent opinion 142 P.2d 7.

2. New trial ⇐116(2)

A notice of entry of judgment, which erroneously states the date of entry of judgment, is a nullity and does not set in motion the 60-day period in which the court has jurisdiction under the Code to grant a motion for a new trial. Code Civ. Proc. § 660.

3. New trial ⇐163(2)

If a motion for new trial is granted and becomes final, the effect of such order is to vacate the judgment theretofore entered. Code Civ.Proc. § 660.

4. Appeal and error ⇐82(1)

An order made denying a motion to strike a notice of entry of judgment is not an "appealable order" under statute dealing with cases in which appeal may be taken from superior court. Code Civ. Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

5. New trial ⇐116(2)

Notice of entry of judgment, which was defective in not stating date on which judgment was in fact entered, did not start running of 60-day period within which trial court had jurisdiction to pass on motion for new trial, so that 60-day period did not commence to run until defendant filed its notice of intention to move for a new trial, and hence trial court had jurisdiction to grant motion for new trial within 60 days after defendant filed notice of intention to move for new trial. Code Civ. Proc. § 660.

6. Appeal and error ⇐13

Where order granting motion for new trial was allowed to become final, judgment to which motion was directed became a nullity, and, since it was a nullity, there was no judgment from which appeal could be taken.

7. Appeal and error ⇐882(20)

Defendant was not "estopped" to contend that notice of entry of judgment was not effective by failing to appeal from order denying his motion to strike such notice, since such order was not appealable. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Robert Lees McCordic against Samuel M. Crawford and others and the Abbot-Kinney Company to recover damages for injuries received by plaintiff when a strap on an amusement device broke. From a judgment in favor of the plaintiff, the Abbot-Kinney Company appeals. Motion for diminution of the record.

Motion for diminution of record granted, and appeal dismissed.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, and Reginald I. Bauder, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries received when a strap on an amusement device called the "Cluve Loopa" broke, defendant Abbot-Kinney Company, hereinafter referred to as defendant, attempts to appeal. There is also a motion for diminution of the record to have included in the record before this court:

(1) A notice of motion to strike a notice of entry of judgment, which motion was made by the appealing defendant; and

(2) An order denying the aforesaid motion.

[1] The motion for diminution of the record should be granted and the documents referred to therein will be considered by this court as part of the record before it.

These are the material facts:

January 16, 1942, plaintiff's attorney served on defendant a notice of entry of judgment in which it was stated that the judgment was entered on January *13*, 1942. The judgment was in fact entered on January *14*, 1942. January 21, 1942, defendant served and filed a notice of intention to move for a new trial. March 19, 1942, defendant's motion for a new trial was granted. No appeal was taken from this latter order and it has now become final.

We are confronted at the outset with this question:

[2-4] *Had the time within which the trial court had jurisdiction to grant a motion for a new trial elapsed on March 19, 1942?*

This question must be answered in the negative and is governed by the following pertinent rules of law:

(1) The trial court loses jurisdiction to pass upon a motion for a new trial sixty days from and after service on the moving party of written notice of entry of judgment. (§ 660, Code Civ.Proc.)

(2) If notice of entry of judgment has not been served, then the trial court loses jurisdiction to pass upon a motion for a new trial sixty days after the date of the filing by the moving party of his notice of intention to move for a new trial. (§ 660, Code Civ.Proc.)

(3) A notice of entry of judgment which erroneously states the date of entry of judgment is a nullity and does not set in motion the sixty-day period in which the court has jurisdiction under section 660 of the Code of Civil Procedure to grant a motion for a new trial. (Lauritzen v. H. L. Judell & Co., 109 Cal.App. 168, 169, 292 P. 536.)

(4) If a motion for a new trial is granted and becomes final, the effect of such order is to vacate and set aside the judgment theretofore entered. (Hatfield v. Levy Bros., 18 Cal.2d 798, 807 et seq., 117 P.2d 841.)

(5) An order made denying a motion to strike a notice of entry of judgment is not an appealable order under section 963 of the Code of Civil Procedure, since such order does not affect in any manner or bear any relation to the judgment either by way of enforcing or staying its execution. (Williams v. Superior Court, 14 Cal.2d 656, 666, 96 P.2d 334.)

[5] Applying the foregoing rules to the facts of the instant case it is conceded that the notice of entry of judgment was defective in not stating the date upon which the judgment was in fact entered. Therefore, it did not commence the running of the sixty-day period within which the trial court had jurisdiction to pass upon a motion for a new trial. The sixty-day period commenced to run January 21, 1942, the date defendant filed its notice of intention to move for a new trial. Thus the trial court's jurisdiction to grant a motion for a new trial expired March 21, 1942, and,

since the motion for a new trial was granted March 19, 1942, it was granted at a period when the trial court had jurisdiction to so act.

[6, 7] Since the order granting a motion for a new trial was allowed to become final, the judgment as to which it was directed was vacated and became a nullity, and, since it was a nullity, there was no judgment from which defendant could appeal. Further, defendant is not estopped to contend that notice of entry of judgment was not effective by failing to appeal from the order denying his motion to strike such notice, since such order was nonappealable.

For the foregoing reasons:

(1) The motion for diminution of the record is granted, and

(2) The attempted appeal is dismissed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 398

In re WILSON'S ESTATE.

WILSON v. LANE.

Civ. 13898.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

Appeal and error ⇐120(1)

An order consolidating two probate matters in superior court is not "appealable".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Los Angeles County.

In the matter of the estate of Edward N. Wilson, deceased. From orders admitting deceased's will to probate, dismissing a petition for revocation of special letters of administration issued to Donald P. Lane, appointing him as executor of the estate, and consolidating two probate matters, Mary Ellen Wilson appeals. On respondent executor's motion to dismiss the appeal.

Appeal dismissed.

A. Brigham Rose, of Los Angeles, for appellant.

Milo W. Horn, of Long Beach, for respondent.

PER CURIAM.

Respondent has presented a motion to dismiss the appeal. From the certificate of the clerk of the superior court it appears that on May 18, 1942, the will of Edward N. Wilson was admitted to probate. The notice of appeal from the order admitting the will to probate, filed on July 22, 1942, was not filed within the sixty-day period within which an appeal was permitted. It further appears from the certificate that appeals were also taken from an order dismissing the petition for the revocation of the special letters of administration which had been issued to Donald P. Lane, from an order appointing Lane as executor, and from an order consolidating two probate matters in the trial court. The last mentioned order is not appealable. The other matters from which appeals were taken have become moot.

The appeal is dismissed.



55 Cal.App.2d 943

SADONKO et al. v. NESTERENKO et al.

Civ. 13903.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1942.

Appeal and error ⇐611

Where respondents' motion to dismiss appeal from superior court's judgment because of appellants' failure to file transcript, as provided in court rules, is supported by superior court clerk's certificate, setting forth facts required by rule of District Court of Appeal, and all grounds stated in motion are supported by such certificate and authorities cited, appeal will be dismissed.

Appeal from Superior Court, Los Angeles County.

Proceeding by Paul Sadonko and others against Thomas Nesterenko and others. Judgment for defendants, and plaintiffs appeal. On respondents' motion to dismiss the appeal.

Appeal dismissed.

No appearance for appellants.

C. F. Jorz, of Los Angeles, for respondents.

PER CURIAM.

Respondents having served and filed their motion to dismiss the appeal in the above-entitled matter on the ground that appellants have failed to file a transcript as provided in the Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the clerk of the Superior Court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and the authorities cited,

It is hereby ordered that the appeal from the judgment be, and the same hereby is, dismissed.



55 Cal.App.2d 189

WILLIAMS v. RYAN et al.

Civ. 12154.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1942.

1. Vendor and purchaser ⇐186, 187

Where contract for sale of realty required vendor to provide for water being piped for household purposes upon purchaser paying $10 for water connection from street main to property line, vendor's failure to furnish water connection to the premises constituted a material breach of contract which excused purchaser from making further payment thereunder until connection was made, and "estopped" vendor from asserting a right to further payments of principal or interest until he had performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Vendor and purchaser ⇐48

Where contract for sale of parcel of realty was prepared by vendor, contract would be interpreted most strongly against him.

3. Vendor and purchaser ⇐58

Where contract for sale of realty required vendor to provide for water being piped for household purposes, and provided that purchaser was to pay $10 for water connection, the payment of the $10 would not be construed as a "condition precedent" to right to have water connection made, in view of intent of parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

4. Vendor and purchaser ⇐76

Where installment contract for purchase of realty required vendor to provide for water being piped for household purposes, vendor's covenant to make water connection and purchaser's covenant to pay installments were "concurrent covenants", and vendor's making of the connection was a material part of consideration supporting purchaser's promise to pay purchase price.

See Words and Phrases, Permanent Edition, for all other definitions of "Concurrent Covenant".

5. Action ⇐6

Under an installment contract for purchase of realty which required vendor to furnish water for household purposes, evidence that water supply for subdivision was so located that septic tanks connected with some of houses in subdivision drained into water tank rendering water unfit for domestic use should have been admitted in purchaser's action for declaratory relief, as tending to show a breach of contract authorizing purchaser to rescind.

6. Vendor and purchaser ⇐110, 117

Where contract for purchase of realty required vendor to provide for water being piped for household purposes, if palatable water was not available, purchaser was entitled to rescind, but if purchaser desired to rescind she could not keep possession of the premises.

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Action by Ruth A. Williams against Harry Ryan and another for declaratory relief for the purpose of having determined plaintiff's rights under a contract for purchase of a parcel of real property from the defendant, wherein the defendants filed a cross-complaint. From an adverse judgment, the plaintiff appeals.

Reversed with directions.

H. J. Kleefisch, of San Francisco, for appellant.

Jensen & Holstein, of San Jose, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action for declaratory relief for the purpose of having determined her rights under a contract dated May 10, 1930, by which defendant Harry Ryan sold to plaintiff a parcel of real property for the sum of $850. Defendant Harry Ryan and his wife, who was joined as a codefendant, by their answer and amended cross-complaint admitted the execution of the contract, but alleged that under the terms thereof there was due and owing on the purchase price, plus interest, and taxes, $1,267.07, and, further, that defendants were entitled to a reasonable attorney's fee of $250, for which judgment was asked. After a trial before the court without a jury, the court determined that $695 was due on the purchase price, $374.49 as interest, $35.96 for taxes and $250 as attorney's fees, and rendered its judgment in favor of defendant in the amount of $1,355.45. From that judgment plaintiff prosecutes this appeal.

The evidence shows that defendant Harry Ryan owns a subdivision in the Santa Cruz Mountains known as Mountain Springs. On May 10, 1930, Ryan entered into a contract with plaintiff, which is a form contract prepared by Ryan, by the terms of which he agreed to sell to plaintiff an unimproved lot in that subdivision for $850, $100 on execution of the agreement "receipt whereof is hereby acknowledged," the balance payable in monthly installments of $15 each, payable on the 10th day of each month starting June 10, 1930, with 7 per cent interest on the unpaid balance. The buyer agreed to pay all taxes. The form provides that the agreement is "subject to" certain "conditions, restrictions and reservations," among which are that the seller reserves all water rights, and that the "title to each lot in Mountain Springs carries with it one share of stock in the Mountain Springs Water Association. A charge of Ten ($10.00) Dollars will be made for water connection from street main to property line. Water will be piped for household purposes only"; that the buyer is entitled to immediate possession; that in the event "suit is commenced by the Seller against the Buyer for any cause arising out of this agreement, the Buyer hereby promise [s] to pay to the Seller a reasonable attorney's fee * * *."

There is no dispute that, when this contract was entered into, Ryan knew that plaintiff intended to build a house on the property, and that the property was purchased for that purpose. Plaintiff took possession and immediately started construction of a log cabin. She testified that over a period of time she expended between $2,200 and $2,500 on improving the property, defendant admitting that he had assisted in several respects in the construction of the house. Over a period of time the plaintiff paid to defendant $155 in installments on the purchase price, the last payment being made on December 31, 1931. Although the contract acknowledged receipt of $100 upon the execution of the agreement, it is admitted that such sum was not then paid, plaintiff testifying that she gave a promissory note in that sum to Ryan in lieu of the cash. Plaintiff testified the note had been paid by her husband. Defendant denied the note had been paid and produced the uncancelled note. The trial court found it had not been paid. That finding is supported by the evidence.

After the cabin was constructed, a dispute arose concerning the quality of the water in the area. There was no water piped to plaintiff's premises. There was a pipe and a faucet on the adjoining lot from which plaintiff was permitted by defendant to secure water. Plaintiff complained that the water was not palatable. Plaintiff testified that on many occasions she offered to pay the balance due on the contract if water fit for human consumption were delivered to the premises. Several witnesses called on her behalf corroborated this testimony. Defendant denied that such a tender had been made, and the trial court found in accordance with defendant's testimony. But defendant did not deny that plaintiff had complained of the quality of the water, and that he had admitted that

the pipes were broken and that the water tasted of sulphur. It is undisputed that no water connection was ever made on plaintiff's lot. It is also undisputed that no water company existed, defendant owning all the water rights, he testifying that, after the forty-five lots in the subdivision were sold and paid for, he intended to convey a proportional interest in the water rights to each landowner.

The record shows, without contradiction, that the first argument over the water occurred in January, 1931. In 1932 these arguments had reached such a stage that plaintiff refused further payments until palatable water was delivered. In July of 1932 defendant Ryan removed the faucet on the adjoining premises so that plaintiff had no water at all in or near her premises. Thereafter, all water used by plaintiff had to be conveyed to the premises for a considerable distance.

[1-3] Appellant urges that, under the contract, respondent was obligated to furnish a water connection to the premises, and that his failure to do so constituted a material breach of the contract which excused her from making further payments until the connection was made, and estopped the defendant from asserting a right to further payments of principal or interest until he had performed. With this contention we agree. The trial court found that under the contract the defendant was not obligated to make the water connection until the $10 fee was paid, and also found that no tender of that amount had been made. That is not a reasonable or proper construction of the contract. This contract was prepared by respondent and must be interpreted most strongly against him. It provides that the seller reserves all water rights; that "water will be piped for household purposes only"; and that "a charge of Ten ($10.00) Dollars will be made for water connection from street main to property line." Respondent knew of appellant's need for the water. He knew the house had been completed and was being used. Yet at no time did he offer to make a water connection to the premises. Reasonably construed, the payment of the ten-dollar fee was not a condition precedent to the contract right to have the connection made. It seems quite clear to us that it was the intent of the parties that, when needed, the connection would be made by the seller, and the $10 added to the other sums due under the contract. The payment of the $10 fee was no more a condition precedent to the right to the water connection, than was the payment of the full purchase price a condition precedent to the right of appellant to construct a home on the premises. Obviously, under the contract, the connection was to be made within a reasonable time after the need therefor arose.

[4] It cannot be successfully argued that the covenant to make the water connection was an independent covenant. The covenant to pay the installments and the covenant to make the connection were concurrent covenants, the connection to be made within a reasonable time after the need therefor arose. Nor can it be successfully urged that the covenant to make the water connection was subordinate and incidental to the main purpose of the contract. Obviously, the making of the connection was a material and essential part of the consideration supporting appellant's promise to pay the purchase price. It was a major and integral part of the consideration for the whole contract.

During the trial, appellant offered to pay to respondent $605 for a deed to the property and the promised share of stock. Upon the refusal of the tender, this sum was deposited in court. This sum was computed by taking the purchase price $850, deducting therefrom the $100 represented by the note, the $155 paid on account, and adding the $10 for the water connection. This was an insufficient tender. It excluded the note for $100 which the court found was unpaid, and excluded any sum for taxes, admittedly payable by appellant. However, if appellant makes a proper tender including these omitted sums she is entitled to the deed and share of stock.

[5, 6] It should also be mentioned that during the trial appellant attempted to show that the water supply for the subdivision was so located that septic tanks connected with some of the houses in the subdivision drained towards and into the water tank, rendering the water unfit and dangerous for domestic use. The trial court sustained respondent's objection to such testimony, stating that: "Unsanitary water, I think that is up to the Board of Health." This was clearly an erroneous ruling. Water, and palatable water, was indispensable for the use of the lot for the purpose for which it was purchased. If palatable water was not available, appellant was entitled to rescind. If she desires to rescind, however,

she cannot keep possession of the premises. She must elect whether she desires to rescind for such breach (if such breach is found to exist) or whether she desires to tender the full sum due, including the $100 note, the $10 connection fee, and the taxes, without interest.

The judgment appealed from is reversed with instructions to the trial court to declare the rights of the parties in a manner not inconsistent with the views herein expressed.

KNIGHT and WARD, JJ., concurred.



55 Cal.App.2d 176

HOGE v. LAVA CAP GOLD MINING CORPORATION.

Civ. 12096.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1942.

Rehearing Denied Nov. 27, 1942.

Hearing Denied Dec. 24, 1942.

1. Corporations ⇐452

A resolution of corporation directors that its vice president be authorized to negotiate with its president and others for adjustment of any differences between corporation and them, that president's indebtedness to corporation for purchase price of shares of stock therein be canceled in view of services rendered to corporation by him, and that such shares be delivered to him as payment for his services, amounted to an "offer", acceptance of which would constitute basis of binding contract for president's acceptance of such shares as compensation for services rendered and cancellation of his claims against corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

2. Corporations ⇐452

Where time for acceptance of offer by corporation directors' resolution to give its president certain number of shares of stock as compensation for services rendered was not specified, offer remained open for reasonable time.

3. Corporations ⇐452

A corporation did not rescind or revoke its directors' resolution, offering to give its president certain number of shares of stock as compensation for services rendered, by subsequent resolution that general releases of "certain claims" of corporation against president and his asserted claims, not enumerated, against corporation should be exchanged on payment of corporation's claims.

4. Limitation of actions ⇐46(1)

Where corporation's president, to whom it offered in directors' resolution to deliver certain number of shares of stock as payment for services rendered, accepted offer by letter dated January 29, 1937, and complaint in his action against corporation for dividends declared on such shares was filed in following July, cause of action was not barred by statute of limitations. Code Civ.Proc. § 337, subd. 1.

5. Costs ⇐146, 169

Under the Code section relating to costs, the term "costs" means those fees and charges which are required by law to be paid to the courts or some of their officers, the amount of which is expressly fixed by law, and the inclusion of the term "necessary disbursements" in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowed as an item of costs. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs" and "Necessary Disbursements".

6. Costs ⇐154

It may be assumed, in absence of contrary showing, that it was necessary for plaintiff, his attorney, or some one specially designated, to appear and interrogate witness whose deposition was taken at defendant's request. Code Civ.Proc. § 2025-½.

7. Appeal and error ⇐1008(1)

Whether presence of plaintiff's attorney of record during examination of witness, whose deposition was taken at defendant's request, was necessary to protect plaintiff's rights properly, was fact question to be decided by trial court.

8. Costs ⇐154

The cost incurred in taking of deposition is proper disbursement.

9. Depositions ⇐19

The mode of taking witness' deposition by either written or oral interrogation is subject to trial court's direction.

10. Costs ⇐154

Necessary traveling expenses may be allowed as item of "costs" incurred in taking of witness' deposition. Code Civ.Proc. §§ 1032, 2025½.

11. Appeal and error ⇐936(1)

Where disbursement by plaintiff's attorney of record in traveling to another state to appear for plaintiff in taking of witness' deposition at defendant's request was imposed on plaintiff by defendant so far as record showed, District Court of Appeal must assume, on appeal from judgment for plaintiff, that trial court correctly decided that such attorney's presence at taking of deposition was necessary to protect plaintiff's rights, so as to authorize allowance of such disbursement as item of "costs". Code Civ.Proc. §§ 1032, 2025½.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Arthur W. Hoge against the Lava Cap Gold Mining Corporation to establish plaintiff's ownership of a certain number of shares of defendant's capital stock and recover dividends declared thereon. From a judgment for plaintiff and an order denying defendant's motion to strike an item from plaintiff's cost bill, defendant appeals.

Modified, and affirmed as modified.

Prior opinion, 129 P.2d 764.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

James Snell, of Grass Valley, for respondent.

WARD, Justice.

The defendant appeals from a judgment in favor of plaintiff declaring the latter to be the owner of 6,000 shares of the capital stock of defendant, Lava Cap Gold Mining Corporation, and that he recover the sum of $1,860, dividends declared on said stock. Defendant also appeals from an order denying its motion to strike from plaintiff's cost bill an item of $360, being traveling expenses of plaintiff's attorney from Grass Valley, California, to New York and return incurred in taking a deposition in the latter place. Both appeals are presented on one transcript.

As appears from the evidence introduced, the facts out of which the suit arose may be stated as follows: Arthur W. Hoge, the plaintiff, a mining engineer residing in the Grass Valley mining district, H. B. Walmsley, a member of the bar of New York state, and R. F. D. LeMon, a promoter, had become interested in a group of gold-mining claims or properties located in said district, and conceived the idea of forming a corporation for the purpose of exploiting them. There were conflicting claims to these properties, debts and defects of title, and Hoge was to assist in clearing these matters up, being more or less familiar with the properties and qualified by experience in such work. Title to them was to be preliminarily vested in LeMon. The entire capital stock of the corporation, consisting of 2,500,000 shares, was to be issued to LeMon in return for a conveyance through him to the corporation of clear title to a portion of the properties, he in turn to put back into the treasury of the corporation 1,000,000 shares, and with the remainder satisfy the claims of various stockholders in prior organizations, pay off various creditors having claims upon them, and divide the balance between Walmsley and himself as compensation for their services prior to organization and thereafter until the corporation should be on a self-sustaining basis. Out of the stock so issued to LeMon it was agreed among the promoters and Hoge that the latter would be given 100,000 shares to take the presidency of the proposed corporation and "straighten out the mess." One of the witnesses testified that Hoge was to accept the presidency and that the stock was to cover his compensation until the mine was on a self-sustaining basis.

The plan was carried out, the defendant corporation was organized, coming into existence on January 14, 1932, its stock was issued as agreed, LeMon was elected to the office of executive vice-president, and active mining operations were begun and have since continued. Hoge, as president, was active in the corporation's affairs, particularly in getting the mining operations under way, in this regard acting as general manager and superintendent. Work was commenced around January 1, 1933,

consisting of unwatering a mine, going down and opening up sample ore bodies, retimbering and putting the mine in condition for operation.

In March, 1933, LeMon, charged with selling the stock of the company to the public, was preparing to apply to the Commissioner of Corporations of this state for a permit to sell. In that connection he addressed a letter to Hoge, in which he stated that he was endeavoring to clean up all ragged ends, and wanted the statement of the company to show no indebtedness whatever if possible. He refers to an item of "bills payable" and says: "This is made up of two $2,000 notes to yourself and Jockmus. Mr. Jockmus has consented to exchange his demand note for Lava Cap stock at 30¢ or 6,000 shares and I am today sending him Certificate No. 751 for 6,000 shares in payment of his note. Knowing your willingness to keep pace with others in this respect insofar as you can, I am enclosing herewith Certificate No. 752, registered in your name, for 6,000 shares, and I would ask you to mark your note paid and return to me by air mail immediately so that it can be eliminated from the statement. This, with the cancellation of the $25,000 mortgage, gives us a clean slate. I hope to have the mortgage out of the way by April 10th, at which time we can issue our statement and make application for a permit in California."

There were enclosed in this letter two promissory notes payable to Hoge, one executed by the corporation and the other by LeMon himself. Hoge had previously been requested by LeMon to subscribe for stock with the idea—counsel for appellant suggests—that Hoge being recognized in his community as a competent mining engineer, and being president of the company, prospective investors could be more readily induced to subscribe. Hoge had replied that he was unable to do so. As to the letter transmitting to him the stock certificate and notes he testified at the trial that he had no recollection of ever having subscribed for the stock, and regarded the matter as an offer made to him to take and pay for the stock by discounting the company's note and using the proceeds for that purpose—in effect, accepting the stock as an unauthorized gift. He declined to have anything to do with the transaction; and in the following month, LeMon being on a visit to the company's office at Grass Valley, handed back to LeMon the stock certificate, with his name endorsed thereon, and the two notes. A witness, O'Keefe, who at the time of the trial was secretary of the company, testified that at some time during the year 1933 this certificate was returned to the corporation by LeMon and canceled.

In addition to his activities as President of the defendant, Hoge was interested in a concern known as Hoge Development Company. Some time in the year 1933 prior to July this company was in immediate need of funds. To meet this need Hoge, who as president and manager of defendant was authorized to draw upon the corporation's local bank account, turned over to the development company $6,500 of the defendant's funds. He testified that he regarded the transaction as a loan—although no security was given for it—and that he apprised LeMon of what he contemplated doing. However, after it was done LeMon took strong exception to it, visited Hoge (who was at the time sick in a hospital) and demanded that he replace the funds; also that he and his son (who was assistant treasurer and assistant secretary of appellant) resign their offices, and that Hoge return to LeMon the 100,000 shares given him on the organization of the company. Hoge refused to resign or return the stock.

On LeMon's return to New York toward the end of July a report of the matter was made to the directors of the company, which, with respect to Hoge, at a meeting on August 1, 1933, wherein it appears that Hoge's indebtedness to the company was repaid on July 26th, passed the following resolution: "Resolved, that the Vice President be authorized to negotiate with Arthur W. Hoge and Arthur M. Hoge and the Hoge Development Company for the purpose of amicably adjusting any differences that may exist between this Company and them, or any of them, but that no legal action shall be taken in connection therewith, and that such steps as may be necessary to take to protect the interests of this company shall be taken in a careful and diplomatic manner, including the procuring of the resignations, if possible of Arthur W. Hoge as Director and President and Arthur M. Hoge as Assistant Treasurer and Assistant Secretary of the corporation, such resignations to be accepted at such time as this Board of Directors may deem proper.

"Further Resolved, that in view of the services rendered to this company by Arthur W. Hoge, his indebtedness to this company for $2,000 for the purchase of 6,000 shares of stock, be and the same hereby is cancelled, and that the said 6,000 shares of stock be delivered to said Arthur W. Hoge as payment for his services."

It is apparent from the tenor of this resolution that the directors of the company other than LeMon were unaware of the nature of the transaction between Le Mon and Hoge above mentioned, or of the situation regarding the stock.

LeMon then returned to California. Hoge at this time was confined to his home —still sick. LeMon got in contact with Hoge junior; informed him that he, Le Mon, had been appointed to handle the difficulty between his father and the company as best he could, and handed to him two written resignations, one for his signature and one for his father's. The son signed and undertook to take the other paper to his father. At this interview LeMon, though authorized by the board of directors to do so, made no disclosure of the terms of the resolution under which he was acting, nor did he come in direct contact with Hoge. Hoge later signed the prepared resignation. LeMon went back to New York and made a report to the board of directors, in which however he made no mention of any disposition of the 6,000 shares of stock, confining himself to the matters subsequently, on September 5th, included in the following resolution passed by the board:

"Resolved, that whereas this Company has had, and now has, certain claims against Arthur W. Hoge and Arthur M. Hoge and the Hoge Development Company, and whereas, the said Hoges or the Hoge Development Company has asserted a claim, or claims, against this Company, and whereas, all matters in dispute between all of said parties have been settled or disposed, except the payment to this company of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39) by the Hoges or the Hoge Development Company, it is hereby resolved, that upon receipt of said sum of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39), this Company exchange general releases with the said Arthur W. Hoge, Arthur M. Hoge and the Hoge Development Company, but that said general releases executed by this Company be not delivered until payment of said sum of Four Hundred Fifty-eight Dollars and Thirty-nine Cents ($458.39) and then only upon delivery of general releases from the Hoges and the Hoge Development Company to this Company."

In accordance with the above resolution releases were prepared, executed by the corporation and forwarded to the local attorney for the company at Nevada City, with instructions to exchange releases with Hoge. The releases, however, were never exchanged.

Later Hoge and Walmsley entered into some correspondence, and on October 2, 1933, the latter sent him excerpts from the minutes of the board of directors' meeting of August 1st. This was the first intimation to Hoge that LeMon had been authorized to cancel a purported indebtedness from him to the company of $2,000, and to permit him to retain "as payment for his services" the 6,000 shares of stock assumed by the resolution to be in his possession. It was from this correspondence also that Hoge learned that LeMon had received from the company approximately $10,000 during a two-year period for expenses and drawing account. In a letter to Walmsley dated October 9, 1933, Hoge informed him that he was thinking of putting in a bill to the defendant for nineteen months' salary as president and general manager of the company, and wished to have Walmsley's opinion on the matter before doing so; and in another letter to him dated October 17th, referring to the same subject, he states that the matter of salary was never discussed until the time Jockmus, subsequently president of the company, visited Grass Valley in April, 1933, when both LeMon and Jockmus stated to him that it was their idea that no officer or director of the company was to receive any salary until after the properties went into production, adding: "In view of the above facts, I feel that I am certainly just as entitled to compensation as LeMon was."

On November 27, 1933, Hoge wrote to Jockmus, then president of the company, about the same matter, in which letter he also referred to the stock incident, as to which he said: "I want also to add that when Mr. LeMon was here with you last April, I gave him 6,000 shares of stock properly endorsed and also gave him back his note for $2,000.00 and also gave him back the company note of

$2,000.00 whereas I could have paid in my $2,000.00 through my bank and paid for this stock and could in turn cash the company note."

It appears that nothing further was done either about the stock or Hoge's claim for salary until some three years later when, on November 12, 1936, Hoge wrote Jockmus, who was still president of the company, as follows: "I have succeeded, after a period of a little over three years, in getting certified copies of the famous directors' meetings of August 1, 1933, and September 5, 1933." He further stated that from their reading it was clear to him that none of the directors except LeMon knew the facts, as was apparent from that part of the minutes of the first mentioned date reading: "* * * that in view of the services rendered to this company by Arthur W. Hoge, his indebtedness to this company for $2,000 for the purchase of 6,000 shares of stock, be and the same is hereby canceled, and that the said 6,000 shares of stock be delivered to said Arthur W. Hoge as payment for his services." Hoge further stated that "it was understood that I was to receive a salary as President of the Corporation from the time the Corporation was started, * * * As to what steps I shall take in regard to these matters, I have as yet not decided and I might likewise state that this will depend largely upon what I hear from you within the next ten days." After further personal correspondence between Hoge and Jockmus, the facts were referred to the secretary of the corporation, O'Keefe, who wrote Hoge in part as follows: "The 6,000 shares, of which you speak, is of a different classification in that it was completely a corporate matter and, as such, directly related to your activities as President of Lava Cap Gold Mining Corporation. The delivery of these shares to you was contingent upon your fulfillment of certain obligations and was in direct reference to the finances and other activities. They were not delivered to you." Hoge, in reply to that part of O'Keefe's letter requesting "a general release," replied: "A general release on my part will be given when the company's actions are complied with, but not before. * * * This stock was voted to me in payment for services rendered over three months after it had been given by me to LeMon as referred to in paragraph 4 in my letter to Mr. Jockmus of November 12, 1936. In view of the above facts, which LeMon, of course, knew all about, he acted as Chairman of the Board of Directors on August 1, 1933, and voted along with Messrs. Jockmus, Pendlebury, Walmsley and Mrs. Miller, that the said 6,000 shares of stock should be delivered to me as payment for services rendered. It has not been delivered and, consequently, as above stated, there will not be any release on my part until it is." Upon discussion of the situation by the board of directors, the matter of Hoge's claim was finally referred by the company to its counsel, who thereupon, on April 8, 1937, informed Hoge that they had advised the company the claim should be rejected. After further correspondence, the complaint herein was filed in July of 1937.

It is not necessary to decide whether respondent obtained title to the certificate for the 6,000 shares of stock at the time and by reason of its issuance in March, 1933. The factual background, however, becomes important in determining whether he became vested with ownership by reason of the above resolution of August 1, 1933, and occurrences thereafter.

Appellant in great measure places the blame for the issuance of the certificate originally upon LeMon, in this regard stating in its opening brief: "* * * in order to accomplish his purpose, LeMon, in violation of every duty he owed the appellant corporation, caused to be issued, without any consideration, this disputed certificate for 6,000 shares of stock, and in addition to that infamy caused to be executed, likewise without any consideration whatever, the promissory note of the appellant corporation, payable to respondent upon demand. These two documents he forwarded to respondent. Respondent, however, at that time recognizing his obligation to be honest in the discharge of his duties to appellant, refused to have anything to do with the malodorous transaction."

There is evidence that the stock upon its delivery by Hoge remained in the possession of LeMon, although it stood on the books of the appellant in the name of respondent, until subsequent to the resolution of August 1, 1933. There is also evidentiary support in the findings of the court that LeMon delivered the stock certificate to appellant for cancellation without the knowledge or consent of respondent, and that the writing of the word

"Cancelled" across the face of the certificate was without the knowledge or authority of either respondent or appellant. The evidence of witness O'Keefe, who was working in harmony with LeMon, shows that LeMon delivered the certificate to him and that it was marked cancelled. Whether this was with the approval of respondent is a factual matter determined from all of the surrounding circumstances, but there is evidence that at the time of cancellation the matter was handled by LeMon without the knowledge of either interested party.

Whatever occurred prior to August 1, 1933, appellant at that time directed by resolution that the 6,000 shares of stock "be delivered to said Arthur W. Hoge as payment for his services." The court found that respondent had performed certain services of the value alleged, which had not been paid, and that the resolution of August 1, 1933, had been passed and never revoked or rescinded; that delivery of the stock had been demanded by respondent but was refused.

[1] Appellant contends that the resolution of August 1, 1933, vested no title of ownership to the stock in respondent. This resolution, read in its entirety, may be construed to be an offer which, if accepted, constituted the basis of a binding contract. That cancellation of claims should be negotiated through LeMon was simply a matter of convenience. Had the offer been immediately communicated to Hoge, and the cancellation of claims accomplished with the corporation direct, the contract would have been completed. LeMon as an agent of communication was a mere incident. He was neither fair to his fellow directors nor to respondent. Whatever part he played in the negotiations, they did not result in the ultimate purpose of the offer namely, the cancellation of claims.

Upon the theory that it merely offered or proposed that respondent accept the 6,000 shares of stock as compensation for services rendered, appellant also contends that there was no acceptance of the offer in writing, and that the statute of limitations (Code Civ.Proc., § 337, subd. 1) is applicable.

Specifically, it is appellant's contention that the board of directors intended a complete severance of all connections with respondent, and that cancellation of claims should be effected through the negotiations of LeMon.

[2-4] The time for the acceptance of the offer was not specified, and therefore remained open for a reasonable time. Acceptance could not be expected until notification of the offer. Appellant's position is that any information given by Walmsley to Hoge relative to the resolution was unauthorized and "in furtherance of his own ends in connection with his war with LeMon." The incident need not be considered further. The offer was still open; the corporation did not rescind or revoke its resolution of August 1st.

Appellant argues that the resolution of August 1st was rescinded and revoked by that of September 5th. The latter resolution is a declaration that the corporation still held "certain claims" against Hoge and that Hoge "has asserted a claim or claims" against the corporation; that upon the payment by Hoge, his son or the Hoge Development Company of the claim of the corporation, general releases should be exchanged. What claims Hoge still asserted against the company are not enumerated. The claims referred to in the evidence are the salary claim and that for the stock in dispute. Instead of attempting to end the matter, under the provisions of the September resolution, by positive statements further negotiations toward a settlement of the recognized controversy were inferentially approved. That Hoge accepted the company's offer, and demanded delivery of the stock when he finally obtained "certified" or verified copies of the resolutions, is demonstrated by his letter of January 29, 1937, stating: "* * * that the said 6,000 shares of stock should be delivered to me as payment for services rendered. It has not been delivered and, consequently, as above stated, there will not be any release on my part until it is." That a written acceptance was referred to, considered and acted upon by the corporation, is shown by its action in referring the matter to its attorneys for investigation. The acceptance of the offer occurred in 1937. The complaint was filed in July of that year. This also disposes of appellant's claim that the cause of action was barred by the statute of limitations.

A separate appeal has been taken from an order denying a motion to tax costs, and specifically from an order denying defendant's motion to strike from the cost bill an item covering railroad fare and other expenses of the attorney for plaintiff in traveling from Grass Valley to New York

City and return for the purpose, at the request of defendant, of taking Walmsley's deposition. The correctness of the amount is not challenged.

[5] Appellant relies upon section 1032 of the Code of Civil Procedure and the decision in Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503, 507. In the Moss case, in holding that a party was not entitled to recover as costs the amount expended for a bond premium, it was said: "The term 'costs', as has been said, means 'those fees and charges which are required by law to be paid to the courts, or some of their officers or the amount of which is expressly fixed by law'. Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022. The words 'necessary disbursements' should be similarly construed. Certainly the statute does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation. The code authorizes the allowance of costs only, and the inclusion of 'necessary disbursements' in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowable as an item of 'costs'. Bond v. United Railroads, 20 Cal. App. 124, 128 P. 786." The court therein held that the filing by the appellant of a surety bond in connection with which a premium was required was a privilege and not a duty—that a personal bond could have been filed for which no premium would have been required.

[6-11] In the case before us, the interrogatories of the deposition were propounded orally. In the absence of a showing to the contrary, it may be assumed that it was necessary for respondent, his attorney or someone specially designated to appear and interrogate the witness. Code Civ.Proc. § 2025½; Walker Min. Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 95 P.2d 188. In San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, at page 38, 99 P. 359, at page 362, 17 Ann. Cas. 933, the court said: "In the cases to which the law applies each party must take some risk. The party desiring the testimony must take the deposition or run the risk of losing it. The opposing party, if the depositions are taken, must incur the expense of employing counsel to cross-examine, or take the risk of ignoring the proceeding." Appellant imposed a necessary disbursement upon respondent. Whether the presence of the attorney of record was necessary to properly protect the rights of respondent, was a question of fact to be decided by the trial court. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L.R.A.,N.S., 1106; Welch v. Alcott, 178 Cal. 530, 174 P. 34; Hughes v. Hughes, 49 Cal.App. 217, 193 P. 148. We are not in accord with appellant's contention that as a matter of law the statute does not authorize the allowance of traveling expenses as costs. The cost incurred in the taking of a deposition is a proper disbursement. Eades v. Los Angeles Ry. Corporation, 43 Cal.App. 259, 184 P. 884. The mode of its taking, either by written or oral interrogation, is subject to the direction of the trial court. Hopkins v. Superior Court, 105 Cal.App. 133, 286 P. 1053. If the deposition is taken by oral interrogatories it is generally necessary that someone appear. The statute specifically provides for traveling expenses, after proper notice given, upon a failure to take a deposition, except for certain designated reasons. Code Civ. Proc. § 2025½. If traveling expenses may be allowed when the deposition is not taken, we conclude that such an expense may be a necessary disbursement when the deposition is taken. The Legislature could not have reasonably approved the provision found in section 2025½ except upon the assumption that a deposition actually taken in compliance with the Code provisions was, subject to the discretion of the court in fixing the amount, chargeable as a necessary disbursement. In Ott v. Hentall, 70 N.H. 231, 47 A. 80, 51 L.R.A. 226, in construing a statute similar to section 2025½ relative to traveling expenses of an attorney the court said (47 A. at page 82): "Under the previous statutes on the subject, the remedy of a party aggrieved by a failure to take a deposition was an action on the case. Rev.St. c. 188, § 22; Gen.Laws, c. 229, § 10; Powers v. Hale, 25 N.H. 145. Now he is not required to bring a separate action, but may be allowed as costs an equitable sum for actual travel, and have judgment therefor in the action in which the deposition was to be taken." In Moss v. Underwriters' Report, Inc., supra, the filing of a "surety" bond was a privilege. It was there held in effect that the trial court abused its discretion in approving as "costs" the amount of a premium voluntarily paid a surety company. In the present case, so far as the record shows, the disbursement by the attorney of record in

traveling to the state of New York to appear for respondent in the taking of a deposition, was imposed upon the latter by appellant. San Francisco Gas & Electric Co. v. Superior Court, supra. We must assume in the face of the record that the trial court correctly decided that the presence of the attorney of record was necessary to protect the rights of respondent.

It is ordered that the judgment, in so far as it relates to dividends declared on the stock awarded plaintiff, is reduced by an amount of $300, the aggregate of such dividends declared prior to January 29, 1937, the date Hoge became owner of the stock; as so modified the judgment is affirmed, respondent to recover costs.

PETERS, P. J., and KNIGHT, J., concurred.



55 Cal.App.2d 369

ROSCOE MOSS CO. v. JENKINS.

Civ. 13630.

District Court of Appeal, Second District, Division 3, California.

Nov. 4, 1942.

Hearing Denied Dec. 31, 1942.

1. New trial ⇐68

An order granting a new trial solely on ground of insufficiency of evidence should be reversed where evidence was such that verdict for moving party would have been without support.

2. Contracts ⇐346(2)

In action to recover amount due under contract to drill a water well, plaintiff was required to allege and if it was denied to prove performance of the contract. Code Civ.Proc. § 457.

3. Contracts ⇐221(3), 346(2)

Where contract price was payable on completion of work in drilling water well, performance was a "condition precedent" to payment and was required to be alleged and proved as such. Code Civ.Proc. § 457.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

4. Contracts ⇐335(2)

Plaintiff in action to recover amount due under contract to drill water well, alleging performance of contract, was not required to anticipate defendant's contentions as to particulars in which it might be claimed that work was not done in workmanlike manner, and all plaintiff had to do was to make out a "prima facie case" which is a case sufficient to prove that plaintiff furnished the materials and performed labor and completed the work as agreed. Code Civ.Proc. § 457.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

5. Contracts ⇐322(3)

The provision in contract to drill, case and test a water well that work would be done in a good and workmanlike manner did not place the contractor suing for amount due under contract, under duty to prove the exact procedure that was followed in each detail of operations, except as such evidence might be required to meet evidence produced by defendant that work in certain specific operations failed in specific respects to meet requirements of good workmanship. Code Civ.Proc. § 457.

6. Contracts ⇐198(6)

Where contractor held itself out as a company skilled and experienced in drilling of water wells with rotary equipment, and contractor's superintendent recommended the drilling of a rotary well on basis of his familiarity with local water conditions, and landowner relied upon contractor's knowledge and skill, contractor's undertaking to drill the well carried with it an "implied obligation" to do the work in a workmanlike manner.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Obligation".

7. Contracts ⇐189

The obligation of person entering into contract to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, is "implied" by law, and need not be stated in contract.

8. Contracts ⇐322(1)

The statute placing upon a contractor the burden of proving facts showing performance of contract, where allegation of performance is controverted, does not require his proof to negative any possible

claim of breach of warranty. Code Civ. Proc. § 457.

9. Contracts ⇐295(1)

A contractor suing for amount due under contract to drill, case and test a water well, could recover upon proof of substantial compliance with the contract. Code Civ. Proc. § 457.

10. Contracts ⇐322(3)

In action to recover amount due under water well drilling contract requiring drilling to be done in a workmanlike manner, evidence that well was cased, pumped and tested, was sufficient to prove that materials were furnished as agreed in absence of other evidence. Code Civ.Proc. § 457.

11. Contracts ⇐322(1)

Where evidence of performance is so complete that it admits of no inference of a failure to perform according to contract without assuming bad faith, willful breach of duty or negligence on part of contractor, such evidence is sufficient to shift to other contracting party the duty of going forward with his proof to show that contract has been breached. Code Civ.Proc. § 457.

12. Contracts ⇐322(1)

When it is shown that work agreed to be done under contract sued on has been done, contractor is entitled to benefit of statutory presumption that private transactions have been fair and regular. Code Civ.Proc. § 1963, subd. 19.

13. Contracts ⇐322(3)

The measure of proof required to show substantial performance of contract sued on depends upon wording of contract, the nature of undertaking, and the condition of the pleadings.

14. Trial ⇐59(2)

Due latitude in directing the order of proof must be exercised by trial court.

15. Evidence ⇐117

In action to recover amount due under water well drilling contract, wherein defendant claimed that an insufficient amount of water was produced because of unworkmanlike drilling, testimony regarding a subsequently drilled well for purpose of comparison between the two was inadmissible where no sufficient foundation was laid for such comparison.

16. New trial ⇐70

In action for amount due under contract to drill a water well, where there was no conflict in evidence showing that contractor's work was done in a workmanlike manner and evidence would not have sustained a verdict for defendant, granting defendant's motion for new trial after jury returned a verdict for contractor was error.

Appeal from Superior Court, Santa Barbara County; Louis C. Drapeau, Judge.

Action by the Roscoe Moss Company against John Jenkins to recover the amount due under a contract for drilling of a water well, wherein defendant filed a cross-complaint for damages for alleged failure to drill the well in a workmanlike manner. The jury returned a verdict for plaintiff, and from an order granting a new trial, the plaintiff appeals.

Reversed.

Hearing denied; TRAYNOR, J., dissenting.

Loyd Wright and Charles E. Millikan, both of Los Angeles, and Morris J. Stephan, of Santa Maria, for appellant.

Smith & Smith, of Santa Maria, for respondent.

SHINN, Justice.

Plaintiff contracted to drill, case and test a water well for defendant upon his ranch in Santa Barbara County. According to the contract, which was in writing, it was to be drilled with a rotary outfit on a site selected by the owner and to a depth not in excess of 300 feet, the owner to have the privilege of stopping further work at or below 200 feet. Plaintiff was to furnish all labor, tools and machinery, and materials which included 100 feet of 16-inch casing and 150 feet of 12-inch casing, arc welded, and equipment necessary to properly install the casing in the well bore. The casing was to be perforated as directed by the owner and sand-pumped by the contractor after perforating. The agreement provided that, "The Contractor does not agree to find or develop water, but he does agree to drill any well called for herein in a good and workmanlike manner." The contract price was to be $1,392.41 for drilling and reaming the bore and setting and perforating 100 feet of 16-inch and 150 feet of 12-inch casing; for any greater or lesser depth of well cased and drilled, $5.11 per foot was to be added or deducted from said price and the total amount earned was to be paid on completion of the work.

The well was drilled by the rotary method at a location selected by defendant, was

stopped at 290 feet upon instructions of defendant, it was cased to 282 feet, the casing was perforated and the well was swabbed and sand-pumped. At the request of defendant there were no perforations above the 132-foot level because defendant feared that perforations above that level would draw water from a small domestic well nearby which was 140 feet deep and because it was desired to avoid a strata of fine white sand which was above the 132-foot level; also because the owner considered that there was no water available above that level. When completed and sand-pumped the well produced only between 600 and 700 gallons per minute from a pumping depth of about 133 feet and was not considered to be a usable well. Thereafter plaintiff worked on the well for several months, sand-pumping and cleaning it out in an unsuccessful effort to increase the flow of water. At the contract price plaintiff earned $1,555.93. Payment was demanded and refused and this action was brought to recover that amount.

The complaint alleged performance by plaintiff of its obligation under the contract. Defendant answered, alleging on information and belief that the well, if properly drilled, would have been capable of producing more than 1,200 gallons per minute at a pumping level of less than 50 feet "but that by reason of poor workmanship on the part of the plaintiff in drilling and working on said well, the said well failed and still fails to produce more than 600 gallons per minute at a pumping level of approximately 135 feet." It was further denied that plaintiff drilled the well in a good or workmanlike manner and it was alleged that the failure of the well was due in part to the fact "that rotary drilling was not suited for the purpose of properly drilling said well on defendant's land." Defendant also filed a cross-complaint alleging, in his first cause of action, generally, that plaintiff had failed to drill the well in a good and workmanlike manner and that by reason thereof defendant had lost a valuable lease on the property and had been damaged in the sum of $8623.75 through loss of rental which would have been earned under the lease had the well been a successful one. In the second cause of action it was alleged that plaintiff "warranted and represented to defendant that a rotary type well was more efficient and more certain to produce a water well than any other method of drilling" and that plaintiff recommended rotary drilling and "that said failure of said well was due in part to the fact that rotary drilling was not the method of drilling suited or fitted for the purpose of properly drilling a water well on defendant's land." It was alleged that defendant had been damaged by breach of the warranty in the said sum of $8623.75 through loss of the lease and rentals.

The case was tried before a jury and it was stipulated that if the verdict went for plaintiff it should be in the amount sued for. At the close of the evidence defendant abandoned the second cause of action of the cross-complaint and in reply to a statement that he had announced an abandonment of the same, stated, "I agree with that. I limited my proof to the other count, and I quite agree with counsel also that that count in the cross-complaint—I do not just compute the years—would probably be barred all right," whereupon the court granted a motion for a directed verdict upon the second count of the cross-complaint and denied a like motion as to the first count of the cross-complaint. The case went to the jury after denial of motions on each side for directed verdicts on the complaint and answer, and a verdict was returned in plaintiff's favor in the amount of $1,555.93. After entry of judgment defendant, as defendant and cross-complainant, made a motion for new trial and the court made an order "that said motion for a new trial in the above-entitled action be, and the same is hereby, granted only upon the issues presented on the complaint and the amended answer thereto on the ground of the insufficiency of the evidence to sustain the verdict heretofore rendered in said action; and that said motion, as to the issues presented on the cross-complaint and the answer thereto be and the same is hereby denied; * * *." From this order plaintiff has appealed.

[1] The sole question on the appeal is whether a verdict, had it been for defendant, would have found substantial support in the evidence. The only defense which remained for determination by the jury was that the well was not drilled in a good and workmanlike manner. There was not, as we shall show, any evidence or any permissible inference from the evidence, to sustain this defense. It will appear as we discuss the evidence that the conflicts therein on the material issue, as suggested by the defendant, do not exist and that

the evidence was such that had the verdict been for defendant it would have been without support. In such a case an order granting a new trial solely on the ground of insufficiency of the evidence should be reversed. De La Falaise v. Gaumont-British P. Corp., 1940, 39 Cal.App.2d 461, 467, 468, 103 P.2d 447, and cases there cited.

As far as we can determine from the record and from defendant's brief, it would appear that a new trial was granted upon an erroneous theory of procedure as to the duty of going forward with the proof. Defendant contends that the new trial was properly granted because plaintiff failed to prove that the well was drilled in a good and workmanlike manner; that this was a fact necessary to be proved in order to show performance of the contract and that in the absence of such proof there was an insufficiency of evidence to support a verdict for plaintiff. We address ourselves to these contentions.

[2-4] It was necessary, of course, for plaintiff to allege and, if it was denied, to prove performance of the contract on its part. Section 457 of the Code of Civil Procedure reads as follows: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance." Since the contract price was payable on completion of the work, performance was a condition precedent to payment and to be alleged and proved as such. We have seen that there was a general allegation of performance by plaintiff and a denial in general terms that there had been such performance, although there was an express admission that the well was drilled to a depth of 282 feet. If we treat this denial as sufficient, as the trial court did, plaintiff was required under the section to establish on the trial the facts showing such performance. It is clear from the record that plaintiff did show performance on its part. Among the witnesses for plaintiff was the man who drilled the well and whose day by day reports of the operations were placed in evidence. It appeared from his testimony and that of other witnesses that the materials were furnished as agreed and that the usual practices in the drilling of rotary water wells and in the removal of drilling mud by swabbing and sand-pumping were followed. Defendant contends that plaintiff's proof did not go far enough and that it should have shown in detail not only each step taken in the progress of the work but that each such step was taken and each operation of the drilling process was done in a good and workmanlike manner. This contention, which apparently prevailed in the trial court on motion for new trial, is unsupported by any authority cited by counsel or by any rule of law which our investigation has disclosed. We are satisfied that under section 457 of the Code of Civil Procedure plaintiff was not obliged to go any further with its proof than it did go in proving performance. The answer as well as the cross-complaint did not specify particulars in which it was claimed that plaintiff's work was not done in a good and workmanlike manner. We are not questioning that the answer, even though subject to demurrer for uncertainty, was sufficient to put into operation the provisions of section 457 of the Code of Civil Procedure as to the matter of plaintiff's proof, but the allegation certainly left plaintiff and the court completely unadvised as to the contentions of defendant with reference to the question of performance. With the pleadings in that state, plaintiff was not required to anticipate defendant's contentions as to the particulars in which it might be claimed that the work was not done in a good and workmanlike manner. All it had to do was to make out a prima facie case, that is to say, a case sufficient to prove that it furnished the materials and performed the labor and completed the work as agreed. The proof did show this and with sufficient completeness and particularity as to admit of no inference, in the absence of any evidence to the contrary, other than that the work had been done in a good and workmanlike manner.

Defendant makes the error of placing too much reliance upon the stipulation in the contract that the work would be done in a good and workmanlike manner. The error is illustrated by the argument advanced in its support. Under the contract plaintiff was required to furnish, among other things, "all required adapter rings, shoes and landing clamps to properly install above casing," and defendant asks, "Where is there any evidence that this covenant was performed?" Defendant

further says, in discussing rotary drilling, "The purpose of the rotary mud circulating under pressure down through the drill stem and up through the hole outside the drill stem is to form a mud casing in the hole as the drilling progresses." Counsel then proceed to propound questions, saying that they could fill page after page with such questions, which only an expert could answer. These questions relate to the consistency of mud which should be used, the speed of rotation of the drill stem, how rapidly the drill stem should be dropped through different formations, how far the mud should be allowed to penetrate the surrounding formation, what pressure should be on the mud pumps, and finally they remark, "Undoubtedly there is a method of preventing excessive quantities of the rotary mud from being forced back into the water-bearing formation so far as to block it off permanently. What are those methods?" The contention is that plaintiff's proof of performance failed because all such matters were not covered by expert testimony.

[5] The provision in the contract that the work would be done in a good and workmanlike manner did not place the plaintiff under a duty to prove the exact procedure that was followed in each detail of the operations, except as such evidence might be required to meet evidence produced by defendant that the work in certain specific operations failed in specific respects to meet the requirements of good workmanship.

[6] The provision of the agreement that the work would be done in a good and workmanlike manner added nothing to plaintiff's obligations under the contract. Plaintiff corporation was and had been for many years in the business of drilling water wells. Mr. Moss, manager of the company, testified that it drilled from 150 to 200 wells a year and that the company possibly drills more feet of water well hole than any other company in the United States. It uses both the cable tool and rotary methods. Before contracting for the well defendant negotiated with plaintiff's superintendent, who was an experienced driller, thoroughly familiar with the use of rotary equipment. Admittedly plaintiff held itself out as a company skilled, competent and experienced in the drilling of water wells with rotary equipment. There was evidence that the superintendent recommended the drilling of a rotary well, was fairly familiar with local water conditions, and disclosed to defendant his knowledge of the work. Under these circumstances and in view of defendant's reliance upon plaintiff's knowledge and skill, which reliance was shown, plaintiff's undertaking to drill the well carried with it an implied obligation to do the work in a good and workmanlike manner.

[7] A general statement is found in 38 Am.Jur. 662, § 20, reading as follows: "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement. See footnotes in 19 Cal.Jur. 544. It is applicable of course to a contract for the drilling of a well. Borg v. Downing, 1936, 221 Wis. 463, 266 N.W. 182, 183. It is to be borne in mind that defendant did not deny that the well had been drilled but only that the work had been done in a good and workmanlike manner, without specifying any particulars of plaintiff's alleged default. No negligence was alleged, although defendant perhaps could have sued by cross-complaint as for tort based upon alleged negligence. Harding v. Liberty Hospital Corp., 1918, 177 Cal. 520, 524, 171 P. 98. But whether the theory was breach of contract or negligence, defendant's proof would necessarily proceed along the same lines, namely, to establish the failure to use the care, skill and knowledge necessary to do the job in a good and workmanlike manner.

[8] Section 457 of the Code of Civil Procedure, in placing upon a contractor the burden of proving the facts showing performance, where the allegation of performance is controverted, cannot be construed properly as requiring his proof to go so far as to negative any possible claim of breach of warranty.

[9] Plaintiff was entitled to recover upon proof of substantial compliance with its contract. Bavin & Burch Co. v. Bard, 1927, 81 Cal.App. 733, 255 P. 200. There was no allegation in the answer that

plaintiff had not substantially fulfilled its contract. It might have done that and yet have failed in some minor particular to perform the work in a good and workmanlike manner. However, we have assumed that the denial was sufficient to require plaintiff to prove the facts constituting performance and we shall elaborate somewhat upon what we have already said as to plaintiff's fulfillment of its obligation in the matter of proof.

[10] It is not suggested here, nor was it suggested upon the trial, that the materials were not furnished as agreed or that they were not of first-class quality. The well was cased, pumped and tested, and in the absence of other evidence this was sufficient to prove that the materials were furnished as agreed.

[11-14] Where the evidence of performance is so complete, as it was here, that it admits of no inference of a failure to perform according to contract without assuming bad faith, willful breach of duty or negligence on the part of the contractor, such evidence is sufficient to shift to the owner the duty of going forward with his proof to show that the contract has been breached. When it is shown that the work agreed to be done has been done, whether it be the construction of a building, the making of a road or the digging of a well, so that the thing contracted for stands essentially completed, the contractor is entitled to the benefit of the presumption declared by section 1963 of the Code of Civil Procedure, subdivision 19, that private transactions have been fair and regular. There is a presumption of fact that persons have acted in good faith and there is no presumption, of course, in such a case as this, that the contractor has been negligent. There was no duty on the part of plaintiff to negative the alleged poor workmanship which could have resulted only from its bad faith or negligence. It would be a reversal of the customary procedure and wholly illogical to proceed in the trial of issues such as those here involved by requiring the contractor to produce as a part of his case in chief, not only evidence sufficient to make out a prima facie case of performance but also explicit proof as to each bit of material used and each bit of labor done in anticipation of proof that he had breached the contract to do his work in a good and workmanlike manner. He must, of course, prove substantial performance but no inflexible rule can be declared as to the measure of proof required for a prima facie case; too much depends upon the wording of the contract, the nature of the undertaking and the condition of the pleadings; also, due latitude in directing the order of proof must be exercised by the trial court.

While it appears from defendant's brief that he places his main reliance upon the point already discussed, it is suggested rather than argued that there was a conflict in the evidence as to whether plaintiff's work was done in a good and workmanlike manner. We find no such conflict. There was testimony that plaintiff's superintendent McHardie, who was not living at the time of trial, expressed the opinion to defendant that a 2,000 gallon well could be brought in from the sand and gravel encountered above the 282-foot level. On the basis of this testimony it is suggested that the work must have been defective, as Mr. McHardie's prediction was not realized. It is argued further, although without basis in the evidence, that the rotary mud might have been negligently forced into the sand and gravel in such quantities as to shut off the supply of water. All of the evidence on the subject was to the effect that the intrusion of the mud into the formation is relative to the porocity of the formation and that this is true of oil wells and water wells alike. The supposition upon which defendant relies was directly touched upon but once and that was in the testimony of plaintiff's witness Moss, who, in reply to questions asked him on cross-examination, testified that in his opinion it is not possible for drilling mud to case off a water-bearing structure; that plaintiff's experience leads to the conclusion that where there is any particular quantity of water available in the water-bearing stratum the mud does not shut it off and that in his opinion it would not be possible for the mud to wall off or case off the water if there was any considerable amount of water in the water-bearing strata. Defendant called as a witness an expert in the drilling of oil wells by the rotary method. He as well as other witnesses testified to the methods usually employed for the removal of drilling mud. There was nothing in his testimony suggesting that the flow of fluid into the hole is interfered with after the mud and sand in the hole are removed by pumping. A comparison of the methods of operation described by this witness as well as by other

witnesses with those followed by plaintiff in the drilling and cleaning out of the well sufficiently shows that plaintiff followed the usual methods of rotary drilling.

[15] An effort was made at the trial to cast doubt upon the efficiency of plaintiff's work by proof that other wells drilled in the vicinity, one before and one after the drilling of plaintiff's well, were large wells, the first one of them producing 1,000 gallons a minute from a pumping level of 38 feet, and the other in excess of 2,000 gallons a minute from a depth of 75 feet. The first well, which was drilled in 1921 or 1922, was located about 1,000 feet from the well drilled by plaintiff. There was no evidence as to the depth of that well. The other one was drilled by cable tools immediately after the drilling of plaintiff's well and defendant calls our attention to these facts, from which it is suggested that an inference could properly be drawn that plaintiff's work must have been done in a negligent or inefficient manner. But defendant does not direct our attention to the fact that there was no evidence as to the depth of the first well and that the other well, which was called the Longwell well, was shown to have been drilled to a depth of 406 feet. Upon the trial there was much testimony relative to the latter well and the formation through which it had been drilled. An attempt was made to prove by a so-called expert tester of wells that if plaintiff's well had been properly drilled it would have produced as much water as the Longwell well. We do not believe that this testimony should have been placed before the jury at all. No sufficient foundation was laid for a comparison of the two wells. Defendant's witness testified, after examining the log of the two wells, as follows: "Q. How would you expect the Moss well [drilled by plaintiff] to compare in capacity and in pumping level with the Longwell well. * * * A. They should—according to the gravel formations and sand formations on both logs, the wells should be comparable to each other in delivering water at approximately the same depth." He was asked on cross-examination if he had an opinion as to whether the Longwell well, if it had been stopped at 282 feet, would have produced more than 600 gallons per minute and he admitted that he was unable to answer that question. That well was perforated from 138 to 387 feet, and the witness testified that he did not know and had no opinion as to how much of the water developed in the Longwell well came from below a depth of 282 feet. The witness did not undertake to express an opinion and exhibited no knowledge which would qualify him to express an opinion as to how much water might be produced from the sand and gravel shown in the log of plaintiff's well. He went no further than to say that the log showed a "possibility" of water. The well of course did produce something over 600 gallons per minute and the evidence furnishes no reasonable ground for a belief that the water sands and gravels above 282 feet were capable of producing any more water.

Great latitude was allowed defendant in proving the productive capacity of the two other wells. The unanimous verdict in plaintiff's favor conclusively shows that the jury believed (as we do) that the capacity of a well 1,000 feet away from plaintiff's well, of an unknown depth, and the capacity of another well drilled 250 feet away from plaintiff's well and 124 feet deeper, was no proof at all that the failure of the well in question was due to any fault of plaintiff's. Undoubtedly the jury saw, as we see, a convincing inconsistency in defendant's contentions. They may well have asked themselves the question why it was considered necessary to drill a well to a depth of 406 feet with cable tools if a well drilled with cable tools to 282 feet would have produced the 2,000 gallons per minute which defendant sought. The obvious answer was, we think, that the well drilled by plaintiff should have been located differently or drilled to a greater depth in order to develop any more than 600 or 700 gallons a minute.

[16] Had the jury upon the record now before us returned its verdict in favor of defendant, we should have found it necessary to reverse the judgment for insufficiency of the evidence. It is therefore our duty to reverse the order granting a new trial.

The order granting a new trial is reversed.

SCHAUER, P. J., and BISHOP, J. pro tem., concur.

55 Cal.App.2d 388

SAFWAY STEEL SCAFFOLD CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13639.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

1. Workmen's compensation ⇐1004

Industrial Accident Commission may allow as a lien against any amount of compensation which remains unpaid reasonable value of living expenses of the dependents of an injured employee subsequent to injury for which compensation is sought. St.1937, p. 287, § 4903(c).

2. Workmen's compensation ⇐1044

Compensation paid an injured employee under mistaken belief that he is entitled thereto amounts to "furnishing living expenses" to such employee within meaning of statute authorizing Industrial Accident Commission to allow as a lien against unpaid compensation reasonable value of living expenses paid. St.1937, p. 287, § 4903(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Furnishing Living Expenses".

3. Workmen's compensation ⇐1044

Where compensation claimant had recovered sum of money on original award of Industrial Accident Commission predicated upon finding that employer was guilty of serious and willful misconduct, which finding was subsequently annulled, employer was entitled to "lien" against unpaid portion of normal award for the recovery of sum so obtained by claimant. St.1937, p. 287, § 4903(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

Proceedings under the Workmen's Compensation Act on petition of Safway Steel Scaffold Company to annul an order of Industrial Accident Commission denying a petition for a lien against any unpaid award of compensation allowed Alyce Helmick for the wrongful death of her husband.

Order annulled.

B. R. Ware, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

McCOMB, Justice.

Petitioner seeks to annul an order of the Industrial Accident Commission denying its petition for a lien against any unpaid award of compensation allowed applicant in the matter of Helmick v. Safway Steel Scaffold Company and State Compensation Insurance Fund, No. L. A. 49-468.

The essential facts are these:

June 11, 1940, respondent Industrial Accident Commission made an award in favor of Alyce Helmick for the wrongful death of her husband, finding that the Safway Steel Scaffold Company had been guilty of serious and willful misconduct. June 13, 1940, petitioner asked respondent commission for a stay of execution, which request was denied. Thereafter Alyce Helmick filed a certified copy of the findings and award of June 11, 1940, of respondent commission as a judgment with the clerk of the superior court and by levying on Safway Steel Scaffold Company's bank account obtained $654.78. March 10, 1941, on rehearing respondent commission revoked its previous finding that petitioner herein, the Safway Steel Scaffold Company, was liable for serious and willful misconduct and made a finding that said petitioner was not liable for serious and willful misconduct. Petitioner was insured against liability with the State Compensation Insurance Fund. However, the policy did not insure against liability for petitioner's serious and willful misconduct.

This is the question presented for our determination:

Was petitioner entitled to a lien against the normal award made to Alyce Helmick for the recovery of the sum of $654.78, which she had obtained on the original award of the Industrial Accident Commission predicated upon its finding that petitioner herein was guilty of serious and willful misconduct, which finding was subsequently annulled?

[1,2] This question must be answered in the affirmative and is governed by the following rules:

(1) The Industrial Accident Commission may allow as a lien against any amount of compensation which remains un-

paid the reasonable value of living expenses paid by the dependents of an injured employee subsequent to the injury for which compensation is sought. (§ 4903(c), Labor Code, St.1937, p. 287.)

(2) Compensation paid an injured employee under the mistaken belief that he is entitled to the same amounts to furnishing such employee with living expenses.

[3] Applying the foregoing rules to the facts of the instant case, it is evident that the money which Mrs. Helmick obtained under the award of the Industrial Accident Commission subsequently annulled was, under the second rule, supra, in fact money furnished for living expenses, and therefore under the first rule above stated, respondent commission was authorized to allow a lien against any unpaid compensation due Mrs. Helmick.

The foregoing conclusions result in petitioner's receiving that which it had been improperly forced to pay and for which it was justly and rightly entitled to be reimbursed.

For the foregoing reasons the order is annulled and respondent commission is directed to take testimony and make an order in conformity with the views expressed in this opinion.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 390

SAFWAY STEEL SCAFFOLD CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13752.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

Workmen's compensation ⇐1044

Where State Compensation Insurance Fund had not made any expenditure under original award of Industrial Accident Commission for death of employee predicated upon a finding that employer was guilty of serious and willful misconduct, which finding was subsequently annulled, fund had not been injured and was not entitled to a "lien" against unpaid compensation under normal award for reimbursement of amount paid by employer. St.1937, p. 287, § 4903 (c).

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

Proceedings under the Workmen's Compensation Act by the State Compensation Insurance Fund on petition for annulment of order of Industrial Accident Commission denying petitioner's application for lien against unpaid award of compensation to Alyce J. Helmick for wrongful death of her husband while an employee of Safway Steel Scaffold Company.

Order affirmed.

Donald Gallagher, Edmund J. Thomas, Jr., and John J. Batistich, all of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

McCOMB, Justice.

This is a petition by the State Insurance Fund for the annulment of an order of the Industrial Accident Commission denying petitioner's application for a lien against any unpaid award of compensation allowed applicants in the matter of Helmick v. Safway Steel Scaffold Company and State Compensation Insurance Fund, No. L. A. 49-468.

The essential facts are these:

June 11, 1940, respondent Industrial Accident Commission made an award in favor of Alyce Helmick for the wrongful death of her husband, finding that the Safway Steel Scaffold Company had been guilty of serious and willful misconduct. June 13, 1940, petitioner asked respondent commission for a stay of execution, which request was denied. Thereafter Alyce Helmick filed a certified copy of the findings and award of June 11, 1940, of respondent commission as a judgment with the clerk of the superior court and by levying on Safway Steel Scaffold Company's bank account obtained $654.78. March 10, 1941, on rehearing respondent commission revoked its previous finding that petitioner herein, the Safway Steel Scaffold Company, was liable for serious and willful misconduct and

made a finding that said petitioner was not liable for serious and willful misconduct.

Since it appears from the record in the present case that petitioner, State Compensation Insurance Fund, has not paid out any money whatsoever under the original award to Alyce Helmick, said petitioner has not been injured and has no claim for reimbursement.

For the foregoing reasons, the order of the respondent, Industrial Accident Commission, is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 208

SAMPSELL v. GITTELMAN.

Civ. 13725.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

Hearing Denied Dec. 24, 1942.

1. Bankruptcy ⇐295

The purpose of provision of Bankruptcy Act authorizing trustee to prosecute any action in the court where bankrupt might have brought an action had there been no proceedings under the Bankruptcy Act was to indicate courts which have jurisdiction in event the trustee conceives he has a cause and such provision is sufficient to confer jurisdiction on state court of action by trustee for recovery of assets of bankrupt estate. Bankr.Act § 23, sub. b, 11 U.S.C.A. § 46, sub. b.

2. Bankruptcy ⇐296

The fact that trustee in bankruptcy could have pursued all remedies available to him in the federal court did not prevent him from suing bankrupt in state court to recover assets belonging to bankrupt estate. Bankr.Act § 23, sub. b, 11 U.S.C.A. § 46, sub. b.

3. Bankruptcy ⇐152, 246

Upon his election, the trustee in bankruptcy became the titular owner of all the bankrupt's estate as of the date of adjudication and was charged with the duty of actively investigating the affairs of the estate and the conduct of the bankrupt. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

4. Bankruptcy ⇐290

The fact that a bankrupt had successfully secreted assets belonging to the estate and could not be imprisoned for a disobedience of turnover order because of inability of trustee to show that bankrupt had the ability to comply therewith, furnished no basis for absolving bankrupt of duty to pay over the money.

5. Bankruptcy ⇐279
Trusts ⇐95

A bankrupt who had gained possession of money belonging to bankrupt estate became an "involuntary bailee" or "trustee" thereof for which judgment should be entered in order to effect a judicial sale of property thereafter found.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Bailee" and "Involuntary Trustee".

6. Judgment ⇐829(3)

A turnover order entered by bankruptcy court against bankrupt was "res judicata" of claim of trustee in bankruptcy against bankrupt in state court. Code Civ. Proc. §§ 1908, 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

7. Judgment ⇐829(3)

A turnover order entered by federal bankruptcy court comes before the state court with the same force and effect as would a judgment of a sister state.

8. Bankruptcy ⇐136(8)

A turnover order entered by bankruptcy court was a "final order" directed to the specific performance of a definite act by the bankrupt and was not a "judgment in rem."

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order" and "Judgment in Rem".

9. Bankruptcy ⇐136(10)

After finding by referee that bankrupt had possession of property at date of adjudication and entry of a turnover order was affirmed by the district court, fact of possession and control of property and its retention and concealment by the bankrupt was settled beyond future controversy.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Paul W. Sampsell, as trustee in bankruptcy, etc., against Louis Gittelman, to recover assets belonging to bankrupt's estate. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Martin Gendel, of Los Angeles, for appellant.

Craig & Weller and Thomas S. Tobin, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for determination in this case is whether the state court has jurisdiction to enter judgment for the amount of a turnover order previously entered by the referee in bankruptcy.

On the 21st of March, 1939, upon an involuntary petition, appellant was adjudged a bankrupt. Prior to the filing of such petition he had procured from various creditors, divers and sundry articles of merchandise which he had sold for the sum of $13,592.24. Upon the filing of the involuntary petition, plaintiff was elected trustee of bankrupt's creditors and thereupon, by reason of his qualification, became vested with title to all of the property of the bankrupt. 11 U.S.C.A. § 110, sub. a. A portion of the assets of the bankrupt was the money so received for such merchandise which he continued to conceal at all times.

After plaintiff had become satisfied that defendant was concealing such money he instituted summary proceedings before the referee in bankruptcy as a result of which the referee made findings of fact to the effect that "after his adjudication in bankruptcy, defendant concealed the sum of $13,592.24, which had been derived from the sale of merchandise purchased by him and disposed of by him between the dates of January 12, 1939, and March 19, 1939." Upon the findings so made the referee entered an order directing the bankrupt to turn the money over to the trustee. After the order had been reviewed by the United States District Judge, plaintiff instituted contempt proceedings against the bankrupt for the purpose of enforcing the turnover order. At the hearing of the contempt proceeding appellant pleaded that at that time he had none of the money in his possession and was therefore unable to make the turnover. Upon such showing of inability to comply, the district court dismissed the contempt proceedings without prejudice and authorized the trustee to institute an action in the Superior Court of Los Angeles County for the purpose of obtaining a judgment in personam to the end that the bankruptcy might be closed. Pursuant thereto this action was filed. At the trial below, it was stipulated that all proceedings in the federal court described in the above recitals had been regular and that the debt had not been paid. After a copy of the turnover order over objection had been received in evidence defendant offered to prove that he had innocently incurred the obligations involved in the order in the regular course of business; that he had lawfully sold the merchandise; that no acts of fraud had been committed by himself prior to the filing of the bankruptcy proceedings; that he had concealed no moneys from his creditors; and that he had not purchased or sold merchandise with intent to cheat his creditors. The general objection to such offer was sustained. Thereupon, the court made findings of fact as pleaded by respondent and rendered its decision in his favor in the sum of the turnover order and judgment was entered accordingly.

In the absence of any decision directly relating to the jurisdiction of state courts to consider and adjudge the question presented by such a situation, it will be illuminating here to review the provisions of the Bankruptcy Act relating to the rights of a trustee and to the intention of Congress to confer jurisdiction upon the state courts to entertain actions brought by a trustee for the recovery of assets of the bankrupt's estate. The trustee of a bankrupt estate is vested with the title to all of the nonexempt property of the bankrupt as of the date of the filing of petition in bankruptcy. 11 U.S.C.A. § 110, sub. a. The dominion of the trustee extends to all property transferred by the bankrupt in fraud of his creditors, subd. 4 of 110, sub. a, and to all property which, prior to the filing of the petition, the bankrupt might by any means have transferred, or which might have been levied upon and sold under judicial process or otherwise seized and taken away. Concurrent jurisdiction is conferred upon both state and federal courts to avoid fraudulent transfers of the bankrupt's assets, 11 U.S.C.A. § 110, sub. e; to avoid preferences granted creditors within four months prior to the filing of the peti-

tion, section 96, sub. b; to avoid fraudulent liens and transfers made within the same four months for the purpose of hindering, delaying or defrauding creditors, section 107, sub. e. In addition to such provisions the trustee of a bankrupt's estate is authorized to prosecute any action in the court where the bankrupt might have brought an action had there been no proceedings under the Bankruptcy Act, 11 U.S.C.A. § 46, sub. b.

From the several sections of the act pertaining to jurisdiction, there appears to be no provision for the exclusive jurisdiction of the federal courts in bankruptcy matters except in relation to the bankrupt's discharge from his debts, the administration and control of his estate, allowance of claims, division of the net assets among the creditors, and actions for the enforcement of certain federal criminal statutes designed to insure a safe conduct of bankruptcy proceedings. 11 U.S.C.A. § 11. The implication is that such exclusive jurisdiction in the federal courts is confined only to those matters which the Congress had in mind in enacting the Bankruptcy Act and amendments thereto. The above cited sections imply an intent upon the part of the Congress to leave the trustee of a bankrupt's estate free to make use of such courts as are available to recover or to safeguard the rights of the creditors of such estate. Not a section of the act divests the state courts of jurisdiction of an action to recover that which belongs to the creditors, but on the contrary, a liberal interpretation of section 46, sub. b, supra, inclines us to the conclusion that state courts were favored in all cases except in those of diverse citizenship of the litigants. No good reason appears to favor the exclusive jurisdiction of the federal courts in any plenary action or in any proceeding involving the rights of the bankrupt or the creditors except where exclusive jurisdiction over certain matters is confined to the federal courts. § 11, supra.

Indeed, it is inconceivable that any such jealousy could have existed in the personnel of Congress at the time of creating the act as would have led that body into the dubious course of depriving trustees and receivers in bankruptcy of the use of the most convenient agencies in the pursuit of the rights for whose protection they are especially charged. Had a situation similar to that of the instant parties existed forty years ago, under the law as appellant contends, a trustee residing in Fresno, in order to sue a dishonest bankrupt for assets he had concealed prior to the bankruptcy, would have been required to journey to Los Angeles to institute his action in the federal court instead of filing in the Fresno Superior Court. No such folly could have been intended. It has been a universal rule in the United States, as it was in the colonies, that an obligor in any civil matter may be brought to justice in the realm where he is found.

In the constitutional convention it was contended by a group led by Alexander Hamilton that all justice should be dispensed by the state courts. After provision was made for a specified federal jurisdiction nothing was thereafter inserted in the organic law or enacted by a federal statute to shield an evildoer within a state from the effects flowing from the infringement of its laws. Merely because the Constitution vested the federal courts with exclusive jurisdiction over bankruptcy matters and other specific acts and with reference to designated properties affords no basis for the inference that an officer of a federal court may not proceed in a state court to effect a speedy execution of his duties. But without regard to such arguments if the jurisdiction of the state courts were dependent upon provisions of the Bankruptcy Act, section 46, sub. b, supra, is sufficient to confer such jurisdiction.

There is nothing sacrosanct about a dishonest bankrupt. He is entitled to no special privileges; he has earned no coveted exemptions. It has never been suggested by any court, nor is it implied in any statute, that after converting his tangible assets into money which he has concealed, he might retreat to the shadow of a federal court and successfully cry: "Ne plus ultra," and there await the pronouncement of his discharge from futile proceedings because, forsooth, he has so deeply buried his stolen treasure.

Originally, the bankruptcy court had no jurisdiction to try a suit by a trustee to recover assets of the estate. Such actions had to be brought in the state courts unless there was a diversity of citizenship. Bardes v. First National Bank, 178 U.S. 524, 20 S.Ct. 1000, 44 L.Ed. 1175. After the act was amended in 1903, giving the bankruptcy court concurrent jurisdiction it was held that not even possession by that court of proceeds of the sale of mortgaged chattels, could deprive the state court of its jurisdiction of a plenary action to set aside

the mortgage as fraudulent. "No principle of comity was violated and there was no interference with the bankruptcy court." Frank v. Vollkommer, 205 U.S. 521, 526, 27 S.Ct. 596, 598, 51 L.Ed. 911. In one case the trustee of a bankrupt's estate sued the bankrupt and his spouse in ejectment in a state court to be restored to the occupancy of lands to the possession of which the estate was entitled. The trustee was not required to rely upon the summary order of the federal court. Levy v. Miller, 48 R.I. 250, 137 A. 7. In the Levy case it was contended that such jurisdiction could not be exercised because the summary jurisdiction was still vested in the federal court as appellant contends here. While there was no direct authority for the court's jurisdiction of the case, it held that since Miller and his wife were both in possession and asserting the right to remain, and since the action did not interfere with the administration of the estate, Levy had properly brought his action in the state court as any other owner of realty had the right to do.

[1] Section 46, sub. b, supra, is designed to leave no doubt as to the right of a trustee to proceed in a state court. That section's sole purpose is to indicate the courts which have jurisdiction in event he conceives he has a cause. He may be mistaken as to his facts or he may have misconceived the law. But whatever the truth may be as to his right of recovery, he errs not in proceeding in a state court against the evildoer. Bardes v. First National Bank, supra.

[2-4] Because respondent may have pursued all remedies available to him in the federal courts does not defeat him of the right to sue in the state courts. Upon his election he became the titular owner of all of the bankrupt's estate as of the date he was adjudged a bankrupt. § 110, sub. a, supra; Everett v. Judson, 228 U.S. 474, 33 S.Ct. 568, 57 L.Ed. 927, 46 L.R.A.,N.S., 154. He was charged with the duty actively to investigate the affairs of the estate and the conduct of the bankrupt. He pursued the procedure prescribed for bankruptcy courts under such circumstances. Cooper v. Dasher, 290 U.S. 106, 54 S.Ct. 6, 78 L.Ed. 203. Before the bankrupt could be imprisoned for a disobedience of the turnover order, it was incumbent upon the trustee to show that the bankrupt had the present ability to pay. Freed v. Central Trust Co., 7 Cir., 215 F. 873, 132 C.C.A. 7; Matter of Heppelle, D.C., 2 F.Supp. 663. But the facts that he had by his dishonesty successfully secreted the stolen wealth and that the contempt proceedings were futile, furnish no basis for absolving appellant of his duty to pay the money. Gray v. Arnot, 31 N.D. 461, 154 N.W. 268; Wilkinson v. Walker, 5 Cir., 3 F.2d 867. Indeed, the responsibility of appellant must be established in a plenary action based upon his fraudulent concealment. In the Matter of Korin, Bankrupt, D.C., 25 F.Supp. 323. Appellant having gained possession of the money he became an involuntary bailee or trustee thereof (Gray v. Arnot, supra), for which judgment should be entered in order to effect a judicial sale of his property hereafter to be found.

[5-9] Appellant conceives himself to be aggrieved because the trial court proceeded upon the hypothesis that the turnover order was res judicata of the claim of respondent against appellant. Familiar statutes might have reassured him upon that score. "The judgment or order is, in respect to the matter directly adjudged, conclusive between the parties * * * litigating for the same thing under the same title and in the same capacity * * *." Code Civ. Proc. § 1908. Also, whatever appears upon the face of the judgment is deemed to have been adjudged in the former proceeding, and it is also deemed to include whatever is actually or necessarily included therein. Code Civ.Proc. § 1911. In view of the pleading filed in the summary proceeding and the findings of fact made by the bankruptcy court, no doubt survives that the turnover was an adjudication of the debt of appellant to respondent. In that court the sole issue was whether appellant had concealed a sum of money belonging to the estate. That is the only issue here. The parties there are the identical parties here, and they appear in the same capacity now as they did then. The litigation of the parties in the federal court resulted in findings of fact which are the identical facts pleaded in the court below. While the federal court entered the turnover order prescribed in such cases, it was directed at the very gentleman who is defendant here. The turnover order comes before the courts of California with the same force and effect as would a judgment of a sister state. The parties had notice; they contended at the trial, and both enjoyed the privileges of the court's process, hearing and delibera-

tion. It was a final order by a court having jurisdiction of both parties and the subject matter. It was not a judgment in rem but was directed to the specific performance of a definite act by appellant and no other. His position does not differ from that of a party who, once adjudged specifically to perform a contract, is later confronted with the decree of specific performance in an action for damages after his failure to perform. White v. Schader, 185 Cal. 606, 198 P. 19, 21 A.L.R. 499. Nor is it dissimilar to the position of a preferred creditor who, after his claim has been disallowed by the referee in a summary proceeding, finds it is res judicata in a plenary action by the trustee to recover such preference. Myers v. International Trust Co., 263 U.S. 64, 44 S.Ct. 86, 68 L.Ed. 165; Lincoln v. Peoples National Bank, D.C., 260 F. 422. After a finding by the referee that the bankrupt had possession of the property at the date of the adjudication of his bankruptcy and the entry of a turnover order which is affirmed by the district court, "the fact of possession or control of property and its retention and concealment by the bankrupt becomes settled beyond future controversy." Toplitz v. Walser, 3 Cir., 27 F.2d 196, 197.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



HANCOCK OIL CO. OF CALIFORNIA et al. v. HOPKINS et al.*

Civ. 13589.

District Court of Appeal, Second District, Division 3, California.

Nov. 6, 1942.

Rehearing Denied Dec. 5, 1942.

Hearing Granted Dec. 31, 1942.

1. Interpleader ⇐28

An interpleader action may present two separate issues, the first being the propriety of the action itself, in which the question to be decided is whether the plaintiff is in a position to require defendants to interplead, and the second being the contest between the defendants. Code Civ. Proc. § 386.

* Subsequent opinion 150 P.2d 463.

2. Interpleader ⇐23

In order to state a cause of action entitling plaintiff to relief afforded by an action of interpleader, the plaintiff need not allege facts showing that a claim made on him is a valid one. Code Civ.Proc. § 386.

3. Interpleader ⇐23

The plaintiff in an interpleader action must do more than allege that a claim is made on him, and unless it is made to appear that the claim has sufficient substance so that the plaintiff cannot safely determine for himself which claim is right and lawful, he has not shown himself entitled to "interpleader". Code Civ.Proc. § 386.

See Words and Phrases, Permanent Edition, for all other definitions of "Interpleader".

4. Interpleader ⇐23

A mere assertion by a plaintiff of a claim against him by another, without alleging anything on which the claim is based, is not enough to sustain an "interpleader." Code Civ.Proc. § 386.

5. Interpleader ⇐23

Where no fact alleged in complaint in interpleader action indicated that one of the two groups of defendants made anything other than a naked claim against plaintiffs, or, if they did, that the invalidity of the claim was not obvious, and one that the plaintiffs could not safely have determined for themselves, complaint was vulnerable to special demurrer. Code Civ.Proc. § 386.

6. Interpleader ⇐27

If complaint in interpleader action states a potential cause of action, it is error to sustain either special or general demurrer thereto without leave to amend. Code Civ.Proc. §§ 386, 472c.

7. Pleading ⇐225(1)

Though court is entitled to have a clarification of pleading, yet, where complaint is not fatally defective in its statement of a cause of action, it is improper to sustain a special demurrer without leave to amend, and plaintiff should be given opportunity to meet objections advanced so that litigation may be decided on its merits. Code Civ.Proc. § 472c.

8. Appeal and error ⇐672

When a complaint states a cause of action, the face of the record shows an abuse of discretion in sustaining a demurrer

without leave to amend. Code Civ.Proc. § 472c.

9. Pleading ⇐225(1)

It is error to sustain a general demurrer without leave to amend, unless it appears that the complaint is incapable of amendment in a radical particular.

10. Interpleader ⇐9

An exception to the common-law rule that a tenant cannot maintain a suit for interpleader against his landlord exists where there is "privity" between the landlord and the opposing claimant, that is, where the title of the opposing claimant is derived from that of the landlord, or where both claim under landlord by different titles.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

11. Interpleader ⇐27

Where there was not only nothing in complaint in interpleader action to negative possibility that case fell within exception to common-law rule that a tenant cannot interplead his landlord and a stranger to the lease, but there were indications that the case fell within the exception, it was error to sustain special demurrer to the complaint without giving plaintiffs an opportunity to amend. Code Civ.Proc. §§ 386, 472c, 1962.

12. Interpleader ⇐9

The common-law rule that a tenant cannot interplead his landlord and a stranger to the lease is not operative in California because of interpleader statute. Code Civ. Proc. § 386.

13. Interpleader ⇐8(2)

The position necessarily taken by the plaintiff in an "interpleader" suit is that two conflicting claims are made upon him, and that he cannot choose between them except at his peril, and he neither denies nor asserts the validity of either claim. Code Civ.Proc. § 386.

14. Interpleader ⇐8(2)

A plaintiff seeking interpleader cannot succeed if it appears that he knows that one claim is valid and the other claim therefore unenforceable.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Interpleader action by the Hancock Oil Company of California and others against W. L. Hopkins and others. A demurrer of certain of the defendants was sustained without leave to amend, and a judgment was entered in their favor, and the plaintiffs appeal.

Judgment reversed, with directions to amend order sustaining demurrer, and to give plaintiffs an opportunity to amend their complaint.

Pease & Dolley, of Los Angeles, for appellants.

Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for respondents.

BISHOP, Justice pro tem.

In this interpleader action plaintiffs' efforts to transfer to the court the problem of determining which of two claimants should receive the landowners' royalties that the plaintiffs admittedly owe to one of them, have so far proved ineffective, for the joint demurrer of the group of defendants with the surname "Hopkins" was sustained without leave to amend and a judgment entered in their favor. From this judgment plaintiffs have appealed and with good cause, we have concluded.

The complaint was framed in one count. The defendants are placed according to the joint claims they make into two groups: first, the three who bear the name "Hopkins;" then those who are partners. Two of the three Hopkins defendants, W. L. and Gertrude Ann, his wife, had executed back in 1936, an oil and gas lease to the plaintiffs and under and by virtue of its terms landowners' royalties in the sum of $1,447.74 have accrued for the months of January and February, 1941, and additional amounts will become due monthly thereafter, it was alleged. To the royalties accrued and to accrue, "the defendants W. L. Hopkins, Gertrude Ann Hopkins, H. James Hopkins and W. L. Hopkins, Trustees of Wilbur T. Hopkins Trust, and H. James Hopkins and W. L. Hopkins, Trustees of the H. James Hopkins Trust" make claim, according to the complaint, and have demanded that plaintiffs pay all the royalties to them. The defendants who are partners also claim these royalties. The complaint apprises us of this latter fact first by alleging that the partners had brought an action against the three Hopkins defendants in which the partners allege that the Hopkins trio are holding the property, which two of the Hopkins group had leased to our plaintiffs, in trust for the partners, and in which the partners pray for an accounting for the rents, issues and profits and that their title be quieted. It does not appear that the plaintiffs in this

action are parties to the action brought by the partners. However, on two occasions, according to the complaint now before us, the partners, through their counsel of record in that case, did "advise plaintiffs that they claim to be the owners of the real property hereinabove described and that they claim the ownership of all landowners royalties which have accrued and which will hereafter accrue under the terms of said oil and gas lease, and that they will hold plaintiffs strictly accountable to them for said landowners royalties, should said royalties be paid to their co-defendants." The complaint then goes on to allege that the plaintiffs are ignorant of the respective rights of these rival claimants and that they cannot safely determine for themselves which claim is right and lawful.

The defendant partners answered this complaint, but the Hopkins defendants demurred generally and specially, the latter being on the ground of uncertainty in that it cannot be ascertained what the nature of the partners' claim is "and/or whether or not said defendants have any reasonable, tangible or valid claim in and to said sum * * *." The demurrer was sustained without leave to amend. We are of the opinion that the complaint was vulnerable to the special demurrer, but that it was error to sustain it without leave to amend.

[1] An interpleader action may present two separate issues, framed in two series of pleadings. The first has to do with the propriety of the action itself, in which the question to be decided is whether or not the plaintiff is in a position to require the defendants to interplead. If the right of the plaintiff to bring the action is not questioned or is determined to exist, after a trial on the facts if an issue is made (Conner v. Bank of Bakersfield, 1917, 174 Cal. 400, 403, 163 P. 353, 355; Id. 1920, 183 Cal. 199, 202, 190 P. 801, 802), then the second contest is ready to develop, that between the defendants. San Francisco Savings Union v. Long, 1898, 123 Cal. 107, 109, 55 P. 708, 709; Interlocking Stone Co. v. Scribner, 1912, 19 Cal.App. 344, 348, 126 P. 178, 179. In this case we are concerned only with the first problem.

[2-5] In order to state a cause of action entitling him to the relief afforded by an action of interpleader a plaintiff need not allege facts showing that a claim made upon him is a valid one. Fidelity Sav., etc., Ass'n v. Rodgers, 1919, 180 Cal. 683, 684, 182 P. 426, 427; Williams v. Gilmore, 1942, 51 Cal.App.2d 684, 687, 125 P.2d 539, 541. Something more is required of the plaintiff, however, than to allege merely that a claim is made upon him. Unless it is made to appear that the claim has sufficient substance so that the plaintiff "cannot safely determine for himself which claim is right and lawful," to quote from the Fidelity Savings, etc., Ass'n case [180 Cal. 683, 182 P. 427], just cited, he has not shown himself to require the protection of an interpleader action. The rule is stated in 33 Corpus Juris at page 431, "A mere assertion of claim by another, without alleging anything whatever on which to base it, is not enough to sustain an interpleader." See, also, 4 Pomeroy's Equity Jurisprudence, 4th Ed., section 1461, p. 3457; Maclennan on Interpleader, pages 126 and 133. There is no fact alleged in the complaint under examination to indicate that the partners made anything other than a naked claim, or, if they did, that its invalidity was not obvious, one that the plaintiffs could safely have determined for themselves. This defect was pointed out in the special demurrer which called attention to the complaint's failure to disclose that the partners had a reasonable or tangible claim.

[6-9] It may be that these defects in the complaint make it subject to the general demurrer. This is a point of pleading which we need not debate for whatever answer is given the result remains the same; if the complaint states a potential cause of action it was error in sustaining either the special or general demurrer to do so without leave to amend. Apposite to this situation is this statement of the Supreme Court in Wilkerson v. Seib, 1942, 20 Cal.2d 556, 127 P.2d 904, 909: "Although the court is entitled to have a clarification of the pleading in the particulars specified, yet where the complaint is not fatally defective in its statement of a cause of action, it is improper to sustain a special demurrer without leave to amend. In such case the plaintiff should be given the opportunity to meet the objections advanced in order that the litigation may be decided upon its merits." See, also, Olivera v. Grace, 1942, 19 Cal.2d 570, 579, 122 P.2d 564, 140 A.L.R. 1328. We add this quotation from Black v. Browne, 1940, 39 Cal.App.2d 606, 607, 608, 103 P.2d 1012, 1013: "It is well settled that when the complaint states a cause of action the 'face of the record would show an abuse of discretion' in sustaining a demurrer without leave to amend. Schaake v. Eagle, etc.,

Can Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759. It is equally well settled that it is error to sustain a general demurrer without leave to amend unless it appears that the complaint is incapable of amendment in a radical particular. 21 Cal.Jur., p. 121, and cases there cited."

[10] The complaint does not appear to be incapable of amendment, even on the theory on which the respondents (the Hopkins defendants) argue that the general demurrer was properly sustained, that is, on the theory that a tenant under a lease is not permitted to interplead his landlord and a stranger to the lease. No California case is cited in support of this theory but there is abundant authority for it elsewhere. See annotation in 97 A.L.R. 996. To it, however, are several exceptions, one being thus stated in Wilmer v. Philadelphia & R. Coal & Iron Co., 1915, 124 Md. 599, 610, 93 A. 157, 161, as quoted in Maulsby v. Scarborough, 1940, 179 Md. 67, 72, 16 A.2d 897, 899: "'The well-recognized exception to the rule that a tenant cannot maintain a suit for interpleader against his landlord is where there is privity between his landlord and the opposing claimant; that is, where the title of the other claimant is derived from that of the lessor, or where both defendants claim under the lessor by different titles. In such cases the tenant does not dispute his landlord's title.'" The respondents acknowledge that this exception exists by distinguishing Schluter v. Harvey, 1884, 65 Cal. 158, 3 P. 659, on the ground that there the court "merely holds that where the original landlord has transferred title so as to set up conflicting interests in others, interpleader is the proper remedy." The case of Spangler v. Spangler, 1909, 11 Cal.App. 321, 104 P. 995, cited by appellants, was not commented on by the respondents, but it is either in conflict with the rule or an example of the exception to it. The parties interpleaded there were the plaintiff's landlord and one to whom he had, it was claimed, deeded a portion of the leased premises.

[11] Not only is there nothing in the complaint to negative the possibility that our case falls within the exception to the common law rule that a tenant cannot interplead his landlord and a stranger to the lease, but there are indications that it falls within the exception. There is no explanation of the ground upon which three members of the Hopkins family now claim royalties under a lease made by two of them, but the fact that two of them are described as trustees of two trusts, although there is no allegation that they are claiming "as" such trustees, suggests the possibility that the original lessors have somehow conveyed a part, at least, of their interest as lessors to these trusts. The fact, too, that in their own action the partners alleged that the Hopkins defendants held their title in trust for them (the partners) suggests the possibility that if the plaintiffs had been given an opportunity to amend their complaint they could have shown that the title of the partners and that of the Hopkinses had a common source, was indeed a common title, the only difference being that the legal title was in the latter, the equitable in the former. In this connection see Niles v. Gonzales, 1905, 1 Cal.App. 324, 82 P. 212. In the premises, even if we should conclude that in this state the rule is that which generally prevailed at common law, it was still error not to give the plaintiffs an opportunity to amend. As this case was commenced after the addition of section 472c to the Code of Civil Procedure, its provisions are applicable: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made * * *."

What we have said thus far would not be a guide to the trial court should it appear, from the amended complaint, or upon a trial of issues raised by an answer filed in opposition to plaintiffs' attempt to interplead, that the rival claims were not between plaintiffs' lessors and those whose claim stems in some way from the lessors' title, but between the lessors and strangers to their title. Granted that the rule prevailing elsewhere would in such a case require the denial of the remedy of interpleader to the plaintiffs, we are of the opinion that in this state the remedy would be available.

We find not inappropriate this quotation from Williams v. Gilmore, 1942, 51 Cal. App.2d 684, 688, 125 P.2d 539, 541: "In view of such technical rules as prevail in other jurisdictions (30 Am.Jur. 218) the weight of authority is not persuasive, for 'the conditions under which the remedy may be invoked in this state are prescribed by statute and [the] scope of the remedy has been broadened and enlarged.' Mutual Life Ins. Co. v. Henes, 8 Cal.App.2d 306, 47 P.2d 513, 515; Fidelity Sav., etc., Ass'n,

v. Rodgers, supra; 14 Cal.Jur. 702." An examination of the cases collected in the annotation earlier referred to (97 A.L.R. 998) discloses that those cases which support the conclusion that a tenant may not interplead his landlord and a stranger are based in the main on one or both of these grounds: (1) that the claim of the landlord and that of the stranger are not identical; (2) the rival claims do not have a common origin, they lack privity. As an element emphasizing the fatality of the lack of privity some of the cases point out that a result of its lack is to place the plaintiff tenant in the position of denying his landlord's title, a thing that may not be done. A few cases place their denial of the right of the tenant to interplead directly upon the inability of the tenant to deny his landlord's title. Insofar as the rule is based on either of the first two reasons, it is no longer controlling in this state, if it ever was, for these two common law restrictions upon interpleader, (identity, common source, of claim) have not been a hobble upon that equitable remedy with us since the addition of the last two sentences to section 386 (Code Civ.Proc.) in 1881. Those sentences read, in part: "And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. * * * The action of interpleader may be maintained, and the * * * plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another." That an identity of claims is not necessary in an interpleader of rent where the defendants were the plaintiffs' landlord and a stranger, is determined in Warnock v. Harlow, 1892, 96 Cal. 298, 303, 31 P. 166, 31 Am.St.Rep. 209. (This case is not of assistance to us, generally, because the right of the plaintiff to interplead was not questioned.) In this connection it is to be noted that it is not rent, strictly speaking, but landowners' royalties which the plaintiff desires to pay into court and which the partner defendants are willing to have deposited there.

[12-14] The two reasons most often relied upon for the rule followed in England and our sister states are thus rendered inoperative in this state by the liberal provisions of our statute, section 386, Code Civ. Proc. If the third reason sometimes relied upon and often referred to is a good reason for the rule, then we should follow the rule, for it is true that "The following presumptions * * * are deemed conclusive: * * * 4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." Code Civ.Proc. sec. 1962. Unless we are bound by authority to construe this rule of evidence as a limitation upon section 386, Code Civ.Proc., when a tenant finds himself in jeopardy from the rival claims of his landlord and a stranger, we should not so interpret it. We are not disposed to echo the words of the Lord Chancellor, found in Dungey v. Angove, (1794) 30 Eng. Reprints 644, 645: "* * * how monstrous a thing would it be, if it was in the power of the tenant to make the landlord, at law the Defendant in the ejectment, disclose his title by an interpleading bill!" The position necessarily taken by the plaintiff in an interpleader suit is that two conflicting claims are made upon him and that he cannot choose between them except at his peril; he neither denies nor asserts the validity of either claim. Admittedly, in an action brought by the landlord for the rent, or other obligation under the lease, the tenant could not defend on the ground that the landlord had no title at the time of his entry under the lease. But this fact but emphasizes the predicament in which the tenant finds himself when a third party presses against him what appears to be a superior claim. He has no remedy unless it be interpleader. A plaintiff seeking interpleader, it is true, cannot succeed if it appears that he knows that one claim is valid and the other therefore unenforcible. In such a case as this the plaintiff, by setting up the lease, does not reveal that the landlord's title is valid, and so the stranger's is inferior; he reveals a situation in which the stranger's claim may be found good, but at the same time the plaintiff cannot show that his landlord's title is not good. It would seem that the equitable relief of interpleader should be available to him; he plainly is embraced by the provisions of section 386, Code of Civil Procedure.

There is in this state no decision questioning the correctness of this conclusion; those that touch on the subject support it. The early case of McDevitt v. Sullivan, 1857, 8 Cal. 592, was an action brought for rent against the tenant by someone standing

in the lessor's shoes. The tenant had already suffered a judgment to be rendered against him for the same rent. The Supreme Court expressed its regret at the tenant's misfortune, held that he could not, in an action for rent, question his landlord's title, but on its way to its decision, said (page 597 of 8 Cal.): "The moment Sullivan discovered that there were adverse claims to the rents, he should have filed his bill of interpleader, making all adverse claimants parties, and offering to pay the rents into Court, to abide the ultimate decision as to the party entitled to them. When a party rents property of another, and he learns afterwards that the title of his landlord is disputed, he may at once proceed in the proper mode to settle the question. If he fail to do this, he cannot dispute the title, except in the cases stated, where the title of his landlord has ceased, or when the lease was obtained by fraud." Here we have a recognition of the principle that one may not (with certain exceptions) deny his landlord's title in an action brought by the landlord or a successor in interest, but at the same time a statement that a tenant may interplead his landlord with a rival claimant for the rent. In Spangler v. Spangler, supra, 1909, 11 Cal. App. 321, 104 P. 995, the defendant there before the court had brought an interpleader action against his landlord and another who claimed a part of the rent the defendant admittedly owed. The appellate court cited McDevitt v. Sullivan, supra, in support of this statement (page 325 of 11 Cal.App., page 996 of 104 P.): "Conflicting claims having been made on the defendant for the rent, he had a right to require the claimants to interplead." As it was a fact that the landlord's rival claimant based her claim on a deed received from the landlord, the claims had a common source, and the court's statement could have been placed on the ground that the case was an exception to the rule. We regard the citation of the McDevitt case as an indication that the court did not believe that there was a rule from which an exception need be made.

Consequently, it is ordered that the judgment be reversed with directions to the trial court to so amend its order sustaining the demurrer of the Hopkins defendants that the plaintiffs be given an opportunity to amend their complaint, if they so desire.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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PEOPLE v. CALDWELL.

Cr. 3567.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1942.

Rehearing Denied Nov. 12, 1942.

Hearing Denied Nov. 27, 1942.

1. Criminal law ⇐315

The fact that employee some 14 years previously had power to sign employer's name to such instruments as required it did not authorize presumption that authority continued after employment had terminated.

2. Forgery ⇐6

Where relation of employer and employee had terminated some 14 years previously and former employee was attempting to procure insurance business, that former employer when informed of negotiations in progress said he did not want to be bothered with details, did not revive former employee's authority to sign former employer's name to any document, particularly to a fictitious document, in absence of proof of conspiracy.

3. Forgery ⇐44

Evidence sustained conviction for forgery of insurance broker's name to insurance certificate and to endorsement thereon.

4. Criminal law ⇐1159(2)

Where substantial evidence supports a conviction, the reviewing court will not attempt to determine the weight of the evidence, since its sole function is to decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

5. Criminal law 448(15), 1169(2)

The query whether witness authorized one charged with forgery to sign witness' name to document involved called for a "conclusion" but the admission of negative answer was harmless where all conversations and relations were gone into fully.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

6. False pretenses ⇐49(1)

In prosecution for grand theft by delivery of pretended master policy issued by Lloyd's covering airplanes, and collect-

ing premiums, evidence sustained finding that no insurance was ever placed at Lloyd's and that defendant had appropriated the premiums collected. Pen.Code, § 484.

7. False pretenses ⇐49(1)

Evidence that defendant delivered a pretended master policy issued by Lloyd's under which insured would be authorized to issue a separate policy and premiums payable would depend on number of policies so issued, and that defendant collected and appropriated five different premium payments made at different times authorized conviction for five separate offenses. Pen. Code, § 484.

8. Criminal law ⇐1159(2)

Appellate courts do not attempt to determine the weight of evidence, but only whether upon the evidence taken as a whole sufficient facts could not have been found by jury to warrant the inference of guilt.

9. Criminal law ⇐1159(1)

Appellate courts will not trespass on the functions of the jury and the trial court by determining what facts are established.

10. Criminal law ⇐1159(2)

In order to justify a reversal of a judgment of conviction upon the ground of insufficiency of the evidence, it must clearly appear that upon no hypothesis is there sufficient evidence to warrant the conclusion reached by trial court, and in determining the matter every fact which jury could have reasonably deduced from the evidence must be assumed in favor of the verdict.

11. Criminal law ⇐1159(2)

That circumstances in evidence might be reasonably reconciled with defendant's innocence will not warrant a reversal of conviction if such circumstances reasonably justify the verdict.

12. Criminal law ⇐603(1)

A defendant who did not ask for a continuance in order that proof from London might be obtained could not after conviction complain of injustice of verdict on ground proof from London would have changed it.

13. Criminal law ⇐472

In prosecution for appropriation of premiums collected on delivery of pretended master policy issued by Lloyd's, expert witnesses were properly permitted to testify to the rules and regulations of Lloyd's. Pen.Code, § 484.

14. Customs and usages ⇐11

Custom or usage may be received to prove methods adopted by a trade, industry, or business, and is admissible to prove intention of parties to a contract which could not be done without the aid of extrinsic evidence, but not to establish that a contract would not have been made.

15. Criminal law ⇐770(3)

Where five counts charged grand theft and under the evidence jury might have properly convicted defendant upon theory of larceny, embezzlement or false representation, all of which were explained to jury, court was not required to admonish jury that they should agree upon one theory. Pen.Code, § 484.

16. False pretenses ⇐52

Where it appeared that defendant had delivered pretended Lloyd's policy and appropriated premiums, refusal to instruct that if complaining witness had received what defendant had agreed to give him there would be no offense was proper. Pen.Code, § 484.

17. Criminal law ⇐814(3)

Where expert witnesses had testified to regulations of Lloyd's and not to custom or customary procedure, refusal to instruct that custom did not exclude other procedure was proper.

18. Forgery ⇐48

Where there was no evidence that defendant charged with forgery had authority either express or implied to sign another's name, refusal to give instruction on implied authority was proper.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Hartley McMullin Caldwell was convicted of forgery and of grand theft, and his motion for a new trial was denied, and he appeals.

Affirmed.

Robert E. Ford, of Hollywood, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order denying his motion for a new trial and from the judgment and sentence after conviction of forgery and from five judgments and sentences for grand theft. The alleged forgery (count 1) consisted of defendant's signing the name of Carle L. Williams, an insurance broker, to a proposed contract of insurance and to the endorsement thereon. The acts constituting the five counts of grand theft were the alleged appropriations of the moneys paid as installments of the premium on the insurance contract.

The grounds of appeal are: (1) insufficiency of the evidence to support the judgments of conviction; (2) error of the court, in admitting proof of the custom and practice with reference to the authority of surplus line brokers in the United States; (3) errors in certain instructions on grand theft; (4) error in refusing to give certain requested instructions.

The facts which were determined by the jury and the trial court are as follows:

Prior to December 31, 1927, appellant was employed by one Carle L. Williams, an insurance broker. During such employment he placed a large policy with Lloyd's of London for the Department of Light and Power of the city of Los Angeles. After leaving Williams he engaged in the insurance business on his own account under the name of "British Foreign Syndicate," with offices in Nevada.

In June 1940, the Pacific Discount Corporation, hereinafter referred to as Pacific, was engaged in the business of aviation finance. Because of the necessity of protecting the unpaid balance upon the purchase and sale contracts financed by Pacific it was necessary that the corporation be in a position to place insurance upon the airplanes sold under such contracts. This plan led to negotiations between the officials of Pacific and defendant, who proposed the scheme of procuring from Lloyd's for Pacific a "Master Policy" under which Pacific would be authorized to issue a separate policy upon each plane sold under such contracts of purchase and sale financed by Pacific. During the course of such negotiations defendant stated to President Groendyke of Pacific that he had "his binding authority" from Lloyd's whereby he was authorized to sell insurance contracts for Lloyd's. Upon Groendyke's request to see such binding authority, defendant did not comply but on June 14, 1940, delivered a purported contract of insurance and received from Pacific $500 as part payment on the premium. Thereafter other checks were delivered to appellant by Pacific in full payment of the agreed premium. About three months after the first payment Mr. Groendyke told appellant that he was suspicious of appellant's authority and that he would deliver no more checks until Pacific should be satisfied as to his binding authority.

Evidently for the purpose of convincing Pacific and its officers that he possessed such authority, appellant borrowed from one Dr. Anderson a policy issued by Lloyd's in 1939 through Newhouse & Sayre as surplus line brokers. He stated to Dr. Anderson that he had to use it as a sample. Thereupon he typed upon a piece of white paper the following words: "D Hudig & Co. of Rotterdam for account of British Foreign Underwriters, International Reinsurance Underwriters (Foreign) Carle L. Williams & Co. all for account of whom it may concern and/or Hartley Caldwell, Esq." He pasted the white paper across the face of the Anderson policy in the space in which the name of the assured appeared, then caused a photostat to be made of the Anderson policy, as altered, and presented the photostat to President Groendyke of Pacific, stating that it was a photostat and that it was a photostat of his binding authority.

Things appeared to have gone serenely until Pacific suffered some losses and the underwriters at Lloyd's repudiated the policy which appellant had claimed to have placed with Lloyd's. Then came the denouement disclosed by the record. The accusation against appellant brought the matter to trial upon the charge that the name of Carle L. Williams Co. had been forged to a certificate which declared that Carle L. Williams Co. had procured from Lloyd's of London the insurance described in the certificate insuring certain risks in favor of Pacific; also that appellant had forged the endorsements upon the certificate and had appropriated the several installments of the premiums paid by Pacific for the insurance. While he did not take the witness stand his contentions below were, as they are here: (1) that he had implied authority to sign the name of Carle L. Williams Co. to the instruments in question and (2) that the state presented no substantial evidence to

prove that he did not have a binding authority to issue a certificate of insurance.

[1] The fact of forgery was established by the testimony of Mr. Williams that he did not sign his own name to the certificate or to the endorsement and that he authorized no one to do so. Appellant sought to overcome the testimony of Williams by proof of implied authority: (1) During the preceding two years Williams had placed about thirty policies with Lloyd's at the behest of appellant. But there is no proof that in any instance Williams permitted appellant to affix the name of Carle L. Williams Co. to a certificate; indeed there is no suggestion that a certificate had been issued by the broker as the basis for the insurance of any one of the thirty policies. (2) Some fourteen years prior to June, 1940, appellant had worked in the insurance office of Williams. During such period as an employee he had specific authority to affix the name of Williams to such instruments as required it. He contends therefore that such implication of authority continued across the span of years and that it persisted in full force and vigor at the time of his transaction with Pacific. But we cannot agree with this view. There is no legal basis for such presumption. There is no evidence that Williams authorized the signing of his name by appellant at any time after December 31, 1927. Williams knew of no instance of appellant's signing the name of Carle L. Williams Co. to a certificate of insurance during the fourteen years following the period of his employment. (3) As further proof of his claim of implied authority appellant cites the testimony of Williams, who admitted that during appellant's negotiations for the Pacific policy he advised Williams of certain developments in response to which Williams stated that he "did not want to be bothered with details."

[2] However often appellant may have signed the name of Williams to bona fide contracts or certificates in bygone years, and however often Williams may have stated to him that he did not wish to be bothered with details of negotiations in progress with reference to the Pacific policy, it cannot be fairly inferred that the authority appellant once enjoyed could have leaped across the chasm of fourteen years during which each went his own way. A further answer to such argument is that the authority to sign instruments executed in the pursuit of lawful transactions could imply no more than for appellant to sign certificates after he had first placed the required insurance with Lloyd's underwriters. Since no insurance was ever placed, as we shall presently see, there arose no occasion for the exercise of such authority if it had continued to 1940. Neither can it be said that any authority could have been implied for appellant to do a criminal act unless it had been first established that the two had conspired together to commit such crime.

[3, 4] There is no intimation in the record that Williams ever agreed that appellant should alter the Anderson policy for the purpose of convincing the officers of Pacific that appellant had a binding authority. Nor is there any indication that Williams ever knowingly received from appellant any portion of the moneys paid as premiums on the Pacific policy except that portion paid him as the surplus line broker. But, on the contrary, while a number of checks were received by appellant in payment of the premium, aggregating substantially $4,200, the net balance after paying the brokerage was appropriated by appellant. Williams' acceptance of the commissions cannot be fairly cited as proof of his knowledge of the signing of the certificate by appellant. There is no evidence that such act was ever brought to the attention of Williams prior to the trial of this action. The testimony of Williams that appellant had no authority to sign the name of Carle L. Williams Co. to the instrument in question is supported by the circumstances detailed and by Williams' innocence of participation in the nefarious designs of appellant. Upon the uncontradicted testimony of Williams and the cited circumstances we cannot say that the jury found appellant guilty of forgery upon insufficient proof. Where substantial evidence supports a conviction the reviewing court will not attempt to determine the weight of such evidence. Its sole function is to "decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

[5] Referring to the proof of the forgery, appellant has assigned as error the ruling of the court allowing the witness Williams to answer the following question: "Did you ever authorize Mr. Caldwell or

anyone else to sign the name of Carle L. Williams at the bottom of indorsement No. 1, a part of People's Exhibit 7?" The basis of his objection was that the question called for the conclusion of the witness. Conceding that it calls for a conclusion, the negative answer of the witness was harmless in view of the proceedings that immediately preceded the inquiry. In answer to proper questions the witness had stated that he had had a discussion with Caldwell about signing certificates; that Caldwell had told him that through the authority of the surplus line broker's license held by Williams the latter could sign certificates on any insurance placed under Caldwell's authority. Williams told Caldwell that until he got a direct connection with a brokerage house in London he would not sign his name to those certificates. Although Caldwell had cleared certain business through Williams' office as a surplus line broker, Williams had never signed any certificate for Caldwell. He had never before seen a certificate of "British Foreign Syndicate," Caldwell's trade name, upon which Williams' name was written. He had never seen any certificate in any of his dealings with Caldwell containing substantially the testimonial clause found on Exhibit 7, which is a declaration that Carle L. Williams Co. had procured insurance from Lloyd's for the benefit of Pacific. Williams further testified that the signature of Carle L. Williams found on Exhibit 7 was not his own signature; also, that the name of Carle L. Williams Co. affixed to Exhibit 5 was not his signature, and that he had never seen it prior to the institution of this prosecution. Exhibit 5 is a letter addressed to Pacific under date of June 3, 1940, on the letterhead of Carle L. Williams Co., signed by the same hand that executed the certificate and the endorsement. It sets forth the details of the terms of the agreement reached between appellant and Pacific for a policy in Lloyd's.

Inasmuch as Williams testified thus fully as to all of the conversations had with defendant with respect to Williams' not signing the certificate, and, under cross-examination, detailed all of his labors and relations with defendant, no prejudice could have been suffered by his answer to the criticized question.

We now proceed to a consideration of the issue as to whether the evidence is sufficient to support the five verdicts of grand theft. In order to clarify subsequent recitals it is appropriate at this point to explain the methods of operation at Lloyd's of London.[1]

[1] Lloyd's corporation writes no insurance. It houses the active underwriters, i. e., the active agents of the 1,900 underwriters in its "big room," and supervises them after the fashion of the New York Stock Exchange in controlling its members. Any British subject may become a member, if the chairman of Lloyd's approves of his character and financial worth, upon his payment of an entrance fee of 55 pounds and an annual subscription of 30 pounds.* The underwriters are grouped into syndicates each of which is represented in the big room by an active underwriter who actually executes insurance in the name of his syndicate. The underwriters are governed by a committee of their own number. Each member makes a minimum deposit at the time of his admission. Such deposits are kept in a "central fund." At the outbreak of the current war the underwriters at Lloyd's transferred about $40,000,000 to New York, with which it created the American Trust Fund. Into such fund all premiums on American business are deposited and from it all losses are paid.

Insurance by Lloyd's upon any risk, anywhere, may be procured only by a Lloyd's broker. He takes a card called the "slip" bearing his own name, a description of the risk, the amount desired, and calls upon the active underwriters in the "big room" at Lloyd's to subscribe the amount he undertakes on behalf of his syndicate. The "big room" is the subscribers' room. It is successor to the coffee room operated by Edward Lloyd in the 17th century where ship owners and merchants sipped coffee and exchanged news and views concerning matters vital to their business and insured one another's cargoes. By a process of growth the ancient coffee room became the domicile of groups of insurance underwriters who transact insurance contracts on properties in all parts of the world.

Lloyd's is not qualified to write insurance in California. Therefore, in this state a Lloyd's policy may be placed only through a surplus line broker. A local agent for a broker at Lloyd's is powerless to place a Lloyd's policy in California except through such surplus line brokers.

When a local party desires to write a type of risk at a specified rate, his broker correspondent at Lloyd's obtains for him

* Fortune Magazine.

All insurance contracts must be placed through a Lloyd's broker in the "big room" at Lloyd's. Every policy issued upon a California risk must be placed through the office of a surplus line broker in California, §§ 1730, 1760.5, 1761, Insurance Code, St. 1937, pp. 1795, 2033, 2034, who in turn must operate through a broker at Lloyd's. Insurance contracts placed by Lloyd's in California may be negotiated and sold by a local agent with a binding authority from a Lloyd's broker, but he can place it only through a surplus line broker. In any event, before any Lloyd's insurance is in effect it must actually have been first subscribed by active underwriters at Lloyd's. Whenever a binding authority is issued by a broker at Lloyd's there is a document stating that such binding authority has been issued. One copy of such document is sent to the surplus line broker in America and another to the office of Duncan and Mount, New York counsel of Lloyd's. Unless it be filed there it has no validity.

Another important fact established by the evidence: Just prior to the commencement of the current war, in order to protect their policyholders in America, the underwriters at Lloyd's transferred to the United States the sum of about $40,000,000, with which they established Lloyd's American Trust Fund. Into this fund all premiums collected on business written in America must be deposited. Unless the premium on an American risk has been paid into this trust fund the insurance has not been underwritten by Lloyd's. A broker at London will not accept a premium from America because of the agreement that "all premiums for dollar transactions" must go through the American Trust Fund. Compliance with these regulations is indispensable to the procurement of a Lloyd's policy by any person in the United States.

[6] Although the rules, regulations and practices of Lloyd's require that every "binding authority" issued to a person in the United States be recorded in the office of Duncan and Mount, appellant's name does not there appear. Neither is any authority found there for placing the Pacific policy. The certificate issued over the name of Carle L. Williams Co. stated that the broker had procured insurance from the underwriters at Lloyd's. Williams denied that he had signed the certificate or that he had authorized appellant to sign that instrument. Appellant admits that he signed it but contends that he did it for Williams under an implied authority. But no such insurance had been first placed with the underwriters at Lloyd's. Williams testified that he relied upon appellant's statement that appellant had a binding authority from underwriters at Lloyd's to sell the policy and to have a certificate issued that the insurance had been placed at Lloyd's. He had no other information with respect to placing the insurance or the authority for issuing a certificate.

Prior to June 14, 1940, appellant had sold about thirty Lloyd's contracts. Such sales had familiarized him with the refined care of the Lloyd's transactions. Upon the hap-

a general or "binding authority" from one or more syndicates to place such insurance. Then, instead of the surplus line broker's cabling the details of each policy, he issues a "certificate" evidencing the coverage and transmits to the Lloyd's broker in London the list of insurance accepted. Similarly, in placing a single risk of some magnitude, the surplus line broker or the local agent of a broker at Lloyd's may request Lloyd's at London to write the specific policy. Upon receipt of a favorable reply from London that the desired insurance has been placed, the surplus line broker issues to the assured a "certificate" that the policy has been authorized. A copy of such certificate is at once mailed to London. Upon its receipt there it is checked against the slip which contains the record of the subscriptions of the underwriters before the policy is prepared in Lloyd's signing bureau. It is then signed by the underwriters, and after being checked by the broker it is forwarded to the California broker. But whether insurance be placed by use of a "binding authority" or by cabling a request for a specific contract on a single heavy risk, the insurance must be placed by a Lloyd's broker in the big room at Lloyd's. No insurance on any risk in California is possible unless it be in some manner first authorized by one or more of the syndicates at Lloyd's. If it be authorized and then placed, the London broker awaits a copy of the certificate from the surplus line broker which the latter issues upon receipt of notice that the insurance has been placed at Lloyd's.

In every case of a binding authority issued to an agent in America it is filed in the office of Duncan and Mount, counsel for Lloyd's in New York. Also, a record of it is "on file in shape of a slip with the Lloyd's brokers who transacted the binding authority."

pening of an event of such signal importance as that of placing an insurance contract of the size and value of that demanded by Pacific with the underwriters at Lloyd's, it is nothing short of singular to find that an experienced insurance man who had negotiated the Pacific policy could offer no proof, or explanation of his want of proof, of having negotiated such contract. He contends that three other methods besides that of using a binding authority for placing insurance at Lloyd's were shown by the evidence, and that the prosecution failed to show that the insurance was not placed by one of such methods. It will be recalled that it was defendant himself, in his bold adventure to sell the insurance, who made the claim that he had a binding authority from a broker at Lloyd's to sell the policy. However, the proof indubitably is that no insurance at all was ever placed by defendant with Lloyd's for Pacific. Hence, the matter of chief concern was not so much the method of placing the insurance as it was that the insurance applied for was actually underwritten. The circumstances placed before the jury amply warranted their finding that no insurance was ever placed at Lloyd's for Pacific, and therefore he appropriated the moneys of his victim.

Upon the showing by the prosecution that no binding authority had ever been issued to him, that no insurance for Pacific was ever underwritten at Lloyd's and that the books of the American Trust Fund fail to disclose the payment of any moneys into that fund on behalf of Pacific, no doubt could reasonably have remained in the minds of the jury that Pacific had not been insured by Lloyd's and that the title to the moneys received by defendant from Pacific never became vested in Lloyd's, but were the properties of Pacific at the times of the several payments. No explanation of the convincing events that surged like the rising tide against defendant was offered. They stand unchallenged. When approached by Howard Huntington on behalf of Pacific, appellant stated that payments to the trust fund have to be made through a third party. When demand was made upon him for his canceled checks showing payment of moneys into the trust fund, he made no response.

Appellant contends that, assuming that the evidence is sufficient to support any conviction of grand theft, the convictions on the five counts should have been but one. He argues that all of the payments by Pacific to him were prompted by one impulse arising from the representations made on June 14, 1940. On that day he represented that he had binding authority from underwriters at Lloyd's to issue the insurance contract which he delivered to Pacific that day. He now contends that conceding that representation to have been false, Pacific agreed to pay the premium required by the policy and that the payments made subsequently were made "upon the same reliance" that induced Pacific to make the contract on the day of the first payment.

Such contention does not exactly accord with the facts. While it is true that the theft in count six was induced by additional representations and assurance that appellant had a binding authority, yet this fact merely adds support to the conviction under that count in addition to that which supports the judgments under the preceding four counts. But there is still another fact that more completely refutes appellant's claim that he could have committed but one act of fraudulent pretense. The premiums payable under a "master policy" such as that described to Pacific by appellant were to be determined by the amount of insurance to be sold by Pacific. Whenever Pacific issued a policy under such master policy it relied upon the original representations of appellant, and whenever appellant accepted the payment of any portion of the premium he impliedly repeated his first representation to the effect that the insurance issued by Pacific was covered by the underwriters of Lloyd's. Because of such implication and repeated representation it cannot with reason be said that he made but one representation. Also, it disposes of appellant's argument and his authority. People v. Fleming, 220 Cal. 601, 32 P.2d 593.

[7] While appellant's first fraudulent representation of June 14th resulted in his acquisition of only $500 on that day, he did not actually gain possession of the other sums until the subsequent dates, as follows: $1,000 June 29, 1940; $402.75 July 30th; $1,804.10 August 9th, and $500 September 12th. He could not appropriate them before they came into his possession. He did not deposit them in a trust fund and later withdraw them. He took each sum as it was paid to him. When one has knowingly and designedly by fraudulent representations defrauded another person,

such representation shall be treated as continuing so as to cover any money, property or services as a result thereof. § 484, Pen.Code. The receipt and appropriation of the moneys to his own use on the five several dates constituted five separate acts. Each of such acts was a complete crime in itself. People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732; People v. Rabe, 202 Cal. 409, 261 P. 303.

This case is of the type in which the rule of convenience might properly be applied. While the information accused appellant of a forgery necessitating proof that he did not have the authority of Carle L. Williams to affix the latter's name to the certificate or to the indorsement upon it, appellant did not take the stand to throw any light upon that subject. Under circumstances such as these, confronted with the testimony of the officers of Pacific and by expert proof of Lloyd's procedure at London and in the United States, appellant should have assumed some of the responsibility of defeating the accusation rather than of maintaining the attitude of expecting the prosecution to fail in its proof. His borrowing of the old policy from Dr. Anderson and altering it; his procuring a photostat to be made of it; his presentation of that instrument to president Groendyke with the statement that it was his binding authority; his statement that he had placed the insurance through Poole and Sons, who had never heard of him; his receipt of the $4,200, no part of which was shown ever to have been paid either to Lloyd's American Trust Fund or to Lloyd's of London; his repeated statement that his binding authority was a great secret, and the proof that no binding authority had ever been issued to him—these facts placed him in a position from which, in reason and sound judgment, it became not only incumbent upon him to make proof of his authority to sign the name of Williams to the certificate, but also to present proof that he had authority to act for a broker at Lloyd's. His proof of possession of any such authority would instantly have dispelled the web that entangled him, and if such proof existed it lay peculiarly within his knowledge.

The rule was recently determined to apply to the defendant in a prosecution for false imprisonment. People v. Agnew, 16 Cal.2d 655, 663, 107 P.2d 601. It has been applied in the case of a prosecution for forgery where the defendant was accused by indictment of passing a note signed with the name of a person who did not exist. People v. Terrill, 133 Cal. 120, 65 P. 303. The rule of convenience was there applied when evidence was introduced to show that no man by the name forged to the fictitious instrument resided in the county. But whether the rule be invoked in support of the judgment, the circumstantial evidence introduced against appellant has woven such a pattern of his guilt as to render his innocence wholly improbable. While the establishment of a negative fact is oftentimes difficult, the ominous circumstances established against appellant leave no doubt that he never possessed any authority to place the Pacific insurance with Lloyd's. Therefore, the moneys which he took from Pacific in payment of purported premiums were taken by him upon the false representation that he had a binding authority to place the Pacific insurance with Lloyd's. Having no such authority, the moneys taken by appellant from Pacific continued to be the lawful property of that corporation as alleged in the information. If the jury believed the testimony and the fair inferences arising therefrom, it was sufficient to warrant a finding that appellant had neither authority to sign the name of Carle L. Williams Co. to the certificate he delivered to Pacific nor a binding authority from a Lloyd's broker to place the policy described in the certificate.

[8-11] The sufficiency of the proof to support judgments which have been founded upon circumstantial evidence has been repeatedly presented to the appellate courts. In such cases we are often asked to supplant the verdict and decision of the trial court with a contrary judgment. Since the decision in People v. Staples, 149 Cal. 405, 86 P. 886, it has been popular with prisoners who found themselves enmeshed in unchangeable strands of circumstance to attempt to defeat the judgment of trial courts upon the strength of that decision. But the falsity of such reasoning has long since been exploded. The language of the court in that case often quoted in support of such contentions was approved by the court then as correct usage in giving instructions upon circumstantial evidence. Its true significance has long since been clarified. People v. Muhly, 15 Cal.App. 416, 114 P. 1017; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. Latterly, judicial logic has been, in a number

of cases, generously applied in upholding the prerogative of the trial courts to determine the ultimate fact of guilt. See People v. Newland, supra. The cardinal principles announced in that case are applicable to the instant case: (1) that appellate courts do not attempt to determine the weight of the evidence; (2) that their function is to decide only whether upon the evidence taken as a whole they can conclude that sufficient facts could not have been found by the jury to warrant the inference of guilt; (3) that they will not transgress upon the functions of the jury and the trial court by determining what facts are established; (4) that in order to justify a reversal of a judgment of conviction upon the ground of the insufficiency of the evidence "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below"; (5) that under such contention the appellate court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence; (6) that because the circumstances in evidence might reasonably be reconciled with the innocence of the defendant will not warrant a reversal of the jury's determination if such circumstances reasonably justify the verdict. By applying these principles we are reassured that the conviction of defendant upon the circumstantial evidence was amply warranted.

[12] Appellant's contention before this court that he tried to reach London to obtain evidence to prove his innocence is a vain and belated cry. The occasion on which he might with propriety have urged the existence of material evidence that he might offer to defeat the contention of the prosecution would have been his motion for a continuance of the day of trial. He will not be permitted to take his chances upon the insufficiency of proof to be offered by the state and thereafter in this court plead the injustice of the verdict on the claim that he could have got evidence had he gone to London. Such contention would be available to appellant only under an assignment of abuse of discretion in denying him sufficient time to prepare or in refusing him the process of the court in his attempts to procure evidence in a foreign jurisdiction. If evidence of value to appellant existed in London, it is presumed that all facilities customarily available to a litigant would have been at the service of defendant.

[13, 14] (2) It is next contended that appellant suffered prejudice by admission of testimony of experts with reference to the authority of surplus line brokers in the United States to bind underwriters at Lloyd's. It is urged that evidence of custom is not admissible to prove what was done in a particular transaction, citing Dutton Dredge Co. v. United States Fidelity & Guaranty, 136 Cal.App. 574, 29 P.2d 316. But the evidence offered by the experts was not evidence of custom and practice. On the contrary, it was evidence of the rules and regulations within the organization of Lloyd's underwriters. In order to understand an occurrence within a highly organized establishment it may become necessary to prove the procedure or the rules and regulations of its inner workings. Custom or usage may be received to prove methods adopted by a trade, industry or business, and is admissible for the purpose of proving the intention of parties to a contract which could not be done without the aid of extrinsic evidence. In the Dutton Dredge Co. case an attempt was made in the trial court to introduce evidence of the custom and usage in the insurance world in order to prove that a contract would not have been made. Proof of custom is not admissible for the purpose of establishing such a fact.

In the case of the conduct of the business and affairs of an establishment, it is presumed that the regular course of business of such establishment is followed, Code Civ. Proc. § 1963, subd. 20, and that the books and records of an establishment truly reflect the facts set forth in such books. Code Civ.Proc. § 1953f.

The evidence received as to the regulations and procedure of Lloyd's was not to prove the authority of "surplus line brokers" in the United States to bind underwriters at Lloyd's. No evidence is pointed to as proof that a surplus line broker has authority to place such insurance. As such broker he has no such authority. His only power as such broker is to place insurance with Lloyd's if he has been first lawfully authorized directly or through another to do so by a Lloyd's broker in London. Nothing was said by expert witnesses to indicate that a surplus line broker can by the issuance of a certificate bind Lloyd's. He cannot act effectively unless he is on the approved list of authorized agents in the

office of Duncan and Mount, and he cannot write, issue or authorize insurance. He can merely negotiate for it, if he has a binding authority, and await notice from a Lloyd's broker that it has been underwritten at Lloyd's before he may safely certify to that fact. Lloyd's underwriters are not bound by any custom or practice in the insurance business. They are bound only by the contracts into which they enter. It is a rule of their organization and a condition of their doing business with any representative that only those possessing binding authority have the power to bind them upon a policy of insurance, and unless such contract be approved by Duncan and Mount, it lacks the necessary validity to confer power upon the representative to place insurance with Lloyd's.

[15] (3) Appellant complains that he was prejudiced by the fact that the court's instructions covered all three theories of grand theft without admonishing the jury that they should agree upon one theory. After instruction that the theft may be committed by larceny, embezzlement or by false representation, the court gave appropriate instructions on theft by false pretenses, or theft by trick and device and on theft by embezzlement. Appellant's apprehension is that a part of the jurors may have been convinced that defendant was guilty under one theory and that the remainder of the jury might have been divided in their persuasion on the other two theories. But the accusation in five counts of the information charged grand theft. Under the evidence, the jury might appropriately have concluded appellant's guilt under any one of the three above mentioned theories of grand theft as defined by section 484 of the Penal Code. If appellant had taken the moneys to deliver for Pacific to Lloyd's, it would have been the theft of Pacific moneys under the theory of embezzlement. If the jury agreed that the representations that appellant could bind Lloyd's were false and that appellant intended to and did acquire the money from Pacific for the purpose of converting it to his own use, such facts were sufficient to support a conviction under either the theory of false pretense or of trick and device. It was not necessary to require the jury to agree upon the theory. If, under any one of the theories set forth, they believed appellant had gained possession of and appropriated to his own use the moneys of Pacific, he was guilty of grand theft. All of the instructions given were pertinent to the issues and were warranted by the evidence.

[16] (4) The final assignment of appellant is that the court erred in refusing to give certain instructions as follows:

(a) "If the complaining witness received what defendant had agreed to give him, there would be no offense on the part of defendant. Where the prosecuting witness gets out of the transaction just what he bargained for, no offense is committed." This instruction assumes that it has already been determined that Pacific had received a Lloyd's policy. It had received only a false certificate that insurance had been placed. Therefore it had no application. Appellant agreed with Pacific to deliver to it a policy of insurance with Lloyd's of London. The only evidence received was that no such policy was ever received or issued. Had Pacific received the insurance for which it bargained there could have been no wrongful taking and appellant would not have been accused.

[17] (b) "As to the custom or the customary procedure followed ordinarily in the effecting of insurance through underwriters at Lloyd's, you have a right to consider such testimony, but you are not to infer from the admission thereof in evidence that such custom has always been followed to the exclusion of other procedure. Custom is merely the habitual manner of doing things and does not exclude the probability of doing such thing in some other manner." An instruction upon the subject of custom had no place in the instructions. We have already demonstrated that the proof presented by the experts was of the regulations as to Lloyd's manner of transacting its affairs, that is, the regular course of business done at Lloyd's. There was no occasion for custom of the insurance world to be introduced in evidence. Not only was the regular course of business at Lloyd's presumed to have been followed, but the testimony of the experts established beyond a peradventure that such regular course is followed by Lloyd's in all of its transactions; and it is also clear from the record that such method of procedure was not followed by appellant in his purported attempt to place a Lloyd's policy with Pacific.

[18] (c) "You are instructed that authority to sign another's name need not be expressly given; that authority may be given by implication. In considering whether or not the defendant herein had implied authority to sign the name of Carle

L. Williams to the certificate of insurance to Pacific Discount Corporation, you may consider the previous relationship between the parties, whether or not Carle L. Williams had on previous occasions given the defendant authority to sign his name or whether on previous occasions the defendant had signed the name of Carle L. Williams with the knowledge of said Carle L. Williams, and his authority so to do was not denied by Carle L. Williams, together with all the other circumstances under which the said certificate was signed by the defendant." We have already shown that appellant had no authority to sign the name of Carle L. Williams to the certificate of insurance following the termination of his former period of employment December 31, 1927. It cannot with reason be said that there was any implied authority in appellant to sign Williams' name simply because he had worked for Williams fourteen years prior to June 14, 1940. During that fourteen years appellant did not, in operating a business under his own name or under the name of British Foreign Syndicate, use the name of Carle L. Williams. The question before the jury was whether appellant with intent to defraud signed the name of Williams to the certificate and endorsement in question, knowing that he had no authority so to do. To ask the jury to consider the employment of appellant by Williams some fourteen years previously as a basis for an implied authority to sign Williams' name to the certificate and endorsement in question would have been an abuse of the right to infer the existence of a fact by reason of other facts. Such inference cannot be fairly made from facts shown to have existed in a remote and distant past. There is no evidence in the record which fairly implied authority over any period of time. Proof of a business relationship between two men that ceased fourteen years ago will not justify a conclusion that the same relationship has been revived.

The facts that Pacific did not receive the insurance it bargained for; that no policy was ever authorized by Lloyd's underwriters; that in the regular course of transacting its business the moneys collected by appellant as premiums upon a Lloyd's policy would have been paid into Lloyd's American Trust Fund; that the American records of Lloyd's of London failed to disclose that any binding authority had been issued to appellant or to the Carle L. Williams Co., or that either was on the approved list of Lloyd's brokers, and that appellant vainly attempted to establish his authority to sign the name of Williams—these are circumstances from which the jury properly determined that appellant not only had no implied authority to sign the name of Carle L. Williams to the certificate of insurance, but also that he had no authority to negotiate a sale of a Lloyd's policy.

The instructions were properly refused.

The judgments and the order denying a new trial are affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

21 Cal.2d 145

LEUPE v. LEUPE.

S. F. 16194.

Supreme Court of California.

Nov. 2, 1942.

1. Divorce ⇐254

The trial court is without jurisdiction to modify an unqualified disposition of property rights made in interlocutory decree of divorce, except in accordance with the methods applicable to judgments generally.

2. Divorce ⇐254

Where motion to modify interlocutory divorce decree by providing that personal property should not be subject to a lien was not made until after expiration of time for appeal, the interlocutory decree had become "res judicata" with respect to all issues determined, and court had no jurisdiction to terminate the lien or to change other portions of the interlocutory decree relating to property. Code Civ. Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Divorce ⇐249(1)

An immediate disposition of property upon an interlocutory divorce decree is within jurisdiction of trial court.

4. Divorce ⇐253

Generally, court should determine property issues at the same time it determines issues with respect to divorce, although the court may specify that its determination regarding property should not become effective or final until the entry of the final decree.

5. Divorce ⇐245(1)

The award of alimony made in interlocutory divorce decree is subject to modification. Civ.Code, § 139.

6. Divorce ⇐254

Where it did not appear that provisions of interlocutory divorce decree relating to property and alimony were in accordance with terms of proposed property settlement, the husband was not precluded from applying for modification of award of alimony made in the interlocutory decree. Civ.Code, § 139.

7. Divorce ⇐245(2)

The fact that interlocutory divorce decree contained the notation "approved" followed by the signature of husband's attorney did not transform the draft of the decree into a "contractual agreement" so as to preclude the husband from making application for modification of award of alimony. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Contractual Agreement".

8. Divorce ⇐245(2)

Husband's acceptance of benefits under interlocutory divorce decree did not "estop" him from seeking reduction of alimony. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Divorce ⇐245(1), 286

A modification of an award of alimony rests within the discretion of court and its order may not be set aside without a clear showing of abuse of discretion. Civ.Code, § 139.

10. Divorce ⇐285

Where testimony on which interlocutory divorce decree was based had not been made part of record upon appeal from modification of alimony allowance, the modification could not be held erroneous. Civ. Code, § 139.

11. Divorce ⇐286

On appeal from order granting modification of award of alimony made in interlocutory divorce decree, the only question for Supreme Court was whether there was any substantial evidence supporting the decision and such evidence was required to be presumed true and testimony to the contrary was not required to be considered.

12. Divorce ⇐223, 225

The granting or rejection of a request for allowance of counsel fees and costs in defense of motion for modification of interlocutory divorce decree rests within sound discretion of trial court and the factors to be considered include the financial resources of the parties.

13. Divorce ⇐182, 222

The refusal to allow counsel fees and costs in defense of motion for modification of interlocutory divorce decree and allow-

ance for support pending appeal was not error under evidence.

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt and A. R. Cotton, Judges.

Action for divorce by Louis Leupe against Marie Leupe wherein defendant filed a cross complaint. From a final decree, from an order modifying interlocutory decree, from an order denying counsel fees and costs in defense of motion for modification of the interlocutory decree, from an order modifying the interlocutory decree and from an order denying application for costs and attorney's fees on appeal and for allowance for care and support pending appeal, the defendant appeals.

Affirmed in part and reversed in part.

For prior opinion of District Court of Appeals, see 121 P.2d 117.

Carl W. Anderson, of Burlingame, for appellant.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for respondent.

GIBSON, Chief Justice.

The respondent, Louis Leupe, brought an action for divorce. The record now before us does not contain the pleadings then filed nor does it disclose the testimony before the trial court, but it appears that Mrs. Leupe, the appellant herein, cross-complained, and on May 17, 1937, was granted an interlocutory decree of divorce upon the ground of extreme cruelty. The decree, approved as to form by respondent's attorney, awarded him certain enumerated personal property and he was ordered to pay Mrs. Leupe $1,500, in instalments of $25 each month, for her interest in this property and in the business conducted by respondent. A lien was imposed upon the property to secure the payments to be made therefor. In addition to the payments for the personal property, respondent was ordered to pay Mrs. Leupe $50 per month for her maintenance and support, and it was provided that upon completion of the payment of the $1,500 her allowance for maintenance and support should be increased to $75 per month. Also, she was awarded $100 as "additional" counsel fees. No appeal was taken from this decree, and for a period of more than eleven months respondent complied in full with its provisions, paying Mrs. Leupe $300 on account of her interest in the personal property and $600 for her support.

On May 11, 1938, respondent filed notice of a motion to modify the interlocutory decree by terminating the requirement of any further payments to Mrs. Leupe thereunder. In support of this motion he alleged compliance with the decree, but asserted that none of the payments made were necessary for Mrs. Leupe's support, and also alleged that she did not need support from him and that he was unable to make further payments as required by the decree. These assertions were denied by Mrs. Leupe except as to past compliance, and she asked an allowance of counsel fees and costs to oppose the motion.

On June 29, 1938, the trial court made an order modifying the interlocutory decree by providing that the personal property should not be subject to a lien and that respondent should thereafter, pending further order of the court, pay $10 per month for the support of his wife, which sum should not be increased upon completion of the payment of the original sum of $1,500 for the property. The order requiring the payment of the instalments of $25 per month on account of the sum of $1,500 was not changed. The total monthly payments were thus reduced from $75 to $35. At respondent's request the court on July 5, 1938, signed a final decree of divorce, which referred to the interlocutory decree, but in accordance with the order of June 29 provided that the personal property should not be subject to a lien and that thereafter respondent should pay $10 per month for Mrs. Leupe's support. Mrs. Leupe appealed from the order of June 29, from a denial of her counsel fees and costs in defense of the motion, and from that portion of the final decree eliminating the lien and reducing the alimony. Subsequently Mrs. Leupe applied to the court for costs and attorney's fees on appeal and moved for an allowance for care and support pending the appeal. The court denied the requests, and an appeal has also been taken from this order.

[1, 2] Appellant contends that the court had no jurisdiction to terminate the lien or to change other portions of the interlocutory decree relating to property after it had become final and the time for appeal or for relief under Code of Civil Procedure section 473 had expired. Respondent re-

plies that any disposition of property rights by the interlocutory decree was not effective or conclusive until a final decree of divorce was entered, and contends, therefore, that the trial court retained power to modify its decree. This problem has been before our courts many times since the legislation of 1903 creating the present dual-decree divorce procedure. While the decisions have not been entirely consistent, no decision has been found that can sustain the order removing the lien. With the exception of certain language to the contrary, hereafter noted, the decisions establish that the trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory decree of divorce except in accordance with the methods applicable to judgments generally, time for which had expired in this case before respondent's motion was made. Even though a final decree is not entered, the interlocutory decree becomes a conclusive adjudication and is res judicata with respect to all issues determined. Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677; Allen v. McCrary, 220 Cal. 508, 31 P.2d 388; In re Bollinger's Estate, 170 Cal. 380, 383, 384, 149 P. 995; Overell v. Superior Court, 29 Cal.App.2d 418, 84 P. 2d 789; Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; Peis v. Mohr, 126 Cal.App. 300, 14 P.2d 878; Klebora v. Klebora, 118 Cal.App. 613, 5 P.2d 965; De Haven v. Superior Court, 114 Cal.App. 253, 300 P. 95; cf. Greenwood v. Greenwood, 101 Cal.App. 736, 740, 282 P. 433; see In re O'Connell, 80 Cal.App. 126, 128, 251 P. 661; Bacigalupi v. Bacigalupi, 72 Cal.App. 654, 238 P. 93; Abbott v. Superior Court, 69 Cal.App. 660, 232 P. 154; see Newell v. Superior Court, 27 Cal.App. 343, 345, 149 P. 998; see Huneke v. Huneke, 12 Cal.App. 199, 203, 107 P. 131; cf. John v. Superior Court, 5 Cal.App. 262, 90 P. 53.

Language may be found in certain decisions which cannot be reconciled with the foregoing cases. In Re Boeson's Estate, 201 Cal. 36, 40, 255 P. 800, relied upon by respondent, it was said that the entry of an interlocutory decree does not sever the marital relation, and that any disposition of property made thereby becomes effective only upon entry of the final decree, until which time property rights remain as before the interlocutory decree. The court cited In re Dargie's Estate, 162 Cal. 51, 121 P. 320, and In re Seiler's Estate, 164 Cal. 181, 128 P. 334, Ann.Cas.1914B, 1093, but these support only the reference to severance of marital relations. Further, the language in Re Boeson's Estate, supra, is dictum, for although the appellant therein was said not to be barred by the decree, she was held barred upon other grounds. Roberts v. Wehmeyer, 191 Cal. 601, 615, 218 P. 22, 27, suggests the law to be that "community property may be divided only upon a dissolution of the marriage and * * * an interlocutory decree is not such a dissolution." This statement of the law has not been followed and has also been characterized as dictum. Klebora v. Klebora, supra, 118 Cal.App. at page 621, 5 P. 2d 965. Similarly, in Radich v. Radich, 64 Cal.App. 605, 607, 222 P. 182, it was said by way of dictum that the court could not dispose of community property or a homestead until the final decree. Insofar as the language of these cases suggests that a court is without jurisdiction to make an unqualified disposition of property in an interlocutory decree of divorce, it is in opposition to the cases previously cited and must be disapproved.

[3, 4] An immediate disposal of property upon an interlocutory decree of divorce is thus within the jurisdiction of the trial court. It has been held in certain cases that the trial court should not assign and dispose of the community or homestead property immediately by an interlocutory decree of divorce, but should wait until such time as the marriage is absolutely dissolved. Remley v. Remley, 49 Cal.App. 489, 193 P. 604; Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248; Radich v. Radich, supra; see Sullivan v. Superior Court, 72 Cal.App. 531, 534, 237 P. 782; Peis v. Mohr, 126 Cal.App. 300, 303–305, 14 P.2d 878; Leavitt v. Leavitt, 134 Cal.App. 145, 24 P.2d 910; but cf. McDaniel v. McDaniel, 134 Cal.App. 597, 25 P.2d 843. These cases, however, dealt with direct appeals from interlocutory decrees in which error only was claimed and do not involve questions of jurisdiction or the effect of such decrees after the time for appeal has passed. Furthermore, it has been said that the court generally should determine the property issues at the same time it determines the issues with respect to the divorce, although the court may specify that its determination should not become effective or final until the entry of the final decree. Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; Webster v. Webster, 216 Cal. 485, 14 P.2d 522; Lo Vasco v. Lo Vasco, 46 Cal. App.2d 242, 115 P.2d 562. This practical

solution of the problem was recognized and approved in the Remley and Strupelle cases, supra. We need not decide in this case whether it was error to make an immediate assignment of property in the interlocutory decree or whether the right to so dispose of the property of the parties was within the discretion of the court. The time for appeal having elapsed, the determination of property issues in the interlocutory decree became final and was no longer subject to modification except in accordance with the methods applicable to judgments generally. It follows that the court could not alter the decree by terminating the lien in the present case.

The conclusion reached here should not, of course, be considered determinative of the effect of an immediate disposition of property in an interlocutory decree of divorce where there is a reconciliation before the final decree. We prefer to reserve judgment upon the problems thus raised until the issue is presented directly. Cf. Peters v. Peters, 16 Cal.App.2d 383, 60 P.2d 313; and (1932) 20 Cal.L.Rev. 294, 301.

[5-8] An entirely different problem is presented with respect to the suggestion that the award of alimony made in the interlocutory decree was not subject to modification. The Civil Code specifically provides that the court may from time to time modify the award in accordance with the circumstances of the parties. Civ.Code, § 139; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; see Dupont v. Dupont, supra, 4 Cal.2d at page 228, 48 P.2d 677. Appellant urges, however, that respondent was precluded from applying for a modification of the award upon the ground that, prior to the entry of the interlocutory decree, he had agreed to a settlement of the property rights of the parties and to the amount of alimony to be paid in the event of a divorce and upon the ground that his attorney had approved the decree. It is also argued that respondent was estopped from applying for a modification of the award of alimony because he had accepted all the benefits of the decree. The only reference to a property settlement agreement is the statement in Mrs. Leupe's affidavit that "said plaintiff and cross-defendant had agreed with his attorney and the attorney for affiant as to the proposed settlement of the property rights of the parties herein and the amount of alimony to be paid in the event an interlocutory decree of divorce was granted to affiant." None of the terms of the "proposed settlement" are disclosed and it does not appear whether any agreement was actually concluded or whether the terms of the interlocutory decree were in accordance with the terms of the proposed settlement. Neither does the fact that the decree contained the notation "Approved" followed by the signature of respondent's attorney transform the draft of the decree into a contractual agreement. The bill of exceptions expressly states that the approval by respondent's attorney was of the form of the decree. It has been held in other jurisdictions that the signature of the attorney upon a decree following such words as "approved," "assented to," "O.K." or even "approved as to substance and form" does not alone constitute assent to be bound by the terms of the decree. Harter v. King County, 11 Wash.2d 583, 119 P.2d 919; Allen & Reed, Inc. v. Investments, Inc., R.I., 182 A. 3; State v. Trotter, 214 Ind. 68, 14 N.E.2d 550; Bank of Gauley v. Osenton, 92 W.Va. 1, 114 S. E. 435; Kirn v. Ioor, 266 Mich. 335, 253 N.W. 318. Finally, respondent's acceptance of benefits under the interlocutory decree cannot be held to estop him from seeking a reduction of alimony. This conduct could at most prevent him from taking a position inconsistent with the decree. Application for a modification of alimony is not inconsistent with the operation of the decree and does not constitute an attempt to annul it. See Ross v. Ross, 1 Cal.2d 368, 369, 370, 35 P.2d 316. No basis for an estoppel has been established.

[9, 10] Appellant's final contention with respect to the allowance for her support is that the evidence presented to the trial court is insufficient to warrant a reduction of the payments originally ordered. It is clear that a modification of an award pursuant to section 139 of the Civil Code, supra, rests within the discretion of the court, and its order may not be set aside without a clear showing of an abuse of discretion. See, for example, Whitehead v. Whitehead, 45 Cal.App.2d 447, 114 P.2d 403; Willen v. Willen, 119 Cal.App. 483, 6 P.2d 554; Marshall v. Marshall, 196 Cal. 761, 765, 767, 768, 239 P. 36; Bruton v. Tearle, 7 Cal.2d 48, 59, 59 P.2d 953, 106 A.L.R. 580; cf. Wilder v. Wilder, 214 Cal. 783, 7 P.2d 1032. Mrs. Leupe argues, however, that there is no room for an exercise of this discretion unless the moving party is able to show a substantial change in the circumstances of the parties between the entry of the inter-

locutory decree and the application for its modification. We cannot say on the record before us that the evidence was not sufficient to support a finding of changed circumstances justifying the reduction that was made. First, the testimony upon which the interlocutory decree was based has not been made a part of the record upon appeal, and pursuant to stipulation no findings of fact were made. Therefore we do not know what was considered by the trial court and are unable to determine whether or not different facts were established upon the motion for modification. This situation is almost identical with that recently presented in Valentine v. Valentine, 47 Cal.App.2d 438, 118 P.2d 17. A similar order modifying an interlocutory decree was affirmed in that case over an objection that there was no showing of a change of circumstances, the court saying (47 Cal. App.2d at page 440, 118 P.2d at page 18): "As the record at the former hearing is not before us, we cannot say that the proof was the same as that adduced at the original hearing. In support of the order, we must assume that other and different facts were established at the second hearing." This reasoning is particularly applicable in the instant case because the same trial judge presided at both hearings, and we cannot assume that he would have altered the award in the absence of such a showing.

[11] Further, even if we should assume that the only change in circumstances is that disclosed by respondent's affidavit and testimony set forth in the bill of exceptions, it would be difficult to hold this showing insufficient. As in other cases requiring a determination of the sufficiency of the evidence, the only question for the appellate court is whether there is any substantial evidence supporting the decision; this evidence must be presumed true and testimony to the contrary need not be considered. Gates v. McKinnon, 18 Cal.2d 179, 180, 114 P.2d 576; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660. The evidence relating to the financial affairs of the parties was in sharp conflict, but the testimony in favor of respondent indicated that his business has declined, that he owed money on his machinery and equipment and that he was in danger of losing the machinery and being forced to discontinue the business. Respondent also testified that Mrs. Leupe had the money which she had received from him on deposit in a particular bank and that she had no need for support from him. With this evidence in the record and without the testimony given at the first hearing it is impossible to hold that the trial court abused its discretion in reducing the total monthly payments from $75 to $35 until further order of the court.

[12, 13] The remaining question to be considered is appellant's contention that the court improperly denied her applications for costs and attorney's fees. The granting or rejection of such a request lies within the sound discretion of the trial court, and the factors to be considered include the respective financial resources of the parties. Wilder v. Wilder, 214 Cal. 783, 7 P. 2d 1032; Arnold v. Arnold, 215 Cal. 613, 12 P.2d 435; Kellett v. Kellett, 2 Cal.2d 45, 39 P.2d 203; Comey v. Comey, 8 Cal. 2d 453, 66 P.2d 148; see McClure v. McClure, 4 Cal.2d 356, 362, 49 P.2d 584, 100 A.L.R. 1257. As the court said in the Kellett case, supra, 2 Cal.2d at pages 49, 50, 39 P.2d at page 205: "The matter was so wholly in the discretion of the trial court that, in order to set aside its order refusing the application, a very strong case must be made out in favor of the plaintiff." While it has been held an abuse of discretion to deny an allowance for costs and attorney's fees where it appears uncontroverted that appellant does not have the necessary funds and that respondent is able to pay, Norris v. Norris, 50 Cal.App.2d 726, 123 P.2d 847, such a situation is not presented by the record now before us. The court may have taken into account the provision for fees made in the interlocutory decree, and in view of the evidence discussed above with regard to the reduction of alimony we cannot say the trial court erred in refusing to allow costs and attorney's fees. This conclusion also applies to appellant's request for an additional allowance for support pending appeal. Cf. Kellett v. Kellett, supra; Comey v. Comey, supra.

The orders of the court below are reversed insofar as they purport to terminate the lien imposed upon the personal property. In all other respects they are affirmed. Each side is to bear its costs upon this appeal.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and SCHAUER, J. pro tem., concurred.

21 Cal.2d 220

FIRST TRUST & SAVINGS BANK OF PASADENA et al. v. CITY OF PASADENA.

L. A. 18080.

Supreme Court of California.

Nov. 9, 1942.

1. Municipal corporations ⇐977

Where city by ordinance set up its own complete taxing system and city charter required presentation of all "claims" within six months and provided that unless so presented no suit should be brought upon any claim for money or damages against the city, in action to recover portion of taxes paid under an alleged overassessment of properties through use of erroneous methods of valuation, complaint which contained no allegations showing compliance with claims provision of the charter stated no cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

2. Municipal corporations ⇐977

Where city set up its own complete taxing system, any provision of ordinance construable as eliminating necessity for presentation of claims for tax refunds or as specifying a longer period for such presentation than that provided by claims provision of charter would be void because in conflict with superior charter provision.

3. Municipal corporations ⇐977

In action against city to recover portion of taxes paid under alleged overassessment of properties through use of erroneous methods of valuation, city was not precluded by "waiver" or "estoppel" from raising defense of noncompliance with charter provisions requiring all claims to be presented within six months because of alleged practice of city officials of making tax refunds in cases where claims had been filed more than six months after payment or because city attorney had told plaintiffs' council that it was not necessary to file claims within six months.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

4. Estoppel ⇐62(4)

Doctrine of estoppel may be invoked against a municipal corporation only in rare cases.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by First Trust & Savings Bank of Pasadena and others against the City of Pasadena to recover a portion of taxes paid by plaintiffs under an alleged overassessment of plaintiffs' properties through the use of erroneous methods of valuation. From a judgment for defendant, the plaintiffs appeal.

Affirmed.

Prior opinion, 123 P.2d 60.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Harold P. Huls, City Atty., and H. Burton Noble, Asst. City Atty., both of Pasadena, for respondent.

PER CURIAM.

A further study of this case leads us to the conclusion that the opinion of the District Court of Appeal rendered when the case was before that court correctly disposes of all questions presented by the record herein. That opinion written by Mr. Justice Spence of the First District, Second Division, we therefore adopt as the opinion of this Court. It is as follows:

"Plaintiffs brought this action seeking to recover a portion of the taxes paid by plaintiffs to the city of Pasadena for the tax year 1933-1934, which portion was alleged to have resulted from an over-assessment of plaintiffs' properties through the use of erroneous methods of valuation. Defendant's demurrer to plaintiffs' amended complaint was sustained. Plaintiffs elected to stand upon said amended complaint and refused to plead further. Thereupon a judgment of dismissal was entered and from said judgment, plaintiffs appeal.

"It is conceded by plaintiffs that its amended complaint contained no allegation showing compliance with the so-called claims provision of the Pasadena charter and that if compliance with said claims provision was required, then the ruling of the trial court was correct. Plaintiffs contend, however, that they were not required to allege compliance with said claims provision of said charter; that their amended complaint was sufficient in all respects; and that the trial court erred in sustaining said demurrer.

"The above-mentioned claims provision of the Pasadena charter is found in article 11 thereof. Said article requires the presentation of 'all claims' within six months and further provides that unless a claim has been so presented, 'No suit shall be brought upon any claim for money or damages' against the city of Pasadena.

"Plaintiffs state that the trial court based its ruling on Farmers' & Merchants' Bank of Los Angeles v. City of Los Angeles, 151 Cal. 655, 91 P. 795, and they devote considerable space in their briefs to an attack upon the decision in that case. They call attention to the fact that the cited case was decided by a divided court and they refer to it as 'only a much criticized, never followed, frequently distinguished decision, out of line with the controlling rule of law.' They concede, however, that it has never been expressly overruled.

"One of the most recent cases in which the cited case is discussed is that of Brill v. Los Angeles County, 16 Cal.2d 726, 108 P.2d 443. The majority opinion in the Brill case distinguishes the Farmers Bank case at page 731 of 16 Cal.2d, at page 446 of 108 P.2d. It is there said, 'In support of its contention that the filing of a claim with it prior to suit was indispensable, the city places great reliance on the case of Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795. That case is factually distinguishable from the present one and does not require a conclusion herein that the filing of a claim with the city was an indispensable prerequisite to the commencement of these actions. There, as distinguished from the present case, the city itself had directly provided a complete scheme for the assessment and collection (which, as shown, includes refund) of taxes by city officers though, pursuant to charter provision, such scheme was to be "substantially" the same "as the mode and manner" for the collection of state and county taxes. Though patterned after the county plan, the city had there set up its own complete taxing system and four of the justices thereupon concluded that under such circumstances the refunding procedure of such city system was subject to and controlled by the charter provision as to the necessity for filing a claim prior to suit to recover money.'

"The minority opinion in the Brill case gives unqualified approval to the decision in the Farmers Bank case and states on page 740 of 16 Cal.2d, page 450 of 108 P.2d, that 'The decision in that case has never been overruled directly or by implication. It has stood for over thirty years, and must now be regarded as the settled law of this state.' It was the view of the minority in that case that the Farmers Bank case could not be distinguished there and it was said in the minority opinion on page 739 of 16 Cal.2d, page 450 of 108 P.2d, 'That case, in respect to the applicability of the law requiring presentation of a claim before suit, is the exact counterpart of the present action.'

[1, 2] "In our opinion, there is no essential ground for distinction between the Farmers Bank case and the instant case. Here as there the claims provision of the charter contained a 'sweeping requirement' (Brill v. County of Los Angeles, 16 Cal.2d page 741, 108 P.2d 443) which covered 'all claims' against the city. Here as there the city had set up by ordinance its 'own complete taxing system.' See Brill v. County of Los Angeles, supra, 16 Cal.2d page 731, 108 P.2d page 446. If any provision of said ordinance is to be construed as eliminating the necessity for the presentation of a claim for a tax-refund or as specifying a longer period for such presentation than that provided by the claims provision of the charter of said city, then such 'ordinance provision must necessarily be held void because in conflict with the superior charter provisions.' Farmers & Merchants' Bank v. City of Los Angeles, supra, 151 Cal. page 659, 91 P. page 797.

[3, 4] "Plaintiffs further contend that even assuming that said claims provision of the charter was applicable to claims for tax refunds, 'administrative construction of charter and tax ordinance and acts of city officials constituting estoppel bar raising defense in this case.' The claimed waiver or estoppel is based upon the allegations of the amended complaint alleging the existence of a practice on the part of the city officials of making tax refunds in cases where the claims had been filed more than six months after payment and alleging that the city attorney had told plaintiffs' counsel that it was unnecessary to file claims within the six month period.

"We find no merit in plaintiffs' claim of waiver or estoppel. Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580; Sacramento and San Joaquin Drainage Dist. v. Riley, 194 Cal. 624, 229 P. 957; Ritter v. United States,

3 Cir., 28 F.2d 265; United States v. Globe Indemnity Co., 2 Cir., 94 F.2d 576; New York City Employees' Retirement System v. Eliot, 267 N.Y. 193, 196 N.E. 23, 87 A.L.R. 988. It is only in rare cases that the doctrine of estoppel may be invoked against a municipal corporation (Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; City of Los Angeles v. Los Angeles County, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; 10 Cal.Jur. 651) and we do not believe this case to be one of them.

"It follows that plaintiffs' amended complaint was insufficient and that the trial court properly sustained the demurrer thereto."

The judgment is affirmed.



21 Cal.2d 228

HUNTER et al. v. HUNTER et al.

S. F. 16234.

Supreme Court of California.

Nov. 10, 1942.

Mortgages ⇐25(6)
Quieting title ⇐44(4)

In action to quiet title to realty and cancel note and trust deed thereon, evidence justified judgment for plaintiffs on ground that they were owners of property and that note and deed of trust were without consideration.

In Bank.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Action by C. E. Hunter and others against Lydia Hunter and another to quiet title to real property and cancel a note and trust deed. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Prior opinion, Cal.App., 121 P.2d 71.

C. E. Luckhardt, of San Jose, and H. L. Preston, of Ukiah, for appellants.

Grattan, Kirby & Pasquinelli, Eugene B. Grattan, Owen D. Richardson and David C. Kirby, all of San Jose, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of the plaintiffs quieting their title in and to certain real property in the county of Santa Clara and cancelling a promissory note and a trust deed on the property.

The amended complaint proceeds on three causes of action: (1) a cause of action to quiet title in the usual form; (2) a cause of action on the ground that there was no consideration for the note and trust deed; and (3) a cause of action based on the oral agreement that the note and deed of trust were to be cancelled if F. A. Hunter predeceased the plaintiffs. The answer admitted the ownership and possession of the property by the plaintiffs but asserted the validity and effectiveness of the note and trust deed.

The plaintiffs C. E. Hunter and Maud M. Hunter are husband and wife. F. A. Hunter was the father of the plaintiff C. E. Hunter. The defendant Lydia Hunter is the mother of the plaintiff C. E. Hunter. The defendant Grandin H. Miller was named as the trustee in the deed of trust ordered cancelled by the judgment. During the events out of which this controversy arose the elder Hunter was living. At the beginning of those events the younger Hunter and his wife were living in Browns Valley, Yuba County, California, and the elder Hunters lived on a ranch in Santa Clara County. The elder Hunters were well along in years and desired to have their son near them for the purpose of helping to farm and manage their ranch, also to do away with the long trips and traffic dangers in their customary visits to the younger Hunters. For the purpose of inducing the plaintiffs to dispose of their property and to move to Santa Clara County to be near the elder Hunters, the latter offered to purchase for the plaintiffs acreage upon which they could make their home. The plaintiffs objected to the plan. They were considering at that time a proposition to dispose of their property in order to take up their residence in San Francisco where the plaintiff C. E. Hunter had the opportunity of securing a good position. The plaintiff wife especially was reluctant to make the move requested by the parents of her husband.

The negotiations continued over a period of time. Finally F. A. Hunter succeeded in finding a place consisting of thirty-five acres adjoining the property of the elder Hunters, which could be purchased for seven thousand dollars. The property had no suitable home upon it and was planted to young trees which would not bear for several years. That condition of the place was one of the grounds upon which the plaintiff wife based her objections to making the change. She was averse to leaving the home in Yuba County for a place where the buildings were inadequate and the property for a considerable period would not be income-producing. Eventually, however, the plaintiffs were persuaded to accept the parents' proposal and they prepared to move to Santa Clara County. They succeeded in trading their property in Yuba County for property in Glendale.

The father and son then proceeded to arrange for the purchase of the thirty-five acre tract involved in this action. F. A. Hunter gave to his son a check for seven thousand dollars for the purpose of purchasing the property. Defendant Lydia Hunter assisted in the drawing of the check. The property was purchased, a deed was executed to the plaintiffs, the transaction was closed, and there is no claim that the younger Hunters did not in all respects comply with their part of the transaction. Throughout all of the negotiations the defendant Lydia Hunter was present at and participated in many of the conversations between the parties. The deed to the property was executed and delivered to the plaintiffs about the 11th day of November, 1932. About February 11, 1933, the plaintiffs, without previous discussion with F. A. Hunter and Lydia Hunter, or either of them, visited the defendant Grandin H. Miller, an attorney, and requested him to prepare an instrument which would enable the elder Hunters to secure title to the property in the event anything should happen to the plaintiffs, the reason given by the plaintiffs for this action being that they desired to protect the F. A. Hunters in the event the plaintiffs should predecease them. A note for seven thousand dollars, due five years after date, bearing four per cent interest, and a deed of trust upon the property to secure its payment were prepared by Mr. Miller, executed by the plaintiffs and delivered to F. A. and Lydia Hunter.

After moving from Browns Valley to Santa Clara County the plaintiffs resided a part of the time with the elder Hunters and a part of the time upon the property involved herein. The plaintiff C. E. Hunter assisted his parents in the management and care of their property and during a portion of the time had a lease upon their ranch. The elder Hunter died in July, 1935. In the fall of that year the plaintiff C. E. Hunter requested the mother to reconvey the property. She at first acquiesced, with the statement that they did not want the trust deed in the first place; but a daughter who was present at the conversation directed the mother not to make the reconveyance. Upon the refusal of Lydia Hunter to execute a reconveyance, this action was commenced.

The foregoing is a sufficient statement of the facts for the purpose of our conclusion. The evidence in many respects was sharply conflicting. Resolving the conflict mainly on the foregoing facts, established by the evidence on behalf of the plaintiffs, the court found that there was no consideration for the promissory note and deed of trust. It is contended by the defendants that this finding is not supported by the evidence. It is supported on the theory that there was shown to be sufficient consideration for the vesting of title to the thirty-five acre tract in the plaintiffs and for the payment by the elder Hunter of the seven thousand dollars as the purchase price. The transaction was closed, and therefore complete at the time of the conveyance to the plaintiffs and the payment of the cash consideration by the elder Hunter. The giving up of their home in Yuba County, the removal to the vicinity of the elder Hunters in Santa Clara County, the assistance given to the elder Hunters by the plaintiffs, constituted consideration for the transfer of the property, and the record supports the conclusion that it was intended as such by all the parties to the transaction. The execution and delivery of the note and deed of trust several months after the transaction was completed, served no more than the consummation of a desire on the part of the plaintiffs to protect the father in the event the plaintiffs should predecease him. Those probative facts and the inferences to be drawn therefrom are sufficient to support the trial court's conclusion that the plaintiffs were the owners of the property

involved and that the note and deed of trust were given as a protective measure only and were without consideration.

In view of the foregoing conclusion, other contentions do not require comment.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER and TRAYNOR, JJ., and SCHAUER, J. pro tem., concurred.



21 Cal.2d 176

ROY v. SALISBURY.

S. F. 16732.

Supreme Court of California.

Nov. 2, 1942.

1. Executors and administrators ⇐221(5)

In action by kennel keeper to recover from deceased's executor for housing, feeding and caring for deceased's dog at kennels under alleged oral contract with deceased, evidence sustained finding with respect to existence of alleged oral contract.

2. Frauds, statute of ⇐54½

Oral contract between owner of dog and kennel keeper whereby kennel keeper was to care for dog in event owner was unable to care for it or should die was not invalid under statute of frauds requiring "agreement not to be performed during lifetime of promisor" to be in writing. Code Civ.Proc. § 1973, subds. 1, 6; Civ. Code, § 1624, subds. 1, 6, and §§ 1649, 1654.

See Words and Phrases, Permanent Edition, for all other definitions of "Agreement not to be Performed During Lifetime of Promisor".

3. Frauds, statute of ⇐130(1)

In determining validity of oral contract whereby kennel keeper was to care for dog in event that owner of dog was unable to care for dog or should die, the rule that if a portion of an oral contract is invalid because of the statute of frauds, the entire contract is unenforceable, was inapplicable since if the alternatives on which the dog was to be cared for by the kennel keeper were inseparable, the contract could be performed during owner's lifetime. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

4. Frauds, statute of ⇐130(1)

Where one part of a contract is capable of performance within lifetime of promisor, and thus not within statute of frauds, and such performance may constitute also a performance of the other part of the contract which is within the statute, the contract may not be condemned. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

5. Frauds, statute of ⇐130(1)

Where a contract contains two promises which are in the alternative, rather than being merely divisible, one of which is within the statute of frauds, and the other not, recovery may be had for a breach of the latter. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

6. Contracts ⇐153

The law does not favor, but leans against, the destruction of contracts because of uncertainty and it will, if feasible, so construe agreements as to carry into effect the reasonable intention of the parties if that can be ascertained. Civ. Code, § 1653.

7. Contracts ⇐155, 175(1)

The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist and the promisor is presumed to be such party. Civ.Code, §§ 1635–1654.

8. Contracts ⇐9(3)

Oral contract whereby kennel keeper was engaged to care for dog if owner should become unable to care for dog or should die was not fatally uncertain where the owner's affection for the dog and his discussion of his illness in connection with the transaction justified conclusion that the inability contemplated was physical incapacity. Civ.Code, § 1653.

9. Contracts ⇐9(3)

Where owner of dog orally contracted with kennel keeper to care for dog if owner was unable to care for dog or should die, and the dog was delivered to the kennels under the contract on illness of owner, the parties by their conduct placed interpretation on contract that owner's illness constituted the inability mentioned in the contract and removed any question of uncertainty. Civ.Code, § 1653.

10. Contracts ⇐170(1)

The construction placed upon a contract by the parties is persuasive and the law recognizes that the practical construction made by them is cogent evidence of their intent.

11. Witnesses ⇐143(5)

Where contract on which claim against deceased's estate was based was community property of husband and wife, and after deceased's death, wife executed instrument agreeing that the claim and the proceeds thereof were the separate property of her husband, the wife was not the "assignor" of her husband within statute so as to be precluded from testifying in husband's action on the claim. Code Civ. Proc. § 1880, subd. 3; Civ.Code, § 161a.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignor".

12. Appeal and error ⇐1170(7)

Where contract on which claim against deceased's estate was based was community property of husband and wife, and after deceased's death, wife signed instrument agreeing that the claim and proceeds thereof were separate property of her husband, error if any in permitting wife to testify in husband's action on the claim was not prejudicial and did not constitute a miscarriage of justice where her testimony was merely cumulative and case was tried before court without jury. Code Civ. Proc. § 1880, subd. 3.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action on a claim by C. A. Roy against Raymond Salisbury as executor of the estate of Edward S. Drucks, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 121 P.2d 109.

Raymond Salisbury in pro. per., and Joseph C. Prior, both of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

CARTER, Justice.

Defendant, as executor of the estate of Edward S. Drucks, deceased, appeals from a money judgment in favor of plaintiff upon a rejected probate claim.

Plaintiff, the owner of the Palanka Kennels and a breeder and trainer of Doberman Pinscher dogs, sold a pup named Mike of that breed to the decedent, Dr. Drucks. It appears that decedent had a great affection for Mike and employed plaintiff to train him. Decedent knew that plaintiff's usual rate for boarding and caring for Doberman Pinschers was $20 per month, having paid that amount to plaintiff for keeping Mike on several occasions. The trial court found that the oral contract between decedent and plaintiff, which is the basis of plaintiff's claim against decedent's estate, was as follows:

"That if said Drucks ever became unable to care for said dog, or, if he should die, he had arranged that said 'Mike' would be delivered to plaintiff to be housed, fed and cared for by plaintiff for the remainder of said dog's life, at plaintiff's usual rate for housing, feeding and caring for such dogs, viz., at the rate of $20.00 per month, which said sum said Drucks promised and agreed to pay, payable at the end of each month, and that said dog was neither to be sold nor exhibited by plaintiff." On December 30, 1938, decedent being ill, was taken to the hospital. Mike was delivered to plaintiff's kennels, and ever since said date has been kept and cared for by plaintiff according to the terms of the contract. Decedent returned to his home on January 5, 1939, and died on January 9, 1939. On December 30, 1938, Mike's life expectancy was eight years; the rate of $20 per month applied to that period of time equals $1,920. Plaintiff's claim against the estate being rejected, he commenced this action and judgment was entered therein on January 20, 1941, awarding him $480 for the period from December 30, 1938, to December 31, 1940. With respect to the remainder of Mike's life expectancy the sum of $1,440 was awarded which was to be paid at the rate of $20 per month on the last day of each month commencing in January, 1941, or that defendant executor "pay into court a sum of money sufficient to meet the monthly installments of $20.00 each for the housing, feeding and caring for said dog 'Mike' during the lifetime of said dog,

accruing between the 31st day of December, 1940, and the expiration of said life expectancy of said dog 'Mike' as found herein, viz., eight years after December 31, 1938, or a total of $1,440.00, the sum of $20.00 to be paid over to plaintiff on the last day of each and every month during the lifetime of said dog 'Mike,' commencing with the month of January, 1941, and continuing during the lifetime of said dog 'Mike' until the said sum of $1,440.00 has been fully expended."

[1] Disregarding conflicts there is sufficient evidence to support the findings with respect to the existence of the contract. One of plaintiff's employees testified that in June or July, 1938, decedent called at plaintiff's kennels and stated to plaintiffs: "'My health is failing. In the event anything should happen to me or I should die, Mike will be brought to the kennel and I want him to stay here and be taken care of and be fed, not to show him and not to work or not to sell him,' and Mr. Roy (plaintiff) said, 'Yes, I will do that.'" The same witness related other conversations in which decedent stated that he wanted to be sure Mike would be cared for and a few days after Thanksgiving "The Doctor came in and he was crying. He says, 'I come back from the cemetery.' He said, 'It will be my last visit,' and Mr. Roy said, 'Doctor, you will be all right, you will get well.' Doctor Drucks said, 'I know better. I didn't come here for sympathy or charity. It is strictly business,' and he said, 'so the agreement about Mike still stands,' and they shook hands on it." Mr. Bollinger testified that decedent had said he was making arrangements for Mike's care if he was unable to care for him. Mrs. McIntosh testified that the decedent told her he had made arrangements with plaintiff to care for the dog "in case the Doctor was unable to take care of him or in the event of his death." Mr. McIntosh testified substantially to the same effect. There is evidence that after decedent had purchased Mike, he had paid $20 per month for his care by plaintiff.

With regard to the commencement of performance under the contract, Mr. Repose, a friend of decedent, testified that the latter told him "if anything happened, that Roy (plaintiff) would take care of the dog and to take the dog out to the kennels there and that Roy would look after the dog." Repose occasionally attended to the dog for decedent. At the time decedent was taken to the hospital he had been bedridden for five days, and Mabel Hanavan, a close friend of decedent's who was at his home, told Repose to take Mike to plaintiff's kennels. That was done. Decedent spoke of the dog after he returned from the hospital, but it appears nowhere that he requested that Mike be brought home. As far as appears, no other arrangement existed between plaintiff and decedent in regard to the taking of Mike to the kennels or for his care. These circumstances were sufficient to justify the inference that when Repose delivered the dog to the kennels it was in accordance with decedent's request, and was pursuant to the terms of the latter's contract with plaintiff. Decedent's physical condition coupled with his removal to the hospital created a situation where he was unable to care for Mike, and having made no other arrangement in respect to the care of the dog, it may be assumed that the delivery of the dog to the kennels was in accordance with his agreement with plaintiff. It is reasonable to infer that decedent knew Mike was at the kennels during the time he was home after returning from the hospital and at the time of his death, inasmuch as he was very much attached to the dog and discussed it during that time. So far as the record discloses he made no comment in regard to Mike's absence.

[2] Defendant urges that the contract was unenforceable because it was not in writing, and came within the statute of frauds providing that an agreement which by its terms is not to be performed during the lifetime of the promisor must be in writing. Code Civ.Proc. § 1973(6); Civ. Code, § 1624(6). In that connection he claims that the contract contemplated by the parties was one in which plaintiff was to board Mike *only* in the event of decedent's death and refers to evidence that decedent spoke of approaching death in the transactions forming the basis for the contract. But it should be noted that witness Bollinger, after testifying that decedent had said that if he were unable to care for the dog he wanted it cared for at a proper place, also testified: Q. "When he said that you don't know what he (decedent) was referring to when he said he was unable, whether it was sickness, death or going away from here? A. *He was referring to his ill health.* He didn't say anything about expecting to die. He

said he was in ill health and making arrangements with Mr. Roy if he was unable to take care of the dog." The evidence from several witnesses was to the effect that the dog was to be boarded if the decedent was unable to care for it *or* should die. It thus appears that decedent had two contingencies or alternatives in mind as stated in the contract found by the court to exist, namely, that the dog was to be boarded by plaintiff if decedent should die, or if he were unable to care for it because of illness. It is appropriate to observe at this point also that defendant contends that the contract is fatally uncertain (discussed later herein). If that be true then section 1654 of the Civil Code is pertinent. It provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party."

One of the preceding rules to which reference is made is that "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ.Code, § 1649. Merely because decedent spoke of impending death in connection with the transaction does not necessarily establish that the contingency of death only was the sense in which decedent believed that plaintiff understood the promise. We have therefore the contract with the two alternatives as found by the court.

With that in mind we turn to the issue of the statute of frauds. There are several rules applicable to this case which will support the judgment. Conceding that if the sole provision of the contract was for the care of the dog in the event of decedent's death, it would be a contract not to be performed during the lifetime of decedent, promisor, and therefore condemned by the statute of frauds (see Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562); but we have seen that death was not the sole alternative. If the terms of a contract are such that it admits of performance during the lifetime of the promisor, it is not within the statutory provision here involved. That conclusion follows by analogy from the accepted interpretation of the statute of frauds provision that a contract that "by its terms is not to be performed within a year" must be in writing. Code Civ. Proc. § 1973(1); Civ.Code, § 1624(1). It is to be noted that the wording of the two provisions is identical except as to the period of time involved. An oral contract which is capable of being performed within a year is not condemned by the statute or, as recently stated by this court in Hollywood M. P. Equipment Co. v. Furer, 16 Cal.2d 184, 187, 105 P.2d 299, 301: "It is well settled that oral contracts invalidated by the statute because not to be performed within a year include those only which *cannot* be performed within that period. 2 Williston on Contracts [Revised Edition], § 495 [p. 1441]. Even though a promise may not by its terms be performed within a year, yet it is not inhibited by the statute if there is a possibility that it may be. The contract itself must contain language whose reasonable interpretation shows a clear intention that it cannot be performed within the year. It is subject of proof unless by its terms it is incapable of performance within said period." (See, also, 12 Cal. Jur. 857.) Manifestly the contract here in question could be performed within the lifetime of decedent. If he became unable to care for Mike during his lifetime, the contract would be performable and the performance might be completed before his death because the dog might die before decedent, thus requiring no further care and the contract would have been completely performed. It was stated in Gaskins v. Security-First Nat. Bank, 30 Cal.App.2d 409, 418, 86 P.2d 681, 685, involving a contract with the guardian of an incompetent to care for the latter's minor children with reference to section 1624(1):

"It could also be said that even assuming the contract with the original guardian was not in writing, its performance was not by its terms postponed beyond one year. In the case at bar the contract was to care for the minor children of the incompetent during their minority with payment to be made when the youngest attained majority. Obviously such a contract might be fully performed in one year from the date of its execution, as, for instance, would be the case should all the minor children have died within the first year." See, also, 27 C.J. 184.

[3-5] However, defendant contends that if a portion of an oral contract is invalid because within the statute of frauds the entire contract is unenforceable, cit-

ing Fuller v. Reed, 38 Cal. 99, and that here the agreement to have the dog cared for in the event of decedent's death was inseparable from the term that similar care was to be given if decedent was unable to care for the dog. That rule cannot have any application here because even if the alternatives upon which the dog was to be boarded, that is, death or inability to care for the dog are treated as inseparable and indivisible, still the contract could be performed during decedent's lifetime. If decedent became unable to care for the dog before his death and it was boarded by plaintiff but died before the death of decedent, there would be no further performance required, and the provision with regard to the contingency in the event of death would never become operative. Where one part of a contract is capable of performance within the time specified, and thus not within the statute, and such performance may constitute also a performance of the other part of the contract which is within the statute, then the contract may not be condemned. Furthermore, where a contract contains two promises which are in the alternative, rather than being merely divisible, one of which is within the statute of frauds and the other not, recovery may be had for a breach of the latter. See Ward v. Ward, 94 Colo. 275, 30 P.2d 853; Canister Co. v. Wood & Selick, Inc., 2 Cir., 73 F.2d 312, certiorari denied 296 U.S. 590, 56 S.Ct. 101, 113, 80 L.Ed. 417; 25 R.C.L. 703; 27 C.J. 318. The contract in question stipulates that "if said Drucks ever became unable to care for said dog, *or*, if he should die" Mike would be delivered to plaintiff for boarding, "for the remainder of said dog's life." Obviously, the promises were in the alternative and in no event was the contract to extend beyond Mike's life. Decedent's affection for Mike and the other circumstances herein narrated indicate that he desired that Mike's welfare be safeguarded if he were unable to give that protection himself. All decedent desired would be accomplished by said contract if he became unable to care for the dog before his death, and that inability continued as it did in the instant case up to his death and thereafter, as the result of his death during the lifetime of the dog.

[6-8] Defendant contends that the contract is fatally uncertain, referring particularly to the clause "If said Drucks should become *unable* to care for said dog." That position is untenable. It is a fundamental principle as stated in McIllmoil v. Frawley Motor Co., 190 Cal. 546, 549, 213 P. 971, 972:

"'The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.'" See, also, Civ.Code, § 1653; Sutliff v. Seidenberg, S. & Co., 132 Cal. 63, 64 P. 131, 469; Meyers v. Nolan, 18 Cal.App.2d 319, 63 P.2d 1216; Pease v. Lindsey, 129 Cal.App. 408, 18 P.2d 717; Noble v. Reid-Avery Co., 89 Cal.App. 75, 79, 264 P. 341. Also, adverting to section 1654 of the Civil Code, in cases of uncertainty not removed by the rules stated in sections 1635 to 1653 of that code, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, and the promisor is presumed to be such party. From decedent's affection for the dog and his discussion of his illness in connection with the transaction together with the testimony of Bollinger heretofore mentioned that the decedent had illness in mind with reference to the care of the dog, the trial court was justified in concluding that the inability contemplated was physical incapacity. Not only was the decedent bedridden and in no condition to care for the dog, but he was taken to the hospital when Mike was taken to the kennels.

[9, 10] We have heretofore pointed out that the evidence was sufficient to establish that Mike was delivered to the kennels under the terms of the contract. That being true the parties by their own conduct have placed the interpretation on the contract that the illness of decedent constituted the inability therein mentioned and removes any question of uncertainty. The construction placed upon a contract by the parties is persuasive and the law recognizes that the practical construction made by them is cogent evidence of their intent. Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386.

In connection with his claimed uncertainty, defendant urges that the impounding of funds under section 953 of the Probate Code for the payment of immatured or contingent claims is an equitable proceeding, that therefore the judgment here providing for such impounding is in ef-

fect requiring specific performance of the contract, and that the rules in specific performance cases with respect to uncertainty in contracts are applicable. That reasoning is extremely doubtful to say the least, but in any event, as we have seen, the contract here is not fatally uncertain.

[11] The contract upon which plaintiff's judgment is based was the community property of the plaintiff and his wife, Elizabeth. After the contract was made, the dog delivered to the kennels, and six months after decedent's death, Elizabeth executed the following instrument:

"July 8, 1939. In consideration for the sum of * * * $1 to me in hand paid by my husband C. A. Roy, I hereby agree that the claim against the Estate of Edward S. Drucks (No. 71031 Alameda Co.) on account of the Doberman dog 'Mike' and all proceeds thereof is the separate property of my husband, C. A. Roy.

(Signed Mrs. Elizabeth Roy.
"Wife of C. A. Roy."

At the trial Mrs. Roy testified, over defendant's objection (his motion to strike was also denied), that decedent acquired Mike from plaintiff and he was trained at the kennels; she also testified as to the amount paid for such training, and the conversation on which the contract between decedent and plaintiff was based. Defendant urges that Mrs. Roy was incompetent as a witness under Code of Civil Precedure section 1880(3) providing that a person cannot be a witness who is a party or assignor of a party to an action, or person in whose behalf an action is prosecuted against an executor upon a claim or demand against the estate of a deceased person as to any matter or fact occurring before the death of decedent. It is contended that by virtue of the above instrument Mrs. Roy was the assignor of her community property interest in the rights under the contract. We believe that the case of Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190, is controlling on this proposition. There plaintiffs, husband and wife, prosecuted an action for a personal injury to the wife. The court found that plaintiffs had an agreement *prior* to the accrual of the personal injury action that all community property then held or thereafter acquired would be the wife's separate property and that *after* the action had accrued, the husband had relinquished to his wife all his interest in the damage action. Defendant contended that there could not be an *assignment* of a cause of action for personal injuries, to which this court replied at page 720 of 155 Cal., at page 194 of 103 P.:

"It is a rule universally recognized that one who is injured personally may not assign a claim growing out of such tort; but there is some authority to the effect that almost every other kind of property is assignable. Rued v. Cooper, 109 Cal. [682] 693, 34 P. 98. However, the court found here, *not an assignment*, but a relinquishment, of all the husband's claim to the community property. *If such remission as to further accretions before the cause of action would operate as a transmutation of the property into the wife's separate estate, we see no reason why the same result could not be attained by the same means after the cause of action came into existence.* It was therefore proper for the court to find with reference to the agreement which the plaintiffs made *after* the accident and before February 8, 1906." (Emphasis added.) While there is no finding in the instant case that the above quoted instrument is a relinquishment rather than an assignment, it is readily susceptible of that construction inasmuch as it states that the chose in action here involved "is the separate property" of plaintiff. It does not purport to be a present transfer, that is, an assignment. Rather, it is a recognition of an established status of the property as separate rather than community. Defendant contends that since the amendment in 1927 of section 161a of the Civil Code, a wife has a present, existing and equal interest in the community property, the cases decided under the former section, holding that she was competent as a witness in an action by her husband on a community claim against an estate are not pertinent here because they were based upon her lack of a present interest in the community claim. However, the Perkins case involved a transfer by a *husband* to his wife of his interest in such a claim, and unquestionably he had a vested interest in all community property at that time.

[12] But even if it be assumed that error was committed in permitting her to testify, it was not prejudicial and did not constitute a miscarriage of justice. The evidence heretofore discussed as supporting the judgment all came from sources other than Mrs. Roy. Her testimony was

merely cumulative, there being adequate evidence without it to support the judgment. The case was tried before the court sitting without a jury. Defendant saving his objection by stipulation had opportunity to and did cross-examine Mrs. Roy. It has been held that under the proper circumstances where there is sufficient independent competent evidence to support the judgment without the erroneously admitted testimony of incompetent witnesses, such error is not prejudicial. Evans v. Gibson, 220 Cal. 476, 31 P.2d 389; Manford v. Coats, 6 Cal.App.2d 743, 45 P.2d 395; Gump v. McPherson, 136 Cal.App. 778, 29 P.2d 893.

The judgment is affirmed.

SHENK, J., and SCHAUER, J. pro tem., concurred.

CURTIS, Justice, and GIBSON, Chief Justice (concurring).

Concur in the judgment on the ground stated in the opinion that the admission of the evidence of the wife, even though erroneous, was not prejudicial.

TRAYNOR, Justice (dissenting).

I dissent. Section 1880 of the Code of Civil Procedure provides: "The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." The wisdom of such a statute has been a matter of controversy for so long that it may well be time for the Legislature to make a re-examination that will freshly evaluate the protection of estates from false claims and the ensuing risk of defeating just claims. See Wigmore on Evidence (3d ed.) §§ 578, 1576, 2165. In any event the section should be amended or repealed only by the Legislature. Its revision cannot properly be undertaken by the court, which could resort only to quibbles over words, as it does in the present case by labelling the agreement between the husband and wife a relinquishment rather than an assignment.

Perkins v. Sunset Tel. & Tel., 155 Cal. 712, 103 P. 190, upon which the majority opinion relies, in no way concerned section 1880(3) of the Code of Civil Procedure. Moreover, ten years before the cause of action for the injuries to the wife arose the husband and wife agreed that all community property acquired in the future should be the separate property of the wife, and the reference to the agreement succeeding the cause of action was therefore dictum unnecessary to the decision.

In the light of all the evidence it is not improbable that a different judgment would have been reached had the erroneously admitted evidence been excluded. Since the error is therefore prejudicial the judgment should be reversed.

EDMONDS, J., concurred.



21 Cal.2d 132

In re PETRIE et al.

Cr. 4422, 4426.

Supreme Court of California.

Oct. 30, 1942.

Rehearing Denied Nov. 27, 1942.

Escape ⚿1

The statute declaring escape from officer's legal custody a felony punishable by imprisonment in state prison, as it read before, as well as after, 1941 amendment, applied to escaping prisoners previously convicted of misdemeanors, as well as those convicted of felonies. Pen.Code, § 107, as amended by St.1935, p. 2118; § 4532.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Original proceedings in habeas corpus by Bert Petrie and Paul Bafford for release from the custody of the warden of the state prison at San Quentin.

Writs denied, and petitioners remanded to respondent's custody.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Seibert L. Sefton, of San Francisco, and Harry A. Houser and Owen D. Richardson, both of San Jose, for petitioners.

Earl Warren, Atty. Gen., and David R. Lener, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

These two proceedings involve practically the same question of law. Each of the petitioners was originally convicted of a misdemeanor—Paul Bafford of petit theft and Bert Petrie of the charge of drunkenness—and while in the lawful custody of a peace officer under a judgment of conviction of the crime of which he was charged, each escaped from said officer. After his apprehension, each was convicted of, or pleaded guilty to, the crime of escape, and by a judgment of the superior court of the county in which the action was pending, each was sentenced to a term of imprisonment in one of the state prisons of the state. Each of the petitioners has applied to this court through separate proceedings in habeas corpus to be released from his said imprisonment, contending that he is illegally imprisoned by the warden of said state prison.

Bafford in the first instance was committed to the California State Prison at Folsom, but was later transferred to San Quentin where he remained up to the date of the filing of this present petition. Petrie was sentenced direct to San Quentin. Each of the petitioners was convicted under the provisions of section 107 of the Penal Code as enacted in 1935, St.1935, p. 2118, and prior to its amendment in 1941. This section of the code was originally enacted in 1872, and amended in 1923, St. 1923, p. 270. It was subsequently amended in 1933, St.1933, p. 1072, and again in 1935. The amendment of 1933 made no change in the section as it stood in 1923, except as to the punishment for the offense of escape. It provided as did the section as amended in 1923, that a prisoner violating the terms of the section was guilty of a felony. The section as amended in 1923 fixed the punishment "as provided in section one hundred eight of the Penal Code," while the section as amended in 1933, provided for a definite term of imprisonment in the state prison or a fine or both. The section as amended in 1935 simply added "industrial farm or industrial road camp" as the places from which should a prisoner escape, he would be guilty of the crime of escape. Nothing contained in the section as amended in 1923, was omitted from the section either by the 1933 or the 1935 amendments. Therefore, a comparison of the two amendments subsequent to 1923 and prior to 1941 with said section prior to these two amendments indicates that except as to the punishment provided in the several enactments, no material change was made in the section as it stood after the amendment of 1923 by either of said two amendments.

In the case of In re Haines, 195 Cal. 605, 234 P. 883, it was held that said section 107 as amended in 1923 applied to a misdemeanor prisoner as well as a felony prisoner. That case was reviewed by us in the decision of In re Halcomb, 130 P.2d 384, this day filed, in determining whether section 4532 of the Penal Code, enacted in 1941, the terms and provisions of which are not materially different from those contained in section 107 as amended in 1923, applied to misdemeanor as well as to felony prisoners. We held that the same construction given to section 107 as amended in 1923 should be given to section 4532 of the Penal Code, as enacted in 1941. It follows, therefore, that section 107 of the Penal Code as amended in 1935 which was in effect at the time each of these petitioners made his escape, does not differ materially insofar as the case against either of these petitioners is concerned from either section 107 as amended in 1923, or section 4532 as enacted in 1941. The same construction should be given to the 1935 amendment as has been given to both section 107 as amended in 1923, and section 4532 as enacted in 1941. In other words as section 107 of the Penal Code as amended in 1923 and as construed in Re Haines, supra, applied to misdemeanor prisoners as well as to felony prisoners, so the same section which had not since been materially changed and was in effect at the time each petitioner committed the crime of escape of which he was convicted, must be construed as applying to them, although at the time of their escape they were under conviction of a misdemeanor only.

It is therefore ordered that the petition of each petitioner be and the same is hereby denied, and each petitioner is hereby remanded to the custody of the warden of the California State Prison at San Quentin.

GIBSON, C. J., and SHENK and CARTER, JJ., and SCHAUER, J. pro tem., concurred.

TRAYNOR, Justice.

I dissent for the reasons set forth in the dissenting opinion in Re Halcomb, Cal.Sup., 130 P.2d 384, this day filed.

EDMONDS, J., concurred.



55 Cal.App.2d 381

PEOPLE v. SMILLIE.

Cr. 3578.

District Court of Appeal, Second District, Division 3, California.

Nov. 4, 1942.

Escape ⇦1

The statute declaring escape from officer's legal custody a felony punishable by imprisonment in State prison applies to escaping prisoners charged with or convicted of either felonies or misdemeanors. Pen. Code, § 107, as amended by St.1935, p. 2118; § 4532.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Erskine Ralph Smillie was charged by information with the crime of escape from an officer's legal custody, and from an order granting his motion to dismiss the information, the People appeal.

Reversed and remanded.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Henry Grivi, of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

Defendant was charged by information filed in the superior court with the crime of "Escape from the Legal Custody of an Officer * * * in Violation of Section 4532 of the Penal Code of California, a felony." The information specifically alleged that the defendant "on or about the 16th day of February, 1942, at and in the County of Los Angeles * * * being then and there in the lawful custody of * * * duly appointed, qualified and acting officers of the California Highway Patrol, * * * under and by virtue of an arrest of said defendant upon three charges of traffic violations, *misdemeanors,* did then and there willfully, unlawfully and feloniously escape from the custody of said officers." (Italics added.) On arraignment defendant moved to dismiss the information upon the ground (Pen.Code, sec. 995, subd. 2) "That the defendant had been committed without reasonable or probable cause."

The theory of the motion was that section 4532 of the Penal Code had no application to persons charged only with *misdemeanors,* who escaped from custody, and that defendant here, at the time of his escape, was in custody solely on misdemeanor charges. The trial court granted the motion and from such order plaintiff appeals. The order must be reversed.

At the time this matter was before the trial court (March 12, 1942) there had recently been decided in the District Court of Appeal (Third District) the case of In re Ramirez (Feb. 14, 1942), 49 Cal.App.2d 709, 122 P.2d 361, 362, in which it was held that section 4532 of the Penal Code applied exclusively to a "prisoner charged with or convicted of *a felony.*" The Ramirez case was not presented to the Supreme Court on direct review, but more recently that court has had the construction of section 4532 of the Penal Code before it in the cases of In re Halcomb (1942) 21 Cal.2d 126, 130 P.2d 384; In re Haynes (1942) 21 Cal.2d 891, 130 P.2d 388; and In re Petrie and Bafford (1942) 21 Cal.2d 132, 130 P.2d 712. In the Halcomb case the court referred to the Ramirez decision and said, "The decision in that case is in direct conflict with the decision of this court in the case of In re Haines, supra [(1925) 195 Cal. 605, 234 P. 883], and for that reason should be and is hereby disapproved."

Upon the authority of the cases hereinabove cited, the order appealed from is reversed, and the cause is remanded for continuation of proceedings under the information.

SHINN and PARKER WOOD, JJ., concur.

SALTER v. ULRICH et al.*

Civ. 13741.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1942.

Rehearing Denied Dec. 3, 1942.

Hearing Granted Dec. 31, 1942.

1. Mortgages ⇐218

Ordinarily and in the absence of some unusual circumstance an independent action upon a note secured by a trust deed may not be brought by the holder of the note without first exhausting the security in the manner laid down by statute. Code Civ. Proc. § 726.

2. Mortgages ⇐218

The statute prescribing the procedure for the foreclosure of trust deeds and mortgages declares a "public policy" of the state enacted for the benefit of the debtor class, which cannot be waived even by the debtor himself. Code Civ.Proc. § 726.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. Mortgages ⇐20

An agreement in advance by a debtor to waive the right of redemption, or the waiver by agreement in advance of the rights secured by the statute prescribing the procedure for foreclosure of trust deeds and mortgages, is invalid. Code Civ.Proc. § 726.

4. Execution ⇐264

Where, upon a judgment regular upon its face, an execution sale of realty was regularly had and a marshal's deed issued thereon, grantee in such deed succeeded to prior owner's interest in the realty, regardless of any question of waiver by such prior owner of his rights as trustor in a trust deed securing the debt on which the judgment was based, and without proceeding under the mortgage foreclosure statute. Code Civ.Proc. § 726.

5. Execution ⇐268

The interest in realty acquired by the grantee in a marshal's deed of such realty, following an execution sale thereof, was not subject to any interest in such realty acquired by the grantee in a commissioner's deed based on the foreclosure of a street improvement bond, where the levy of the execution was prior to the commencement of the proceeding for the foreclosure of the street improvement bond and the grantee in the marshal's deed was not a party to the foreclosure proceeding.

6. Quieting title ⇐10(1)

Plaintiff in an action to quiet title could only rely on the strength of such title as plaintiff had theretofore acquired and not on the weakness of defendant's title.

7. Execution ⇐268

Where plaintiff and defendant each sought to quiet title to realty, defendant claimed title under a marshal's deed based on a valid execution sale and plaintiff claimed title under a commissioner's deed based on the foreclosure of the lien of a street improvement bond, but execution on which marshal's deed was based had been levied before commencement of foreclosure proceeding, trial court correctly granted judgment for defendant, though the debt on which the execution was based was secured by a trust deed and no steps had been taken to foreclose such trust deed according to statute. Code Civ.Proc. § 726.

8. Quieting title ⇐50

In action to quiet title to realty, where plaintiff claimed title by virtue of a commissioner's deed based on foreclosure of the lien of a street improvement bond and defendant claimed title under a marshal's deed, based on an execution sale and judgment was for defendant, inclusion in judgment of declaration that "plaintiff's" street bond was still a lien on the property was error, where plaintiff had never owned the bond itself and status of bond was not in issue.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action to quiet title by Fred R. Salter against E. W. Ulrich and others. Judgment for defendants, and plaintiff appeals.

Affirmed as modified.

Harold L. Green, of Los Angeles, for appellant.

John A. Jorgenson, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Conflicting claims between plaintiff and defendant E. W. Ulrich as to ownership of

* Subsequent opinion 138 P.2d 7.

a parcel of real property gave rise to this action, wherein each sought to quiet title as against the asserted claim of the other. Both parties, it was stipulated, derived their claim of title from a common source, it appearing without dispute that one Charles A. Kassell was the record owner of the realty in question, except as his title may have been divested by the foreclosure of a street improvement bond under which plaintiff asserted ownership, or by proceedings in an action in the Municipal Court of the City of Los Angeles under which a marshal's deed on sale under levy of execution was issued to defendant Ulrich.

On April 24, 1929, Kassell, as owner of the property herein involved, encumbered it with a trust deed, in which defendant E. W. Ulrich was named as beneficiary and Bank of Italy as trustee, securing Kassell's promissory note to Ulrich in the sum of $500 with interest. By a complaint filed in the Municipal Court of Los Angeles, March 16, 1934, Ulrich brought suit upon the note against Kassell, who, after being duly served with summons, allowed his default to be entered April 2, 1934. Thereafter judgment was entered April 3, 1934, a writ of execution was issued thereon June 8, 1936, the marshall levied upon the property here in question and sold the same to defendant Ulrich July 7, 1936, for the sum of $250 in partial satisfaction of the judgment which Ulrich had obtained against Kassell. The marshal's certificate of sale was delivered to Ulrich July 7, 1936, recorded July 10, 1936, and thereafter on July 13, 1937, the marshal duly issued to Ulrich a deed purporting to convey to the grantee all the right, title and interest of Kassell in and to the real property here in controversy. It is under that deed, and the proceedings leading up to the same, that defendant E. W. Ulrich in the instant case claims title to the property here involved.

It is to be observed that Ulrich in his action in the municipal court made no mention whatsoever that the promissory note upon which he sued was secured by trust deed, that the security had become worthless or that he waived the security. In that proceeding the only reference to the security is contained in the language of the note itself, which was introduced as an exhibit in the case and which recited: "This note is secured by a deed of trust to the Bank of Italy * * *."

Plaintiff's claim of title arose from matters connected with a street improvement bond in the sum of $174.22, issued against the property February 4, 1931, pursuant to proceedings regularly had under the Street Improvement Bond Act of 1911. M. E. Oswald, then owner of the bond, commenced action in the Superior Court of Los Angeles County December 9, 1936, to foreclose the lien of the bond. Kassell, the only defendant named in connection with said bond foreclosure, was served and defaulted. Decree of foreclosure was ordered April 22, 1937, and under proceedings regularly had this same property was sold June 1, 1937, by a commissioner to Oswald for $314.76, the full amount due on the judgment under said bond. Commissioner's certificate of sale to Oswald was recorded on the date of sale, and thereafter on June 28, 1938, commissioner's deed was issued to Fred R. Salter, plaintiff herein, as assignee of Oswald, owner and holder of said commissioner's certificate of sale.

With reference to the bond foreclosure proceedings, which are not attacked on the ground of any irregularity affecting the foreclosure itself, it is admitted that Kassell was the sole defendant named and that nothing was alleged and no action taken with reference to the Ulrich trust deed, the Ulrich judgment or the marshal's certificate of sale to Ulrich, all of which matters were of record in the county recorder's office at the time of the suit.

Plaintiff brought this action to quiet title, relying upon his deed obtained through the street bond foreclosure, naming Ulrich and others as defendants. Ulrich in his answer denied that Salter acquired any title under the bond foreclosure, and affirmatively asked that his, Ulrich's, title acquired by virtue of the marshal's deed be declared to be valid and that he be adjudged to be the owner of the property in question. Defendant prevailed, the trial court ruling in favor of Ulrich's contention by adding to the conclusions of law and judgment the following clause: "That at the time said E. W. Ulrich purchased said real estate on July 7, 1936, plaintiff's street bond was a lien on said property, and said E. W. Ulrich took said property by that sale and the subsequent deed aforesaid subject to the lien of said bond."

Plaintiff appeals, and defendant E. W. Ulrich also objects to the above-quoted portion of the judgment which decreed that the street bond was still a lien upon the property.

[1-3] Appellant rests his case largely upon the contention that the court proceedings leading up to the marshal's deed under which respondent claims title were invalid. This is so, asserts appellant, because suit was brought upon a promissory note said to be secured by a trust deed; and for such a situation, it is argued, section 726 of the Code of Civil Procedure prescribes that there can be but one form of action, to wit, in accordance with the provision laid down in the chapter relating to the foreclosure of trust deeds and mortgages. Admittedly, the municipal court action upon the trust deed note was not a foreclosure in any sense of the term, but was simply a suit upon a promissory note. It must be conceded that there is an abundance of authority that ordinarily and in the absence of some unusual circumstance an independent action upon a promissory note secured by a trust deed may not be brought by the holder of the note without first exhausting the security in the manner laid down by section 726 of the Code of Civil Procedure. Bank of Italy v. Bentley, 217 Cal. 644, 20 P.2d 940; Unger v. Goldman, 12 Cal.App.2d 129, 54 P.2d 1126; Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390. And although several cases declare that the rule enunciated in section 726 is one designed for the protection of the primary debtor, that in order to avail himself of the provisions of the section it must be pleaded as a matter of defense, and that such defense may be waived by the failure of the debtor to plead it (Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann.Cas.1916D, 171; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502; Kempton v. Superior Court, 3 Cal.App.2d 374, 39 P.2d 846), other and later decisions indicate that section 726 declares a public policy of the state enacted for the benefit of the debtor class which cannot be waived even by the debtor himself. Winklemen v. Sides, 31 Cal.App.2d 387, 88 P.2d 147; Unger v. Goldman, supra. Certainly an agreement in advance by the debtor to waive the right of redemption or the waiver by agreement in advance of the rights secured by section 726 must be held to be invalid and of no effect. Security-First Nat. Bank v. Chapman, 31 Cal.App. 2d 182, 87 P.2d 724; Winklemen v. Sides, supra, and cases therein cited.

[4-6] But in the situation here presented the questions of waiver on the part of the trustor or the necessity of proceeding under section 726 in the original action on the note are beside the point. We are confronted here, and the trial court in hearing this matter was confronted simply with a record where, upon a judgment regular upon its face and without any apparent flaw or defect, a sale under execution was duly and regularly had and a marshal's deed was in due course issued thereupon. Quite obviously respondent by that series of legal steps succeeded to whatever interest the predecessor owner had in the property. His levy upon the realty was prior in time to that of appellant, and when appellant brought his proceedings under his street bond he failed to proceed against respondent, who at the time held an outstanding record interest against the land. Therefore, the street bond foreclosure proceedings did not disturb whatever interest respondent had acquired in the property. Neither in the present quiet title action could appellant establish any interest superior to respondent, because he could only rely upon the strength of such title as he had theretofore acquired. 22 Cal.Jur. 167.

[7] We therefore hold that the trial court correctly ruled against appellant's claim of title and in favor of respondent. The declaration in the court's judgment that "plaintiff's" street bond was still a lien on said property at the time of respondent's purchase July 7, 1936, serves only to create an ambiguity and properly has no place and serves no function in the judgment in the present case. In the first place, it must be observed that plaintiff (appellant) never was the owner of the street bond in question; at most he was assignee of the commissioner's certificate of sale on foreclosure of the street bond. Furthermore, the status of the street bond, once foreclosed by its then owner Oswald, was not in issue in the present action, and we are cited to no evidence in the record in support of any finding or judgment that it is a present lien on the realty.

[8] It is ordered that the following portion of the judgment be deleted: "That at the time said E. W. Ulrich purchased said real estate on July 7, 1936, plaintiff's street bond was a lien on said property, and said E. W. Ulrich took said property by that sale and the subsequent deed aforesaid subject to the lien of said bond."

As thus modified the judgment is affirmed.

MOORE, P. J., concurred.

W. J. WOOD, Justice.

I dissent. Defendant Ulrich has not appealed, but the majority ruling in effect modifies the judgment of the lower court in his interest and releases the property from a just claim which is supported by a valid lien. Ulrich in his answer asks that his title be quieted, but he has not complied with the familiar rule that one who seeks equity must first do equity.



55 Cal.App.2d 432

BORDEN v. BOYVIN.

Civ. 12038.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1942.

Hearing Denied Jan. 6, 1943.

1. Judgment ⇐574

Title to realty was not rendered "res judicata" by order sustaining without leave to amend general demurrer to amended complaint asserting such title where clerk of court failed to enter judgment on such order.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Action ⇐63

Establishment of defense of "laches" required more than proof of mere lapse of time and, in the absence of showing that such equitable defense was available as applied to the facts of a particular case, no further consideration need be given thereto.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

3. Limitation of actions ⇐19(1)

Statute precluding recovery of real property unless plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises within five years before commencement of act in respect to which such action is prosecuted or defense made did not bar recovery by a party having an absolute conveyance of the property. Code Civ.Proc. §§ 318, 319.

4. Mortgages ⇐33(1)

Whether a deed to realty, absolute in form, executed simultaneously and in connection with written agreement to execute a grant deed was given as a mortgage must be determined from a construction of the deed and agreement read together. Civ. Code, § 1642.

5. Appeal and error ⇐1009(1)

Trial court's finding that grant deed to realty was given as an absolute conveyance must be upheld on appeal unless it can be said as a matter of law that transaction whereby grant deed was given in connection with written agreement between grantor and grantee created a mortgage.

6. Deeds ⇐19

A deed unaffected by fraud in its inception conveys title and is not rendered void or subject to rescission on account of a failure of consideration.

7. Deeds ⇐145

The remedy for breach of a personal covenant in deed to realty not amounting to a condition is generally an action for damages, except where grantee promises to support the grantor.

8. Deeds ⇐145
Mortgages ⇐33(3)

Evidence sustained findings that grant deed to realty executed in connection with written agreement providing for conveyance to grantor's brother in consideration for advances to the amount of $3,000 to be made from time to time in grantee's sole discretion and for use of property by grantor while she paid taxes, charges, and all encumbrances against it and for reconveyance upon repayment of money advanced with interest thereon was an absolute "conveyance" not intended as a "mortgage" nor subject to a "condition subsequent" as to advancement of money so as to warrant rescission thereof after grantor's death by her successor in interest for failure to make advances in full amount. Civ.Code, § 1642.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Subsequent", "Conveyance" and "Mortgage".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by C. F. Borden against Ruth S. Boyvin, individually and as administratrix of the estate of her mother, for a declaratory judgment as to title to certain real estate. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Jerrell Babb, of Los Angeles, for appellant.

A. Terkel, of San Francisco, and Dryer, Richards & Page, of Los Angeles, for respondent.

WARD, Justice.

This appeal is taken by defendant as administratrix of her mother's estate from a judgment for plaintiff in an action brought by him upon a claim of title to real property.

On May 24, 1932, C. F. Borden, Sr., a widower, entered into a written agreement with his sister Arabelle Stronach, a widow, whereby Mrs. Stronach agreed to execute a grant deed to her brother covering property on which she resided at Hermosa Beach upon the consideration that he advance her at any time or times, within his sole discretion, various amounts of money up to the sum of $3,000. It was further agreed that Mrs. Stronach should pay all taxes, assessments, charges for water, light and gas, and any and all encumbrances that were or might be created against the property, of which she should have the use as long as such items were paid. The parties further agreed that C. F. Borden, Sr., would reconvey the property to Mrs. Stronach in the event she found a purchaser ready, able and willing to buy it, or whenever she should have repaid the amounts advanced by him under the agreement, together with interest thereon at the rate of 7 per cent per annum.

Simultaneously with the execution of the agreement, and in compliance therewith, Mrs. Stronach conveyed the property by grant deed to her brother, who duly recorded the instrument and over a period of years advanced her sums aggregating $2,437.74.

Until her death on January 7, 1936, Mrs. Stronach remained in possession, since which time her daughter, appellant herein—who was the sole beneficiary under her mother's will, and who was appointed administratrix of her estate—has occupied the property.

In August of the year 1936, shortly before he died, C. F. Borden, Sr. deeded the property to his son, plaintiff herein. At such time the son had full and complete knowledge of the agreement above mentioned and of the deed from Mrs. Stronach to his father.

Notice to creditors in the matter of the estate of Mrs. Stronach was duly and regularly given, but no claim was filed therein by C. F. Borden, Jr.

Several years later, C. F. Borden, Jr. commenced an action against defendant herein as administratrix of her mother's estate, wherein he prayed that the court decree that his predecessor, C. F. Borden, Sr., was during his lifetime the owner in fee simple of the property; that Mrs. Stronach in her lifetime, and her daughter as administratrix of her estate, had no right, title or interest therein; that the cloud upon his title be removed and that he be declared the owner in fee simple thereof. He subsequently filed an amended complaint, wherein he prayed for the same relief. Defendant herein, as administratrix, filed a general demurrer thereto, which was sustained without leave to amend, but the clerk of the court failed to enter judgment in her favor based on the order sustaining the demurrer.

On March 19, 1940, plaintiff brought the present action for declaratory relief upon allegations similar to those of the above mentioned amended complaint the demurrer to which had been sustained without leave to amend. Defendant demurred, and upon the demurrer being overruled she filed her answer as administratrix. Judgment was entered decreeing that the deed from Mrs. Stronach to her brother, contrary to the defense interposed to the action, was not intended as a mortgage; that the advancement by him of the full amount provided for in the agreement was not a condition subsequent to the conveyance, and that C. F. Borden, Jr. is the lawful owner of the property and entitled to have his title thereto quieted.

[1] By answer filed defendant set up the defenses of res judicata, laches and the statute of limitations. The action upon which appellant bases the claim of res judicata did not reach the stage of final judgment. In the points and authorities presented in conjunction with a demurrer

to the complaint, defendant states that such "action is still pending in the above court."

[2] Appellant offers no argument in support of her contention that the action is barred by laches. A defense of laches demands more than mere lapse of time. In the absence of a showing that this equitable defense is available as applied to the facts, no further consideration need be given thereto.

[3] The claim that the action is barred by section 337 of the Code of Civil Procedure seems to be abandoned, and attention is given to sections 318 and 319, Code of Civil Procedure, which require that in an action for the recovery of real property, or one arising out of the title to real property, the claim may not be maintained unless "the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made." (Code Civ.Proc. § 319.) The trial court found that under the provisions of sections 318 and 319, plaintiff's cause of action is not barred, and specifically, "That it is not true that neither the plaintiff, his ancestor, predecessor or grantor has ever at any time been seized or possessed of the real property in question * * *." If a party has an absolute conveyance of real property (Comstock v. Finn, 13 Cal.App.2d 151, 56 P.2d 957; Crane v. French, 39 Cal.App.2d 642, 104 P.2d 53), the above sections do not apply.

[4, 5] This brings us to the principal contention on appeal, which is whether the deed, absolute in form, was given as a mortgage. Since the judgment is for plaintiff, the trial court's construction of the instruments, which should be read together (Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Civ.Code, § 1642), must be upheld, unless it can be said as a matter of law that the transaction was a mortgage and not an absolute conveyance. The allegation that the advances made by plaintiff's father aggregating $2,437.74 have never been repaid, is not specifically denied, but the answer alleges the making of certain payments and denies that such payments were for taxes, etc.

[6, 7] It is the rule in this state that a deed unaffected by fraud in its inception conveys title, and is not rendered void or subject to rescission on account of a failure of consideration. What is done after its conveyance has no effect upon its validity where performance is not required as a condition. Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976; Lawrence v. Gayetty, supra; 26 C.J.S., Deeds, § 21, p. 195; 9 Cal. Jur. 141. The rule is based upon the idea of the finality of a deed. The remedy for the breach of a personal covenant not amounting to a condition is generally an action for damages. In Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767, an exception is noticed where the grantee promises to support the grantor; but in the present action defendant "denies that said payments were to be used by the said Arabelle Stronach for her support and maintenance."

Defendant did not seek a money judgment for the difference between the amount advanced with interest and the promised $3,000, and it does not appear that Arabelle Stronach or the administrator of her estate ever obtained a purchaser for the property as contemplated in the agreement. Evidently the trial court concluded that the money to be advanced up to $3,000 was for support and maintenance, and that the death of the promisee-grantor terminated the duty to make further payments.

[8] From the evidence introduced, reasonable inferences may be drawn to support the findings or conclusions of law that the deed was not intended as a mortgage, and that the making of the advances did not constitute a condition subsequent to the deed. Henley v. Hotaling, 41 Cal. 22; First Nat. T. & S. Bank v. Edmonds, 28 Cal. App.2d 26, 81 P.2d 1052; Taylor v. Avila, 175 Cal. 203, 165 P. 533; County of Los Angeles v. Hannon, 159 Cal. 37, 112 P. 878, Ann.Cas.1912B, 1065; Hitch v. Hitch, 24 Cal.App.2d 291, 74 P.2d 1098. It does not appear that a sound basis exists for disturbing the judgment based on these findings or conclusions.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

55 Cal.App.2d 296

HORSTMAN v. KRUMGOLD et al.

Civ. 13736.

District Court of Appeal, Second District, Division 2, California.

Oct. 30, 1942.

1. Pleading ⇐369(3)

In action by occupants of automobile against motorist for injuries sustained in automobile accident, trial court erred in compelling occupant to elect between cause of action based on theory that occupant was a passenger for compensation and was injured because of motorist's negligence in operation of the automobile, and cause of action based on the theory that occupant was a guest in the automobile, and that motorist was guilty of gross negligence under automobile guest statute, where both causes of action were based on the same set of facts.

2. Pleading ⇐369(1)

A litigant who has stated the facts in different counts, so as to meet any possible developments in the evidence, may not be required to elect between the various causes of action presented, either before the trial or at the close of the case.

3. New trial ⇐3
Statutes ⇐225

The statute providing that a new trial is a re-examination of an issue of fact, must be considered in connection with the statute providing that an issue of fact arises on a material allegation in the complaint controverted by the answer, and hence trial court was authorized to grant plaintiff's motion for new trial as to second cause of action which was dismissed after defendant's motion to compel plaintiff to make an election between her first and second causes of action was sustained, and plaintiff elected to proceed under the first cause of action, as against defendant's contention that there was no trial of an "issue of fact" as to the second count. Code Civ.Proc. §§ 590, 656, 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue of Fact".

4. New trial ⇐17

Trial court's action in dismissing plaintiff's second cause of action when defendant's motion to compel plaintiff to make an election between her first and second causes of action was erroneously granted, and plaintiff elected to proceed under her first cause of action, was an "error in law" within meaning of statute providing that a new trial must be granted for an error of law. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Error in Law".

5. Appeal and error ⇐277

Statute providing that the important enumerated rulings of the court are deemed to have been excepted to, should be liberally construed so that the rights of litigants are not lost by counsel's failure to keep fresh in mind those rulings of the court which are enumerated in the statutes. Code Civ. Proc. § 647.

6. Appeal and error ⇐277

Trial court's action in dismissing plaintiff's second cause of action after trial court sustained defendant's motion to compel plaintiff to make an election between her first and second causes of action, and plaintiff elected to proceed under her first cause of action, was in effect the granting of a "nonsuit" as to the second cause of action, and hence plaintiff was not required to note a formal exception to that ruling. Code Civ.Proc. § 647.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonsuit".

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Ruth Toal Horstman against Joseph Krumgold and Sarajo Krumgold to recover for injuries sustained by plaintiff in an automobile accident. From an order of the trial court granting plaintiff's motion for new trial as to the second cause of action set forth in plaintiff's complaint, Sarajo Krumgold appeals.

Order affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Harry Rabwin and Monroe R. Rubin, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Defendant Sarajo Krumgold has appealed from an order of the trial court granting plaintiff's motion for a new trial

as to the second cause of action set forth in the complaint.

Plaintiff commenced the action to recover damages for injuries which she suffered when the automobile driven by defendant, in which she was riding, left the highway and turned over. The accident occurred in the State of Nebraska on July 11, 1940. Plaintiff and defendant were strangers to each other before they took the trip during which the accident occurred and they had agreed to share expenses of the gas and oil. The first cause of action, which was based on the theory that plaintiff was a passenger for compensation, charged defendant with negligence in the operation of the automobile. The second cause of action, which was based upon the theory that plaintiff was a guest in the automobile, charged defendant with gross negligence pursuant to the automobile guest law of the State of Nebraska. When the action was called for trial twelve jurors were called to the jury box and their examination on voir dire was commenced, whereupon defendant presented a motion to the court to compel plaintiff to make an election between the first and second causes of action. The motion was granted and plaintiff elected to proceed under the first cause of action. The court then granted defendant's motion to dismiss the second cause of action. When the evidence had all been received the court, on defendant's motion, directed the jury to return a verdict for defendant. Thereafter the court granted plaintiff's motion for a new trial as to the second cause of action.

[1, 2] The court erred in compelling plaintiff to make an election between the two causes of action. Both were based upon the same set of facts and plaintiff had the right to state the facts in different, and if need be, inconsistent counts. Goldwater v. Oltman, 210 Cal. 408, 423, 292 P. 624, 71 A.L.R. 871. A litigant who has stated the facts in different counts so as to meet any possible developments in the evidence may not be required to elect between the various causes of action presented either before the trial or at the close of the case. 21 Cal.Jur. 232, § 161; Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709. If she was uncertain as to whether the evidence would show the defendant was guilty of simple negligence or of willful misconduct she could so frame her complaint as to avail herself of either contingency, by setting forth in one count various allegations as to simple negligence and in another count the allegations as to willful misconduct. Plaintiff was entitled to have both theories submitted to the jury. 45 C.J. 1090, § 663.

[3, 4] Defendants cite section 656 of the Code of Civil Procedure, in which it is stated that "A new trial is a re-examination of an issue of fact" and, asserting that there has been no trial of an issue of fact as to the second count, contend that the court was without jurisdiction to grant the new trial as to such count. Section 656 must be considered in connection with section 590 of the Code of Civil Procedure in which it is provided: "An issue of fact arises—1. Upon a material allegation in the complaint controverted by the answer". In the case now before us an issue of fact arose as to the second cause of action upon material allegations in the complaint which were controverted by the answer. In section 657 of the Code of Civil Procedure it is provided that the verdict must be vacated and a new trial granted on all or part of the issues * * * for an "error in law, occurring at the trial and excepted to by the party making the application." Manifestly, the trial court committed errors in law in compelling plaintiff to elect and in dismissing the second cause of action after the election to stand upon the first count. Our conclusion that the court had authority to grant the motion for a new trial is in line with several decisions of the reviewing courts of this state. In Stow v. Superior Court, 178 Cal. 140, 172 P. 598, 600, a motion by the defendant for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action was granted before the introduction of any evidence. The trial court, being convinced later that it had reached the wrong conclusion, granted a new trial. The Supreme Court sustained the order granting the new trial, stating: "Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action as set forth in his complaint or his defense, is an error of law occurring at the trial. The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the cause." In Green v. Duvergey, 146 Cal. 379, 80 P. 234, the trial court refused to permit the introduction of any evidence unless the plaintiff would deposit a certain

sum of money with the clerk but the plaintiff declined to obey this preliminary order and a judgment of dismissal was entered. The motion of plaintiff for a new trial was denied but the Supreme Court reversed the order denying the motion for a new trial. In Allen v. California Mut. B. & L. Ass'n 40 Cal.App.2d 374, 104 P.2d 851, the defendants objected to the receipt of any evidence on the ground that the complaint did not state a cause of action. The objection was sustained and judgment on the pleadings was entered in favor of the defendants. The motion of the plaintiffs for a new trial was granted and the defendants took an appeal. The reviewing court sustained the order of the trial court, holding that the action of the trial court was, in effect, the granting of a nonsuit and could be reviewed on a motion for a new trial. In the case now before us the action of the trial court in dismissing the second cause of action was, in effect, the granting of a nonsuit and was reviewable on motion for new trial.

[5, 6] Defendants refer to the fact that no formal exception was noted by plaintiff when the court made its order requiring her to elect between the two causes of action. Before 1907 it was the practice for lawyers to note exceptions to rulings of the court made during trials, which they wished to have reviewed subsequently. In that year the Legislature, realizing that there was no necessity for frequent interruptions of the court by notations of exceptions, amended the Code of Civil Procedure by providing that the important rulings of the court, which were enumerated, were deemed to have been excepted to. Among the matters which are now, "deemed to have been excepted to," as set forth in section 647 of the Code of Civil Procedure are orders "to strike out a pleading or a portion thereof * * * or an order granting or denying a nonsuit * * *." The amendment to section 647 of the Code of Civil Procedure has met with much favor and has resulted in improvement in the manner of conducting trials. The old custom of audibly noting exceptions is not generally followed at the present time. The amendment should be liberally construed in order that the rights of litigants be not lost by the failure of counsel to keep fresh in mind those rulings of the court which are enumerated in the amendment. The record before us discloses that plaintiff vigorously opposed the order requiring her to make an election as to the second count and after the noon recess she requested the court to reconsider its ruling. There is much force in counsel's argument that plaintiff's conduct at the trial was equivalent to the notation of an exception to the court's ruling. We are satisfied, however, that under the code section as now in force the ruling was deemed to have been excepted to, for, as we have seen, the order of the trial court was, in effect, the granting of a nonsuit.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



55 Cal.App.2d 403

In re BELL'S ESTATE.

CHENOWETH v. ELLIS et al.*

Civ. 6846.

District Court of Appeal, Third District, California.

Nov. 5, 1942.

1. Appeal and error ⇐659(3)

The purpose of a suggestion of diminution of record is to correct any error or defect in the transcript and upon such motion an appellate tribunal should be liberal in permitting documents to be added to the record in order that they may be considered and given such weight as they may be entitled to.

2. Appeal and error ⇐659(3)

On appeal from order settling final account of and discharge of administrator, where principal question was whether appellant heirs received sufficient notice of time of hearing on the account, administrator's motion to have incorporated in record of appeal certain letters of appellants' attorney indicating sufficiency of notice and consent to entry of judgment in action brought by heirs against administrator, together with judgment entered therein and affidavit of trial judge, would be granted where the letters, notice and judgment were before trial court in determining sufficiency of notice.

* Subsequent opinion 136 P.2d 804.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Proceeding in the matter of the estate of Albert C. Bell, deceased. From an order settling the first and final account of and discharging Orr Chenoweth, administrator, Helen Erma Ellis, a minor, and others, appeal. On administrator's motion for diminution of record.

Motion granted.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Chenoweth & Leininger, of Redding, for respondent.

SCHOTTKY, Justice pro tem.

Respondent has filed herein a motion for diminution of record, and seeks to have incorporated in the record of this appeal—

(1) A letter dated January 19, 1942, from J. Oscar Goldstein, one of the attorneys for appellants, to Orr M. Chenoweth, administrator, and one of the attorneys for the administrator; (2) a letter dated January 22, 1942, from J. Oscar Goldstein to Glenn D. Newton, attorney at law, Redding, California, and attorney for plaintiff in an action filed by Twila Bragg and Elizabeth Richards, plaintiffs, v. Josie Ellis, Helen Erma Ellis, Betty Jean Ellis, Orr M. Chenoweth, as administrator of the estate of Albert C. Bell, deceased, defendants; numbered 11,645, Superior Court of the State of California, in and for the county of Shasta; (3) notice of consent to entry of judgment in said action numbered 11,645, dated January 22, 1942, and signed by J. Oscar Goldstein and Burton J. Goldstein, attorneys for appellants; (4) certified copy of the judgment in said action numbered 11,645; (5) notice dated April 31, 1940, given by the county clerk of Shasta County under section 1200 of the Probate Code, of the hearing of the final account and report and petition for discharge in the estate of Albert C. Bell, deceased.

The appeal herein is by Helen Erma Ellis and Betty Jean Ellis, Heirs-at-law of said Albert C. Bell, deceased, from an order of the Superior Court of Shasta County confirming and approving the first and final account and report and petition for discharge of administrator in said estate. The said final account and report was filed on April 3, 1940, and appellants' objections thereto were filed on July 1, 1940. The order confirming and approving said first and final account and report was made and entered on February 2, 1942, in the absence of appellants and their counsel, after hearing held on the same date. From a reading of appellants' opening brief, which is on file herein, it appears that the principal question involved herein is whether or not appellants received sufficient notice of the time of the hearing of said first and final account and the objections thereto.

In support of their petition for diminution of record respondents have filed an affidavit of the superior court judge who heard the said first and final account and report, in which affidavit the said judge sets forth that prior to the 28th day of January, 1942, the date of the trial of said action No. 11,645, said Orr M. Chenoweth presented to him the letter of J. Oscar Goldstein, dated January 19, 1942, and that prior to said date he was advised of the contents of the letter dated January 22, 1942, from J. Oscar Goldstein to Glenn D. Newton, and also of said notice of consent to entry of judgment, and further, that at the hearing of said first and final account on February 2, 1942, said Orr M. Chenoweth presented and called his attention to said letters, notice, and judgment, and that all of said documents were before the court at said hearing; and that in addition to deciding and considering that the attorneys for appellants herein had due and legal notice of the said first and final account, he also decided and considered that said letters and notice, coupled with the said judgment entered in action numbered 11,645, made it unnecessary to give any further and additional notice. Respondent has filed an affidavit of Orr M. Chenoweth, administrator of the said estate and one of the attorneys for the administrator, to substantially the same effect as the affidavit of said superior judge.

Appellants have filed, in opposition to said motion, an affidavit of J. Oscar Goldstein, in which he denies that appellants received any notice of the time of the hearing of said first and final account, and denies that there was any waiver of notice of hearing by appellants, and refers to the transcript filed on this appeal, as proof that said letters and documents were not offered in evidence at the time of said hearing.

[1, 2] The purpose of a suggestion of diminution of record is to correct any error or defect in the transcript. We are not prepared to state what weight may ultimately be attached to said proposed addi-

tions to the record, nor are we entirely convinced as to their relevancy. However, we believe that upon a motion of this kind an appellate tribunal should be liberal in permitting the said documents to be added to the record in order that they may be considered and given such weight as they may be entitled to. Were it not for the fact that the affidavit of the trial judge states that he considered said letters, notice and judgment, we would be disposed to deny the motion, but in view of his statement that said letters, notice and judgment were before him, and considered by him, we believe that the motion should be granted.

It is therefore ordered that respondent's motion for diminution of record be granted, and that the documents set forth in Exhibits A, B, C, D and E to respondent's notice of motion, be incorporated in, and made a part of the record of this appeal.

THOMPSON, J., and ADAMS, P. J., concurred.



55 Cal.App.2d 406

CARMICHAEL v. SUPERIOR COURT OF NEVADA COUNTY.

Civ. 6909.

District Court of Appeal, Third District, California.

Nov. 5, 1942.

Dismissal and nonsuit ⇐60(6)

Where a defendant had not been within the state after commencement of action and it was not shown that he had property within the state, defendant was not entitled to a dismissal of the action notwithstanding that summons had not been served upon him and return made within three years after commencement of the action and that action had not been brought to trial within five years. Code Civ.Proc. §§ 581a, 583.

Petition by C. H. Carmichael against the Superior Court of Nevada County for a writ of mandamus to compel the respondent to dismiss an action as to petitioner.

Alternative writ discharged and peremptory writ denied.

Proctor K. Perkins, of Los Angeles, and John L. Larue, of Grass Valley, for petitioner.

Ivan C. Sperbeck and McGilvray & McGilvray, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

Petition for writ of mandate.

Petitioner alleges that on September 30, 1936, an action was commenced in the Superior Court of Nevada County against several defendants, including petitioner herein, to recover the sum of $5,000; that summons was thereupon issued directed to all defendants; that petitioner was never served; that the summons was never returned or filed, and that no stipulation extending time was ever made or filed; that on February 20, 1942, petitioner made a motion in the said superior court to dismiss the action as to him, on the grounds that summons had not been served upon him and return made within three years after commencement of the action, and that said action had not been brought to trial within five years; that said motion was denied.

An alternative writ having issued out of this court respondent filed an answer in which it admitted the foregoing allegations of the petition but denied that petitioner has no plain, speedy and adequate remedy at law. As a special defense is set up that there was filed in the superior court an affidavit by one of the other defendants in the action which alleged that petitioner herein was then and had been since the commencement of the action living and residing in the State of Idaho, that said affidavit was submitted to the court and used by the court and that the facts alleged therein were not refuted. It was alleged as a further separate defense that petition for mandate is not the proper remedy, and that the petition does not state facts sufficient to constitute a cause of action.

At the time of the argument in this court it was admitted that petitioner has been out of the State of California during the entire period; and relying on Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361, 363, respondent contends not only that petitioner has no right to have the action dismissed under the provisions of section 583 of the Code of Civil Procedure, but also that he has made a general appearance in the action by his motion in the superior court.

In the Judson case, supra, petitioners sought, by writ of prohibition, to restrain the trial court from rendering judgment against them following the entry of their default. They had filed in the said trial court a motion to dismiss the action for want of prosecution within five years, under section 583, supra, but the motion had been denied on a showing that said defendants had either secreted themselves within the state to prevent service of summons, or had resided outside of the state, by reason of which the court was powerless to proceed to trial in said action. In their petition for writ of prohibition they contended that their motion to dismiss did not constitute a general appearance, and therefore the court had no right to order their default entered; also, that said cause not having been brought to trial within five years the trial court had lost jurisdiction over said action for all purposes except to dismiss it. The Supreme Court held to the contrary on both points. Regarding the jurisdiction of the trial court after the lapse of five years the opinion states that "an action should not be dismissed when, as the result of the conduct or action of a defendant, the plaintiff may not proceed to trial with reasonable certainty that a judgment would conclusively determine the rights of the parties."

The court said also: "Under these circumstances, to require the plaintiffs to take the uncertain path of publication of summons against defendants who, they had been informed, were non-residents, would reward subterfuge and make dishonesty profitable. The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for the plaintiff to have brought the action to trial. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; and Kinard v. Jordan, 175 Cal. 13, 164 P. 894."

That language is applicable to the instant case for it would have been impracticable for plaintiff to bring this action to trial. Service of summons on defendant by publication would have been an idle act as no money judgment could have been based upon such service, and it is not shown or contended that defendant had property within the state.

Other cases also hold that there may be circumstances which constitute exceptions to the rule of section 583, supra, requiring a dismissal when a case is not brought to trial within five years.

In Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, above cited, which is relied upon by petitioner as holding that dismissal is mandatory after five years under section 583, supra, the court said it was mandatory unless circumstances in some way interrupted the running of the period; and because in that case an appeal from an order changing venue was pending for three years during the five-year period, it held that the statute did not run, as it was impossible for the plaintiff to bring the case to trial—that there are implied exceptions to the rule.

In Marr v. Superior Court, 27 Cal.App. 2d 393, 396, 80 P.2d 1005, 1006, where mandate was sought to compel the hearing of an appeal from a justice's court it was contended as a defense that section 981a of the Code of Civil Procedure required the dismissal of such an appeal "where the appealing party fails to bring such appeal to trial within one year from the date of filing." But the court cited Christin v. Superior Court to the effect that the statute was "to prevent avoidable delay for too long a period," and that it "does not sanction a penalty on the innocent party for delay which renders it impossible, impracticable, or futile to proceed." Also see Bayle-La Coste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458.

As to petitioner's contention that no action should be dismissed because the summons was not served and returned within three years, section 581a of the Code of Civil Procedure specifically provides that no dismissal shall be had thereunder for failure to serve summons on a defendant during his absence from the state or where he secretes himself within the state to prevent service.

It is therefore ordered that the alternative writ issued herein be discharged. The peremptory writ prayed for is denied.

SCHOTTKY, J., pro tem., and THOMPSON, J., concurred.

55 Cal.App.2d 266

FRICKE v. BRADEN et al.

Civ. 6824.

District Court of Appeal, Third District, California.

Oct. 28, 1942.

1. Evidence ⇐461(1)

For purpose of determining what parties intended by language used, it is competent to show not only circumstances under which contract was made, but also to prove that parties intended and understood the language in the sense contended for, and for such purpose the conversation between and declarations of the parties during negotiations at and before time of execution of contract may be shown.

2. Evidence ⇐20(1)

It is common knowledge that where a building is constructed as a trade center, it it the usual thing to have a number of separate businesses that do not compete with each other.

3. Evidence ⇐450(4), 455

In action for declaratory relief construing lease of grocery, liquor and bakery departments in a Super Market which purported to give lessee exclusive right to sell a general stock of groceries, liquors, bakery goods, etc., where issue was whether term "Super Market" was intended to mean entire building, or only that portion designated on plans as "market", trial court erred in excluding parol testimony explaining circumstances under which lease was made, and meaning of term "Super Market" as understood by parties at time lease was executed.

The word "Super" means over and above; higher, as in quantity, quality and degree; more than; as in super-essential, super-natural or super-standard. The word "market" is defined as a public place; or a large building where a market is held; a market place.

See Words and Phrases, Permanent Edition, for all other definitions of "Market" and "Super".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Richard Fricke against Clayton B. Braden and Russell R. Inks, for declaratory relief construing two leases which had been assigned to plaintiff, wherein the defendant Inks filed a cross-complaint. From an adverse judgment, the defendant Inks alone appeals.

Reversed.

J. J. Henderson, of Sacramento, for appellant.

O'Donnell & Bagby, of Woodland, for plaintiff and respondent.

Brandenburger & White, of Sacramento, for defendant and respondent.

SCHOTTKY, Justice pro tem.

On October 28, 1939, Paul Prom executed and delivered to appellant Russell R. Inks, a lease of "the grocery, liquor and bakery departments in the Super Market to be built by lessor on lots 82, 83 and 84 of Swanson Unit No. 1." Said lease provided further: "Lessee to have the exclusive right to sell the following: General stock of groceries; liquors, wines and beers; bakery goods, candies, tobacco, nuts and dried fruits in cello packages (not exclusive)." Said lease was not recorded until July 5, 1940.

On March 20, 1940, said Paul Prom executed and delivered to respondent Clayton B. Braden a lease of: "All of the south store-room of that certain building owned by the lessors and located on Lots 82, 83 and 84 of Swanson Unit No. 1 to the City of Sacramento, the central portion of said building being now occupied by the Riverside Market. Said store-room is known as No. 2719 Riverside Boulevard."

Said lease provided further: "It is understood and agreed that said premises are being leased for the purpose of conducting therein a general drugstore business, and business customarily associated and connected therewith."

On July 12, 1940, respondent Richard Fricke commenced an action for declaratory relief, alleging in his complaint that he had purchased "lots 82, 83 and 84 of Swanson Unit No. 1 to the City of Sacramento, together with the buildings thereon, being No. 2719 Riverside Boulevard, and known as the Riverside Market" ; that there had been assigned to him by the former owner of the property two leases, one to the appellant Inks, and one to the respondent Braden; that a controversy had arisen between Fricke and said lessees as to their respective rights under said lease,

both of said lessees claiming the right to sell liquors upon said premises; and said respondent prayed for a declaration of rights and duties of himself and said lessees under said leases.

Respondent Braden filed an answer in which he alleged that he had the right to sell liquors upon said premises leased by him. Appellant Inks filed a cross-complaint, in which he claimed that under his lease he had the exclusive right to sell liquors on said properties, and that respondent Braden had no right to sell liquors on the part of the property leased by him, and appellant prayed for a judgment decreeing that he had the exclusive right to sell liquors in said building, and that respondent Braden be enjoined from selling liquors in any portion of said building.

The trial court found that it was not true that appellant Inks had the exclusive right to sell liquor in said building, and further found:

"That the portion of the building known and designated upon the plans (Plaintiff's Exhibit No. 3) as Drug Store, for the purpose of deciding the issues in this case, is not a part of that portion of the building designated by said plans as 'Market' and described in the lease of Russell R. Inks as Super Market. That defendant Russell R. Inks, never did and does not now occupy or claim tenancy to any part of the above described premises known as and called the Drug Store.

"The court finds that the plans and specifications which defendant Inks examined before the building was erected plainly indicated what part constituted the Super Market, and also indicated the Drug Store and Beauty Shop as separate parts of the building. That neither of the latter is within the Market or Super Market, and each has always been a distinct and separate store of said building both as a fact and architecturally, and said Market has always been designated by a sign indicating what part thereof constituted said Market.

"Defendant Inks has never had possession of any other part of said Market than that part he now occupies, and defendant Braden never had notice of any claim he made to the exclusive right to sell alcoholic liquors in the entire structure, including the Drug Store, until after said Braden had moved into said Drug Store, and has acquired his right to conduct said business.

"That there are no ambiguities or uncertainties in the terms and conditions of the respective leases Plaintiff's Exhibit No. 1 and No. 2 relative to the rights of the defendants to sell liquors in their respective parts of said building."

Judgment followed in accordance with said findings, and this appeal is by appellant Inks, from said judgment.

The principal contention advanced by appellant is that the trial court erred in sustaining respondents' objection to the introduction of parol evidence explaining the circumstances under which appellant's lease was made, and the meaning of the term "Super Market," as understood by the lessor and lessee at the time appellant's lease was executed.

It appears from the record that before the appellant Inks' lease was executed, said appellant, his brother, and Paul Prom (the former owner of the property), were on the lots where the building was to be constructed and that the plans and specifications of said building were exhibited to appellant. The lease was then prepared by Paul Prom and signed by appellant. The plans, which were introduced in evidence, show a building having a frontage of 105 feet on Riverside Boulevard. According to the said plans, the north wing has a frontage of 25 feet and a depth of 27 feet, and has two stores, one of which is marked "Shoe Shop" and one marked "Beauty Parlor"; the central part of the building is designated "Market," and has a frontage of 63 feet and a depth of 70 feet; and the south wing is marked "Drug Store," and has a frontage of 17 feet and a depth of 48½ feet, and there are no doors between the part designated "Market" and the part designated "Drug Store."

[1] In Balfour v. Fresno C. & I. Co., 109 Cal. 221, at page 226, 41 P. 876, at page 877, the court said: "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown."

In Pappadatos v. Market Street Building Corp., 130 Cal.App. 62, at page 65, 19 P.2d 517, at page 518, the court said: "As said in Edward Barron Estate Co. v. Waterman, 32 Cal.App. 171, 162 P. 410, 411: 'The scope, purpose, and effect of the

lease, of course, must be determined from a consideration of it as a whole rather than by a resort to any individual clause thereof. Civ.Code, § 1641. So construed, the lease must be given such an interpretation as will make it effective in conformity with the intention of the parties (Civ.Code, § 1643); and if its terms are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it (Civ.Code, § 1649); and if different constructions of its clauses may be otherwise equally proper, that construction must be given which will be most favorable to the party in whose favor the clauses in controversy were made (Code Civ.Proc., § 1864).' Furthermore, section 1654 of the Civil Code provides in part: '* * * The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *'"

We have read the record carefully and we are convinced that the court erred in refusing to permit appellant to show the conversations between, and the declarations of the parties during the negotiations at and before the time of the execution of the lease. It is apparent from the record that the meaning of the term "Super Market" was uncertain and ambiguous. In fact, the trial court judge at one point said: "From that reading I presume that the building itself had not been erected so I am unable to tell from this whether the lease covered the entire Lots 82, 83 and 84 or how much this super market covered. These are all matters that undoubtedly the parties can enlighten the court on."

And at another point the trial judge said: "This is a lease. * * * It doesn't point out what the super market is, whether that super market is the entire building or not. But it is 'in the super market to be built,' and I take it that probably that might refer to the building."

We have been unable to find a definition of the term "Super Market" in any dictionary, nor have we been able to find any decision in which it has been defined. The word "Super" is derived from the same Latin word, and means "over," "above." It is defined in Webster's New International Dictionary 2d Ed., as, "over and above; higher, as in quantity, quality or degree; more than, as in super essential, supernatural, or super-standard." The word "Market" is defined in the same dictionary as "a public place; or a large building where a market is held; a market-place."

[2, 3] The lease from Paul Prom to appellant was of the "grocery, liquor and bakery departments in the Super Market to be built by lessor." The trial court in its final conclusion evidently was convinced that this clearly referred only to that portion of the building designated on the plans as "Market," and that there was no uncertainty or ambiguity which would justify any parol testimony as to how said term was understood by the parties. The word "Super" and the word "Market," combined certainly mean something more than the mere word "Market," and in our opinion it is more logical to conclude that the term "Super Market" was intended to mean the entire building, than to conclude that it meant only the portion marked "Market." It is a matter of common knowledge that where a building is constructed as a trade center, such as this one was, it is the usual thing to have a number of separate business that do not compete with each other. What the precise meaning of the term was, as understood by the parties in a given case, can best be ascertained by the conversations between, and the declarations of the parties at and before the time of the execution of the lease. We therefore conclude that the trial court erred in sustaining respondent's objections to the introduction of parol evidence explaining the circumstances under which appellant's lease was made, and the meaning of the term "Super Market" as understood by the lessor and lessee at the time appellant's lease was executed. While it may be true, as respondent Braden contends, that the evidence sustains the findings of the trial court, yet this ruling of the court prevented appellant from introducing evidence that was material to the issues.

As stated at the outset, the action was one for declaratory relief. One of the main questions involved was the meaning of the term "Super Market," as understood by the lessor and lessee. The determination of this question was necessary in order that there might be a proper declaration of the rights and duties of the parties. Appellant was entitled to show by parol evidence, if he could, that the term "Super Market" was intended to refer to the entire building, and that it was so understood by Prom and himself.

Several other claims of error made by appellant do not require discussion. The error hereinbefore referred to is sufficient to require a reversal of the judgment and a retrial of the action.

The judgment is reversed.

THOMPSON, J., and ADAMS, P. J., concurred.



55 Cal.App.2d 538

SIGNORELLI v. MILLER.

Civ. 13495.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1942.

1. Damages ⇐163(1)

In action for injuries to pregnant woman when automobile in which she was sitting behind steering wheel was struck from rear by defendant's automobile, plaintiff had burden to prove by preponderance of evidence not only that she suffered ills and abnormalities claimed, but also that such ills and abnormalities were caused by the accident.

2. Damages ⇐208(2)

In action for injuries to pregnant woman when automobile in which she was sitting behind steering wheel was struck from rear by defendant's automobile, whether plaintiff's difficulties arose from a source other than defendant's negligent operation of his automobile so as to warrant verdict of only $275, was for jury under conflicting expert testimony.

3. Appeal and error ⇐930(1)

In construing evidence appellate court is bound to view its aspects most favorable to sustaining the verdict.

4. Damages ⇐130(4)

$275 to pregnant woman for injuries sustained when automobile in which she was sitting was struck from rear by defendant's automobile was not inadequate under conflicting expert testimony warranting jury's conclusion that most of plaintiff's difficulties did not arise from defendant's negligence.

5. Appeal and error ⇐996

When two or more inferences can be reasonably deduced from facts, reviewing court cannot substitute its deductions for those of trial court or jury.

6. Appeal and error ⇐108, 110

An order denying motion for new trial and a verdict are not appealable.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge pro tem.

Action by Helen Signorelli against Ray Miller to recover for injuries sustained when the automobile in which plaintiff was sitting was struck by defendant's automobile. From a judgment and from an order denying a motion for new trial and from the verdict plaintiff appeals.

Judgment affirmed and appeals from order and verdict dismissed.

George N. Foster, of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

In an action for damages for personal injuries arising out of an automobile collision, nominal liability of the defendant in favor of plaintiff Helen Signorelli (hereinafter referred to as plaintiff) was admitted. The case was tried and submitted to a jury on the sole issue of the *amount* of damages. The jury awarded plaintiff $275. Her motion for a new trial was denied. She prosecutes this appeal and states the only question involved, as follows: "Considering the undisputed evidence of injury presented on behalf of the plaintiff * * * was the verdict and judgment of $275.00 adequate in amount as a matter of law?"

An effectual response to the question is that the record discloses that the evidence of injury to plaintiff is *not undisputed.* On plaintiff's behalf the evidence tended to show that on November 24, 1939, she was sitting in the front seat of her automobile, behind the steering wheel, when her car was struck by defendant's automobile which approached from the rear. Plaintiff testified "I was hit so hard I was thrown against the wheel and hit my stomach, I was quite

large at the time, I was pregnant, I was about five months along, and I hit the wheel and my head was smashed back and my neck was sprained in the back, and my back was terribly sprained, and I started crying." Her husband helped her out of the car; she could walk; later he drove her home; she was not "cut or bruised in any way." She said, "I could feel the baby kicking again, and I felt sure it was all right, and I would see my own doctor later on." She testified further that "a week or two after the accident" she started vomiting once or twice a day and that such condition persisted until "two or three weeks" before delivery of the child on February 21, 1940. She also said that after the accident she was "terribly nervous and it seemed to affect me so I wanted to sleep all the time. * * * I had to urinate more than I usually had to. * * * I would be able to void, but it would be a very small amount." Her back, she said, "hurt me terribly"; also, she said, she suffered pain in the neck and the child was delivered about five weeks prematurely. On November 16, 1939, eight days prior to the accident, she had been examined by one of her doctors and she was again examined by him on November 30, six days after the accident. Concerning the first of the two mentioned examinations the doctor said that he found conditions "essentially normal for a woman who has had one previous delivery." Of the second examination he testified, "I found tenderness over the lumbar area of the spine * * *; also tenderness high in the vagina, I would say in the fornices of the vagina contiguous with the bladder; *that is all.*" This doctor also examined plaintiff on June 19, 1941, and concerning that examination testified, "She still has tenderness on motion in the cervical and lumbar portions of the spine; she has a fourth degree retroverted uterus, which can only be corrected by surgery, and a cystocele which protrudes from the vagina. * * * A cystocele is the out-pouching of the neck of the bladder through the vagina." Concerning his conclusions as to her condition and the cause thereof, the following appears: "Q. * * * From your history of the case and what you found on November 30th, what did you conclude as to the tender conditions? A. Well, I concluded *from the history of the case* that she had an automobile accident, had been injured, and I was apprehensive about whether she would go to term with it, and that she had been injured. Q. That these injuries were from the accident? A. Apparently."

There was further evidence of a cumulative nature to the same effect as that above related but no useful purpose would be served by reciting it, as enough already has been set forth to require an award larger than $275 *if the jury was bound to conclude that all or a substantial part of the ills or abnormalities mentioned were proximately caused by the accident.* It is upon this point that the case turns.

Plaintiff admitted that she saw her doctor only two or three times between the date of the accident (November 24, 1939) and the date of her child's delivery (February 21, 1940); that she received no bruise as a result of the accident; that she had vomited while carrying a preceding child, *before the accident,* "the first two or three months" after conception; that likewise during such earlier pregnancy she had had backaches "normally"; that after the accident she got no medical treatment for her neck or abdomen; that the length of her stay in the hospital for delivery of the baby *after* the accident was the same as that for delivery of her first baby *preceding* the accident; that the time spent in convalescence in the hospital was the same in each case; that at the time of the accident, in spite of her "terrible shock," she got out of her car and walked around to the back of it to see what damage had been done; that she did not see her doctor "until a week after the accident." To the question "Did you really think you were hurt after the accident?" she answered, "No, I don't think so." As to an asserted pain in the area of the kidneys she admitted that she had not mentioned it to anyone for "about five or six months" after the accident and that the mention then was to friends, *not* to a doctor.

The doctor who examined plaintiff six days after the accident found her uterus to be "in normal condition"; her "blood pressure and urinalysis normal"; no bruise on her abdomen. Another doctor who was employed by plaintiff in December, 1939, to attend her during her expected confinement, testified that at the time of her first visit to his office she gave no history of having suffered injuries in an accident. He further testified that on examining her (at a later date at which time she told him she had been in an accident) he "found nothing abnormal * * * except * * * she complained some of pain in her back."

He prescribed belladona for "pain in the back and frequency in urination." At the time of delivery an abnormality appeared in the form of "a cystocele." Later he discovered "she had a movable kidney on the right side." As to the essential question of causation he testified, "Cystocele is always caused by a trauma or injury. * * * It would be rather difficult to say that it was absolutely due to this accident. * * * My opinion is it had quite a great deal to do with it *from the history of the case.*" As to the kidney condition the court asked the doctor, "Can you tell from the particular nature of it whether it was due to a nervous condition or to an application of external force?" and the answer was, "Impossible to tell."

On further cross-examination as to the cause of the cystocele the doctor said, in substance, that he meant to testify that cystocele "was caused by trauma" but that he was not prepared to say "that this cystocele * * * was caused by this automobile accident" or that it was due to an accident, and that "cystocele is a very common thing in the delivery of children." In effect the doctor's testimony was that cystocele always relates to some injury as a cause but that such injury may be sustained in childbirth itself just as well as by the application of external force.

On behalf of the defendant a doctor who qualified as a specialist on diseases of the genito-urinary system testified that he had examined plaintiff in March, 1941; that his "findings were all essentially normal, except we found she had a relaxed vaginal outlet, permitting a pouching down of the bladder into the vagina, and a pouching upward of the vagina when she strained. That was abnormal. We also found she had what is commonly termed as floating kidneys." As to the relation of the accident to her condition he testified, "I was of the opinion the accident she described to me before the examination played no part in the production of the conditions I found her abnormal in." He stated in substance that in his opinion the bladder symptoms she related were due to "an inflammation of the bladder, secondary to the cystocele," and that "the cause of the cystocele and relaxation of the vaginal outlet was secondary to childbirth * * * it was caused by the relaxation of the vaginal outlet as a result of childbirth, allowing those structures to stretch and letting the bladder down into the vagina." Specifically, the following questions and answers appear: "Q. Is that a common condition in childbirth independent of any automobile accident? A. It is. Q. Did you find her suffering from the effects of an injury in an automobile accident of any nature whatsoever? A. I did not." Another doctor, called by the defendant, qualified as a specialist in obstetrics and gynecology. He testified that he had examined plaintiff on September 25, 1940. He stated his findings in some detail and gave as his conclusion the opinion "that none of the pathology afterward could be attributable in any way to any accident she might have had."

[1-5] Certainly the burden rested on plaintiff to prove by a preponderance of evidence not only that she suffered the ills and abnormalities she claimed, but also that such ills and abnormalities were caused by defendant's automobile's striking her automobile on November 24, 1939. The processes of law, wherein they depend for the ascertainment of facts on the expert knowledge and testimony of medical practitioners, can be no more certain than such testimony. Here such testimony was conflicting. The jurors apparently concluded that most of plaintiff's difficulties arose from a source other than defendant's negligent operation of his automobile. In scrutinizing and construing the evidence we are bound to view its aspects most favorable to sustaining the verdict. 2 Cal.Jur. § 515, p. 880; Macart v. San Joaquin B. & L. Ass'n, 1941, 45 Cal.App.2d 395, 398, 114 P.2d 395; Dell v. Hjorth, 1942, 51 Cal.App.2d 576, 578, 125 P.2d 505. In the light of the conflict of expert opinion as well as in consideration of all the other circumstances shown, we cannot hold that the evidence fails as a matter of law to support the verdict. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court [or jury]." Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[6] The judgment is affirmed. The attempted appeals from the order denying plaintiff's motion for a new trial and from the verdict are dismissed, such order and verdict being nonappealable.

SHINN and PARKER WOOD, JJ., concur.

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PEOPLE v. HALL.

Cr. 3571.

District Court of Appeal, Second District, Division 3, California.

Nov. 2, 1942.

1. Embezzlement ⇐11(1)

Where agreement required that collection agent should remit one-half of proceeds of all collections on judgment "when and as collected", fact that settlement with judgment debtor was not complete would not afford any reason for not remitting to client his share of proceeds of a partial settlement. Pen.Code, § 484.

2. Embezzlement ⇐44(6)

In prosecution of collection agent for grand theft because of failure to remit money collected to client, evidence sustained conviction. Pen.Code, § 484.

3. Embezzlement ⇐11(1)

"Embezzlement" may be established under certain circumstances without proof of a demand, as where other evidence clearly shows an appropriation by an employee of his employer's funds with intent to do so fraudulently and feloniously. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

4. Embezzlement ⇐11(1)

A demand is not necessary where, under the terms of defendant's employment, the time for payment of money of his employer in his hands has arrived, and there is no satisfactory explanation of default. Pen.Code, § 484.

5. Embezzlement ⇐44(6)

In prosecution of collection agent for grand theft for failure to remit to client moneys collected for him, evidence sustained jury's implied finding that defendant had fraudulently appropriated money of client, which came into defendant's possession. Pen.Code, § 484.

6. Forgery ⇐44(3)

In prosecution for changing grantee's name in deed without knowledge or consent of grantor, evidence sustained conviction. Pen.Code, § 470.

7. Forgery ⇐10

A deed altered by changing name of grantee without knowledge or consent of grantor is void as a conveyance to the person whose name is so inserted as grantee, and such alteration is sufficient to satisfy provision of the Penal Code that every person who with intent to defraud falsely "alters" any deed is guilty of "forgery". Pen.Code, § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter" and "Forgery".

8. Criminal law ⇐1173(2)

In prosecution for unauthorized change of grantee in deed where there was evidence tending to show grantee's knowledge and consent to change, it was prejudicial error not to give in addition to instructions on law of deeds and agency, which were correct so far as they went, an instruction on the law of "estoppel". Pen. Code, § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

9. Estoppel ⇐96

An innocent purchaser taking a void instrument can find protection in the doctrine of "estoppel" where circumstances are presented which establish negligence or some other misconduct by the other party which contributed to the loss.

10. Forgery ⇐5

An intent to defraud is essential to the crime of "forgery". Pen.Code, § 470.

11. Criminal law ⇐1159(4)

Jury's acceptance of a witness's testimony instead of a defendant's is binding on Appellate Court.

12. Embezzlement ⇐44(6)

In prosecution of a collection agent for grand theft because of failure to remit to client moneys collected for him, evidence sustained conviction even though there had been no demand by client. Pen.Code, § 484.

13. Witnesses ⇐199(3)

That an attorney represented a defendant with respect to one matter did not render attorney incompetent to testify with respect to an entirely different matter as to which relation of attorney and client did not exist.

14. Witnesses ⇐205

To be "privileged" the communication between an attorney and client must be confidential and so regarded at least by the client at the time, and if it clearly appears that the communication was not intended by the client to be confidential, it was not privileged.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Communication".

15. Witnesses ⇐206

Communications made in the presence of a third person who is present as a witness are not "privileged".

16. Witnesses ⇐198(2)

An attorney was competent to testify that he and a client did not say various things to each other and that attorney did not know of certain of client's acts, since no "communications" with client were involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Communication".

17. Witnesses ⇐199(2), 206

Where attorney represented two different clients, attorney's letter to one of them demanding an accounting for the other client was not a "confidential communication" between attorney and addressee, neither was a letter written by addressee to attorney and the other client.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Communication".

18. Witnesses ⇐206

An attorney was competent to testify to conversation had with client where client had brought along a witness with him to the conversation.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Forrest I. Hall was convicted of grand theft on two counts, and of forgery on another, and his motion for a new trial was denied, and he appeals.

Judgments and order denying a new trial affirmed as to counts of grand theft, and reversed as to count for forgery with directions for a new trial thereon.

Maurice A. Gleason, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and George H. Johnson, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, Justice pro tem.

Defendant was charged in Count I of the information with grand theft, in Count II with forgery and in Count III with grand theft. He was found guilty on all three counts, judgment was pronounced against him on each, his motion for a new trial was denied and he appeals.

Defendant was a duly licensed collection agent, doing business at Pasadena, in Los Angeles County, California, and all the charges here made against him grow out of his activities in that capacity. John F. Pryor, a lawyer practicing his profession at Hanford, California, had obtained two judgments for his clients, one for William J. Hay against Roland S. Frank and W. A. Bliss, hereinafter referred to as the "Hay judgment" and one in behalf of Mrs. Evelyn Bryon and her brother, Thomas Downing, against J. R. Robinson and Nellie Robinson, hereinafter referred to as the "Bryon judgment." Each of these judgments was obtained in the Superior Court of Kings County but all the judgment debtors resided in Los Angeles County. Mr. Pryor, having observed defendant in action and formed a favorable opinion of his ability as a collection agent, induced his clients above named to turn over to defendant for collection the judgments above described. The grand theft charges rest for support upon evidence showing, it is claimed, that species of grand theft from the plaintiffs above named which would formerly have been known as embezzlement of moneys collected by defendant for them, but which is now charged, under section 484 of the Penal Code, as theft.

The charge in Count I relates to the Hay judgment. This was obtained in 1932 and its original amount was $1,012. In addition to this award to plaintiff it contained a provision "that defendants recover the washing machine and ironer mentioned and described in the testimony herein." On October 28, 1938, in Mr. Pryor's office at Hanford, an agreement was drawn up and signed by defendant, which was sent or taken to Hay and signed by him also. This agreement referred to the Hay judgment, provided that Hay would assign it to de-

fendant "for collection * * * with the expressed understanding" that Hay would "receive fifty per cent (50%) of all the net proceeds of all collections in the above entitled case when and as collected" and that defendant "agrees to retain John F. Pryor as his attorney in the prosecution of this case." At about the same time Hay executed a written assignment of the judgment to defendant, at the end of which was defendant's signed "consent to have John F. Pryor remain as my attorney in the above entitled cause." On October 28, 1938, at Pryor's office, defendant signed a letter addressed to Pryor referring to the assignment of the Hay judgment, stating that "you [Pryor] are to be retained as attorney in the matter," and that in consideration of the facts that Pryor had obtained the judgment on a contingent basis and had received no fees therefor and that "you [Pryor] are now about to perform additional services," it was agreed that "you and I [Hall] are to divide equally the fifty per cent (50%) of the net proceeds if and when a collection is made on account of the claim."

After these papers were signed an execution on the judgment was obtained under section 685, Code Civ.Proc., and defendant made several calls on Frank, one of the judgment debtors, at Long Beach, and on December 2, 1938, entered into a written agreement with him regarding the judgment, by the terms of which defendant was to receive from Frank "$400 cash this date," an assignment of a trust deed for $392, and an assignment of a contract with one Fernandez for sale of three lots with a balance due of "about" $800, and Frank was to cooperate in the collection of "the balance of the judgment." At the time this agreement was signed Frank paid defendant the sum of $400 and assigned to Minnie M. Hall, defendant's mother, as security, the contract for sale to Fernandez of the three lots above mentioned, and the trust deed. On February 10, 1939, Frank paid defendant another $100 on the Hay judgment. On January 7, 1939, Frank assigned to defendant a contract with one Cotton for the sale of two other lots in the same tract with, and near, the three lots covered by the Fernandez contract. The latter transaction, as stated by Frank, was one by which defendant agreed to clear up the title to the two lots, defendant was to have a half interest in them for doing so and Frank was to have the other half, the deal being "independent of the judgment"; but later Frank made an agreement with defendant by which defendant took Frank's interest in the two lots "in on the judgment," and gave Frank credit for the balance due on Hay judgment, "which was about $100." This was in February, 1939. Under date of February 17, 1939, Frank made an absolute deed of the lots covered by the Fernandez contract to defendant's mother, Minnie M. Hall. Under date of March 18, 1939, defendant signed an agreement with Frank stating that defendant "does hereby release" to Frank all defendant's interest in the trust deed above mentioned, and that in consideration of "the release" by Frank to defendant and his mother of all interest in the five lots above referred to and the cash already paid to defendant, defendant "does hereby release and forever settle the obligation of the judgment."

As above stated, in the course of collecting the Hay judgment the defendant obtained from Frank on December 2, 1938, $400 and on February 10, 1939, $100. By the agreement he made with Hay he was required to remit to Hay half of the net proceeds "when and as collected." Defendant testified that he had incurred an expense of $35 for making title search and $20 for other information. He did not report these expenses or claim them as deductions, but if they were deductible items, there would be a balance of $445 as net proceeds. No other items of expense appear up to this time. On December 14, 1938, defendant sent Hay $50, in a letter which stated that "From Frank I received $100," and also mentioned the assignment of the trust deed and a "lien on a house" not definitely described, but apparently the above mentioned contract with Cotton, and then declared, "This is about all I can get Frank to agree to." At the same time defendant paid Pryor $25. On February 17, 1939, defendant sent Hay $14 and on January 29, 1939, he sent Pryor $7. No further sums were sent by him to either of them.

[1] Thus it appears that when defendant received $400 he accounted for only $100 of it, and that on collecting $100 more he accounted for only $28 of it. The excuses he gave at the trial for not making a complete accounting are that he had not made a complete settlement with Frank, and that in January, 1939, and thereafter, Frank was making claim for the washing

machine and ironer which, by the terms of the Hay judgment, were to be returned to him, that defendant, as assignee of the judgment was liable to perform this part of the judgment, and that hence he was entitled to retain the balance of the sums collected as a protection against this liability. Neither of these excuses is good. By the agreement between defendant and Hay defendant was required to remit to Hay half of the net proceeds of all collections on the judgment "when and as collected." The fact that the settlement with Frank was not complete would not afford any reason for not remitting to Hay his share of the proceeds of a partial settlement. Moreover, by the agreement of March 18, 1939, which was signed by Frank, as well as defendant, defendant purported to "forever settle" the judgment, so even on his theory on this point he should have remitted then.

[2] In his own testimony defendant says that Frank was claiming $200 to $300 as damages if he did not receive the washing machine and the ironer. It appears that later, after this prosecution of defendant was begun, Hay settled this matter with Frank for $25. Frank testified that defendant first called his attention to the fact that he was entitled to these articles, and he, Frank, did not make demand on defendant for them before the judgment was settled. Moreover, the agreement of March 18, 1939, "forever" settling the judgment, which Frank signed, would relieve defendant from any liability on this account from that date. Under these circumstances the jury might well conclude that this matter afforded no justification for not remitting the proceeds of the collections.

[3-5] No demand was made by Hay for his share of the amount collected by defendant until more than two years after the last of these collections; in fact Hay testified that he did not know of any collections other than those of which defendand reported to him until about the time of demand. Defendant contends that no sufficient demand was made even then. "No doubt, embezzlement may be established, under certain circumstances, without proof of a demand; as where other evidence clearly shows an appropriation by an employé of his employer's funds with intent to do so fraudulently and feloniously," said the Supreme Court in People v. Royce, 1895, 106 Cal. 173, 177, 178, 37 P. 630, 39 P. 524, 525, and the court quoted this statement with approval in People v. Hatch, 1912, 163 Cal. 368, 373, 125 P. 907, 909, adding to it this: "In some cases, in the absence of other sufficient proof, a demand may be necessary to fix the fact of the fraudulent appropriation; but the real test always is: Does the whole evidence establish the crime charged; that is, a fraudulent appropriation as charged in the indictment." To the same effect see People v. Hill, 1934, 2 Cal.App.2d 141, 157, 37 P.2d 849. In People v. Wyman, 1894, 102 Cal. 552, 557, 36 P. 932, it is suggested that no demand would be necessary where, under the terms of a defendant's employment, the time for payment of money of his employer in his hands had arrived and there was no satisfactory explanation of his default. This suggestion fits the present case. Not only did the defendant fail, without satisfactory explanation, to remit the full amount required when he collected $400 and then $100 for Hay, but he gave Hay misleading information, telling him that $100, instead of $400, had been received on the first collection, omitting to mention the assignment of the Fernandez contract, which he had received and declaring that "this is about all I can get Frank to agree to." The defendant's explanation at the trial of what he later did with the money not accounted for shows that, nearly a year after receipt of the $400, he expended it for improvements and repairs on the two lots above mentioned which he obtained from Frank and in which he claimed a half interest as his own property. By so doing he converted at least half of the money so expended to his own use, if he had not previously done so, without regard to any question of his right to expend money collected for Hay in improving Hay's property without the latter's knowledge or consent. These and the other circumstances already set forth are sufficient to support the jury's implied finding that defendant fraudulently appropriated property of Hay which came into his possession.

The further proceedings of the defendant in collecting the Hay judgment are so interwoven with those relating to the forgery charged in Count II, that the facts regarding both must be included in one statement. As already stated, Frank made a deed, dated February 17, 1939, of the three lots covered by the Fernandez contract. Frank testified that he signed

this deed at or about its date, and that Minnie M. Hall was then named in it as grantee. Defendant testified that no grantee was named in the deed when Frank signed it and delivered it to him, that this occurred in December, 1938, that later in December Frank orally consented to the insertion of the name of Minnie M. Hall as grantee and that her name was then put in. When this deed was introduced in evidence at the trial the grantee named in it was Trinidad Yebras. Frank testified that he did not authorize this change or discuss it with defendant and did not know of it until the investigation leading to this prosecution was begun. Defendant testified that he caused the erasure of the name, Minnie M. Hall, to be made on or about February 17, 1939, and, about a year later, himself inserted the name, Trinidad Yebras, as grantee, that this was done with Frank's oral consent, and that Frank, on being later told of it, said it was "all right." The evidence shows further that Fernandez made payments to defendant on his contract, the amount conceded by defendant being $131 and interest in unspecified amount, and the amount according to Fernandez' son being at least $15 per month for at least 18 months, or $270. Trinidad Yebras was a friend of Fernandez and in November, 1940, bought from defendant the lots covered by the Fernandez contract, and paid him $598 therefor, not knowing at the time of any defect in the title, and thereupon he received from defendant the deed above mentioned with his name in it as grantee. He did this for the benefit of Fernandez. On July 30, 1941, 30 days after the information herein was filed, Yebras began an action to quiet title to the property against Frank and others and later a default judgment was given in his favor against Frank. On March 8, 1941, Pryor wrote and sent to defendant a letter demanding an accounting of his collections for Hay and the date of this letter is the date charged in the information as that of the theft from Hay. In answer to this defendant went to Pryor's office with a large and apparently unsorted mass of papers at which Pryor refused to look, but defendant did not pay over to Hay or Pryor any money.

The reasons now assigned by defendant for not paying over to Hay any of the money received from Fernandez and Yebras are first, the unsettled claim of Frank for the washing machine and ironer, already discussed and held insufficient, second, Yebras' action to quiet title, and third that defendant expended more than the sums so received on the real property obtained from Frank. Since Yebras' action to quiet title was not begun until after this prosecution was commenced, it affords no valid reason why defendant should not have accounted for the money received from Yebras at the time of its receipt. The money defendant claims to have spent was, according to his testimony, all spent on the two lots in which he claimed a half interest under his deal with Frank. The total amount so spent was only $361.40, of which, at most, he could claim against Hay only one-half. Such a claim could afford no good excuse for not paying to Hay his share of the considerable excess over that amount which defendant had collected from Fernandez and Yebras. As to these matters also we cannot say there is no support for the jury's finding of fraudulent misappropriation.

[6, 7] Coming to the forgery charge, we think the evidence above recited is ample to support the jury's verdict. From it the jury could find that after Frank had signed the deed and delivered it to defendant the latter, without Frank's knowledge or consent, changed the name of the grantee and used the deed so altered as a means of obtaining payment from Yebras for the property then appearing to be conveyed to him by it. A deed so altered is, of course, void and ineffective as a conveyance to the person whose name is so inserted as grantee. This is sufficient to satisfy the provision of section 470 of the Penal Code that "Every person who, with intent to defraud, * * * falsely makes, alters, forges or counterfeits, any * * * deed * * * is guilty of forgery." Defendant cites against this conclusion Dutton v. Locke-Paddon, 1918, 37 Cal.App. 693, 695, 174 P. 674, and Riverside P. C. Co. v. Maryland C. Co., 1920, 46 Cal.App. 87, 189 P. 808, but neither case is in point here. In the Dutton case it was held that a change in the name of the grantee of a deed, made with the grantor's consent, after it had been signed but before it had been delivered as a deed, by one who was the real but not the record owner of the property conveyed, was "not the alteration of an instrument, since the instrument had not yet been created" [37 Cal.App. 693, 174 P. 675], and

for that reason did not make the deed void. Here, according to testimony which the jury believed, the deed had been delivered as an effective conveyance and the grantor was not consulted about the change. The other case cited by defendant did not involve an alteration but related to a bond delivered with unfilled blanks, the rule on which is different from that applicable to deeds in like condition stated in the cases hereinafter cited.

In connection with the forgery charge defendant complains of the following instructions given.

"No 25. Under the law of this state a deed to real property must be made in writing, and, therefore, any authority given to an agent to change or alter such deed must also be in writing. If, however, an alteration is made by an agent having authority in writing from the grantor named in the deed to make such alteration the making thereof by the agent would not be a forgery."

"No 26. Under the law of California a deed to real property must state the name of the grantor and the name of the grantee. A deed which does not show the name of the grantee (unless there is written permission given by the grantor for the name of the grantee to be subsequently inserted) is void and carries no title to the property described."

"No 27. The law of this state is that the name of a grantor or grantee in a deed cannot be inserted by an agent for the grantor in the absence of the grantor, unless the agent's authority be in writing. If the authority of the agent is not in writing, his insertion of the name of the grantor or grantee does not convey any title and the deed is therefore, absolutely void."

[8, 9] These instructions correctly stated the law, as far as they went. See Trout v. Taylor, 1934, 220 Cal. 652, 655, 656, 32 P.2d 968, and authorities there cited; also Bryce v. O'Brien, 1936, 5 Cal.2d 615, 55 P.2d 488, approving Trout v. Taylor. But it is also the law, as declared in Trout v. Taylor, supra [220 Cal. 652, 32 P.2d 970], that "An innocent purchaser taking a void instrument can, however, find protection in the doctrine of estoppel, where circumstances are presented which establish negligence or some other misconduct by the other party, which contributed to the loss." This rule should have been stated to the jury, with a fuller explanation of the doctrine of estoppel, as a qualification of, or in addition to, the instructions above quoted. The testimony of defendant states facts which would raise such an estoppel against Frank in Yebras' favor. It shows that Frank orally consented to the insertion of Yebras' name in the deed as grantee, with knowledge that defendant intended then to deliver the deed to Yebras for the purpose of effecting a conveyance of the property to him. While Yebras was not directly informed of this conduct of Frank, the delivery of the deed to him with his name appearing therein as grantee, such delivery being with Frank's consent, was an implied representation that Frank as grantor had executed such a deed, and entitled Yebras to rely, as against Frank, on the latter's conduct above described as creating an estoppel. In the cases of Trout v. Taylor, supra, and Bryce v. O'Brien, supra, it was held that findings of no estoppel were supported by the evidence, but the facts were quite different from those to be considered here. In the Trout case the grantor, who was defrauded in other ways, merely failed to notice that the name of the grantee was not inserted in her deed. In the Bryce case, the grantor was induced to sign a deed without inserting the grantee's name in order to facilitate its exchange for certain bonds. In neither case was a deed altered by the insertion of a grantee's name with knowledge on the grantor's part that it would then be delivered to such grantee as a conveyance.

[10] An intent to defraud is essential to the crime of forgery, as the jury were properly instructed. If the jury had been properly instructed on this rule of estoppel, they could, if they believed defendant's testimony above stated, have found that he had no intent to defraud Yebras, but believed that the deed would be an effective conveyance of the land to him. Without such an instruction on the law of estoppel, the other instructions quoted would prevent them from reaching such a conclusion even though they believed defendant's testimony on this point.

Count III grows out of defendant's dealings with the Bryon judgment, which was dated April 29, 1935. This was an ordinary money judgment in the sum of $1,344. This judgment was assigned to defendant on or about February 8, 1939, and on February 9, 1939, an agreement regarding it was made between Mrs. Bryon, Down-

ing and defendant. This agreement, after reciting the assignment, provided that defendant "agrees to use his best endeavor to collect said judgment, which he is hereby authorized to do" and that in consideration of his services "all moneys collected on said judgment after paying the cost and expense in the premises shall belong" half to Downing and Mrs. Bryon and half to defendant and that "immediately upon making collection of such sum as he may be able to collect on said judgment" defendant will "after deducting the necessary cost and expense in the premises, remit to the First Parties [Mrs. Bryon and Downing] one-half of such net proceeds." The agreement also authorized defendant "to use his own judgment" in compromising the debt, but not for less than $500. After signing these papers Downing left the handling of the matter to his sister, Mrs. Bryon. An execution was issued on this judgment, which defendant caused to be levied on real property at 3920 South Broadway, Los Angeles, hereinafter referred to as the "Broadway property." Defendant bid this property in at the sale in the name of Mrs. Bryon on March 13, 1939, for $500. It was deeded to her by the sheriff August 13, 1940. After deducting expenses, $454.45 was credited on the judgment. On March 13, 1939, the defendant also had the execution levied on Title Guarantee & Trust Co. and thereby impounded $1,218.37 which it had in its possession for payment to the judgment debtors. On April 2, 1940, the money so impounded was finally paid over to defendant. He also received as rent of the Broadway property, in 1939, $260, and in 1940, $360, making his total collections in money, $1838.37. None of this was ever remitted or definitely accounted for to Downing or Mrs. Bryon or anyone for them.

[11] One of the defenses now advanced to Count III is that by an agreement defendant made with Mrs. Bryon after the Bryon judgment was turned over to him for collection he sold to her an interest in some real property referred to in the record as the "Kalmia Street property" in exchange for the judgment, thereby becoming the absolute owner of the judgment, and therefore he was not required to turn over its proceeds to her. The difficulty with this argument is that, while defendant testified that such an agreement was orally made, Mrs. Bryon positively denied it, and the jury's obvious acceptance of her testimony is binding upon us.

[12] The only other excuse given here for defendant's prolonged failure to pay anything to Mrs. Bryon or her brother, out of the $1,800 and more than he received on account of the judgment is that he expended, for attorney's fees and court costs in collecting the judgment, more than he received. These expenditures were in part testified to by defendant, and as to some of them he was corroborated by attorneys who represented him in various suits. Some of these expenses related to the Kalmia Street property and we cannot credit them to defendant because of the jury's finding that Mrs. Bryon had no interest in that property. It appears without dispute that defendant brought many actions in the municipal and superior courts, in connection with his efforts to collect on the Bryon judgment. The nature and purpose of some of those actions appears rather indistinctly in the record; indeed, as to several of them, we cannot determine whether defendant had any good reason for bringing them or not. At least, he lost some of them. The jury may have been in the same situation as we are, and have concluded that defendant had no just reason for deducting from his collections the expenses of some of these actions. But the total of all the expenses which he claimed in all of these actions, including attorney fees not paid but incurred, in some of them, appears to be only $985.57. There may be some other unpaid attorney fees, but the record before us does not enable us to determine the amount thereof. The jury may have concluded that the expenses which defendant could claim in good faith were not sufficient to relieve him from the necessity of paying $200 or more to Mrs. Bryon. They may also have considered his good faith impugned by what they deemed his false explanation of his reason for not doing so—that is, his claim of a purchase of the judgment from her. We cannot say that such conclusions are without substantial evidentiary support in the record.

The same objection to the evidence regarding a demand is raised on this count as in case of Count I. The same rule must be applied. The evidence is sufficient to show an embezzlement even though there had been no demand.

[13-18] At the trial John F. Pryor was called as a witness by the prosecution. Be-

fore his testimony had proceeded far, defendant objected "to any testimony by this witness on the ground it is privileged and confidential between an attorney and a client," and it was stipulated that "any questions asked of this witness may be considered objected to upon the ground it is a confidential communication between attorney and client and privileged." Defendant now argues that the court erred in overruling this objection. The argument is based on the above mentioned papers signed by defendant in connection with the Hay judgment, by which defendant appears to have retained Pryor as his attorney in the matter of collecting that judgment. Pryor denied that he had ever acted as attorney for defendant, but we need not determine whether this testimony overcomes the showing made by the papers referred to. No such arrangement was made regarding the Bryon judgment, and hence the objection could not be good as to matters relating only to it. The argument here seems to assume that every communication between attorney and client is privileged. This is not the law. To be privileged "the communication must be confidential, and so regarded, at least by the client, at the time. If it clearly appears that the same was not intended by the client to have been confidential, it is not privileged." Mission Film Corp. v. Chadwick P. Corp., 1929, 207 Cal. 386, 390, 278 P. 855, 856. Communications made in the presence of a third party who is present as a witness are not privileged. Mitchell v. Towne, 1939, 31 Cal.App.2d 259, 265, 87 P.2d 908. We find in Pryor's testimony nothing that can be regarded as privileged under these rules. Much of it related to the Bryon judgment and was not subject to the objection. He testified that he and defendant did not say various things to each other and that he, Pryor, did not know of certain of defendant's acts. Obviously, these are not communications, at all, but the suggested communications are such that, if made, they would necessarily have been intended for Hay's information, and so not confidential under the rule above stated. The letter of Pryor demanding an accounting of defendant's collections for Hay and Bryon and a later letter repeating the demand and suggesting payment to them on account, purported to have been written by Pryor in behalf of Hay and Bryon, and could not be regarded as a confidential communication between him and defendant, even if he were attorney for defendant as well as Hay and Bryon. Pryor produced and identified a letter from defendant and Pryor's answer to it, but this letter from defendant was addressed to both Hay and Pryor. Pryor also testified to a conversation he had with defendant after the letter Pryor wrote to defendant demanding an accounting; but defendant brought a witness with him to this conversation. We find no error in the ruling complained of.

The judgments and the order denying a new trial are affirmed as to Counts I and III; they are reversed as to Count II with directions for a new trial on Count II.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



55 Cal.App.2d 136

MILLER v. CALIFORNIA ROOFING CO. et al.

Civ. 11967.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1942.

1. Licenses ⇐39

Where plaintiff paid and defendant corporation accepted sum of money for shares of corporation's capital stock at a time before corporation had permit to issue stock, and corporation gave plaintiff document by which it was bound to issue such stock to plaintiff, under provisions of Corporate Securities Act transaction was void whether considered as a sale, an offer to sell, or a mere attempted subscription. Gen.Laws 1937, Act 3814, §§ 3, 17, 18, 33.

2. Contracts ⇐105

Where a statute prohibits or attaches a penalty to the doing of an act, the act is void, notwithstanding that statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum.

3. Licenses ⇐39

Where failure of corporation to possess permit to issue stock voided transaction in which corporation accepted sum of

money from plaintiff for application on purchase price of certain shares of corporation's capital stock, fact that corporation obtained such permit before it issued the shares did not give validity to sale. Gen. Laws 1937, Act 3814, §§ 3, 17, 18, 33.

4. Contracts ⇐140

An agreement which grows out of or is connected with an illegal or immoral act or agreement, though it is in fact a new agreement, cannot form the basis of a recovery.

5. Licenses ⇐39

The doctrine permitting a subscription for corporate stock which was void in the first instance by reason of failure of corporation to secure a permit to sell stock to be construed as a continuing offer to subscribe pending procurement of permit is an exception to general rule and applies only to situations in which a representative of creditors is attempting to recover from parties to whom stock has been issued without full payment or where rights of innocent third parties intervene. Gen.Laws 1937, Act 3814, §§ 3, 17, 18, 33.

6. Licenses ⇐39

Sale of securities which were issued in strict conformance with permit of commissioner of corporations but the purchase price for which was paid before corporation obtained permit in violation of Corporate Securities Act was an "illegal sale" in the absence of intervening rights of innocent third parties or of creditors attempting to recover from parties to whom stock has been issued without full payment. Gen. Laws 1937, Act 3814, §§ 3, 16, 17, 18, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Illegal Sale".

7. Contracts ⇐138(4)

The doctrine of "estoppel by conduct" or by "laches" does not apply to an agreement which is illegal as violating a statute or public policy so as to prevent a party from asserting its invalidity.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel by Conduct" and "Laches".

8. Licenses ⇐39

Ordinarily in actions by purchaser of stock sold in violation of Corporate Securities Act against corporation, purchaser will not be held to be in "pari delicto", since Corporate Securities Act was enacted primarily for protection of investing public. Gen.Laws 1937, Act 3814.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

9. Contracts ⇐138(1)

Where contracts or transactions are prohibited by statute for protection of one set of men from another, in furtherance of statute, person injured, after transaction is finished, may bring action and defeat the contract even though both parties are to some extent involved in the illegality.

10. Licenses ⇐39

In actions between purchaser of corporate stock and corporation, great importance is attached to policy underlying Corporate Securities Act that purchaser must be equally culpable with corporation before he will be held to be in "pari delicto", although a less degree of culpability may be sufficient when rights of innocent third parties have intervened. Gen.Laws 1937, Act 3814, §§ 3, 17, 18, 33.

11. Licenses ⇐39

In action by purchaser of corporate stock to recover purchase price on rescission of transaction for the illegality thereof, evidence sustained finding that at time purchaser paid corporation the purchase price of stock, he knew that corporation was not authorized to issue stock and was therefore in "pari delicto". Gen.Laws 1937, Act 3814, §§ 3, 17, 18, 33.

12. Licenses ⇐39

Where purchaser of corporate stock had originally instigated the transaction, and with knowledge that corporation did not have permit from commissioner of corporations to sell stock gave corporation sum of money to apply on purchase price of stock and signed document representing to commissioner of corporations that no sale had yet taken place so as to secure permit for corporation to issue stock, purchaser was equally culpable with corporation and therefore in "pari delicto" and not entitled to recover purchase price of stock despite the illegality of the sale. Gen.Laws 1937, art. 3814, §§ 3, 17, 18, 33.

13. Costs ⇐204

The provision of the statute relating to filing of memorandum of costs requiring that such memorandum be filed, if the action is tried without a jury, not later than five days after notice of entry of judgment

refers to actual notice and not written notice. Code Civ.Proc, §§ 1010, 1033.

14. Costs ⇐203

Where record in action tried without a jury disclosed that eight days after entry of judgment for defendants, defendants served plaintiff with notice of entry of judgment and memorandum of costs and filed such documents with clerk five days thereafter and there was nothing which would evidence actual knowledge of defendants of entry of judgment prior to date on which they signed notice of entry of judgment, filing of memorandum of costs was timely. Code Civ.Proc. § 1033.

15. Costs ⇐203

Purpose of amendment to statute relating to costs permitting filing of memorandum of costs within five days after notice of entry of judgment was to eliminate burden of constantly checking records of clerk to determine when judgment was entered as was necessary under former provision requiring filing of memorandum within five days after entry of judgment. Code Civ. Proc. § 1033.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by R. M. Miller against California Roofing Co. to recover sum paid by plaintiff for certain shares of capital stock as defendant. From a judgment for defendant and from an order denying plaintiff's motion to strike defendant's cross-bill, plaintiff appeals.

Affirmed.

Vincent W. Hallinan and James A. Himmel, both of San Francisco, for appellant.

Emmet W. Gottenberg, David M. Burnett, and John M. Burnett, all of San Jose, for respondents.

WAGLER, Justice pro tem.

This is an appeal from a judgment in favor of defendants in an action brought to recover the sum of $2,500 paid by plaintiff for twenty-five shares of the capital stock of defendant corporation. Plaintiff also appeals from an order denying his motion to strike defendants' cost bill.

The defendant California Roofing Co. is a California corporation, organized in September, 1931, by the defendants Phelps, Edwards and Norton, who are the present directors.

In 1936 the plaintiff, who is a relative of defendant Edwards, entered the employ of the corporation as a salesman. Shortly thereafter plaintiff expressed to his employers a desire to become financially interested in the company, but was advised that it was not possible at that time.

In February, 1938, plaintiff became manager of the company's Palo Alto branch office, at which time plaintiff learned that capital was needed for some contemplated expansion. After preliminary negotiations and discussion, plaintiff deposited $5,000 to the credit of the defendant corporation, in return for which he received the following document:

"February 18, 1938.

"Received of R. M. Miller $5,000.00 to be applied as follows: $2500.00 to apply on the purchase of 25 shares of the Capital Stock of the California Roofing Co., Inc.

"The balance of $2500.00 to be covered by a five year note bearing interest at the rate of six per cent per annum from February 18, 1938.

"California Roofing Co., Inc.
"by W. A. Edwards, Secty. Treas.
"W. A. Edwards."

It is conceded that on February 18, 1938, the defendants had received no permit of any character from the Commissioner of Corporations to sell or offer to sell any stock, and that, although the corporation was organized in 1931, no stock was ever issued to anyone prior to July 26, 1938. On this date a permit was issued by the Division of Corporations allowing the corporation to sell 250 shares of stock to Norton-Phelps Lumber Co. and to Phelps, Norton and Edwards in exchange for certain business assets transferred by them to the defendant corporation.

On November 1, 1938, a permit was obtained allowing the corporation to sell plaintiff twenty-five shares of stock at $100 per share; said permit to become effective only after the shareholders above mentioned should execute and file with the Commissioner of Corporations an agreement whereby they waived any division of assets, with the exception of ordinary dividends, until plaintiff was reimbursed for his $2,500 investment. In compliance with this permit, the following agreement was executed on December 15, 1938:

"This agreement dated December [1]5, 1938, between Norton-Phelps Lumber Co. a corporation, H. K. Phelps, J. E. Norton

and W. A. Edwards, first parties and Richard M. Miller, second party, Witnesseth:

"That in consideration of the subscription of the second party to 25 shares at $100 a share of the capital stock of The California Roofing Co. first parties, the owners of 250 shares of said capital stock in the following respective amounts:

"Norton-Phelps Lumber Co. ..	123 shares
"H. K. Phelps	1 share
"J. E. Norton	1 share
"W. A. Edwards	125 shares
"Total	250 shares

hereby waive their right to participate in any distribution of assets of said The California Roofing Co., excepting dividends payable according to law, until second party shall first have received the return of the amount of the purchase of said shares, namely, $2,500.

"It is understood that upon dissolution of The California Roofing Co. that second party shall first receive the return of said purchase price of $2,500.00 before first parties participate in said distribution.

"It is mutually covenanted and agreed that the provisions of this contract shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

"Subscribed this-15-day of December, 1938."

This agreement was signed by plaintiff and all of the defendants, and was thereafter filed with the Commissioner of Corporations.

On January 5, 1939, plaintiff was issued a certificate for the twenty-five shares. Late in the year 1940, after losing money consistently on the Palo Alto branch, of which plaintiff was manager, defendants decided to close the Palo Alto office, and at a time when plaintiff's discharge was imminent plaintiff gave notice of rescission and demanded the return of the $2,500 plus interest, on the ground that the sale of the stock was void. Upon refusal of his demand, the present action was instituted.

The trial court found that the document of February 18, 1938, was a mere receipt for money advanced by plaintiff to apply on the purchase of stock of defendant corporation; that a valid subscription agreement was entered into between plaintiff and defendants on December 15, 1938, in pursuance of a permit issued to defendants on November 1, 1938, and that said stock was validly issued to plaintiff on January 5, 1939.

The real issue here is not whether the stock was validly issued, but whether the sale was a valid sale under the Corporate Securities Act, Deering's Gen.Laws 1937, Act 3814. If the sale was valid, plaintiff cannot recover on the theory upon which the action is brought. If the sale was invalid, the further question then arises: Was the plaintiff in pari delicto under the facts and circumstances disclosed by the record?

The sale in this case was initiated by what appears to have been an executory oral agreement between plaintiff and defendant corporation. Plaintiff's obligation under the agreement was fulfilled on February 18, 1938, when he paid over his money and received the writing bearing the same date. By this document the defendant corporation very definitely bound itself to sell plaintiff twenty-five shares of its stock at some time.

The Corporate Securities Act forbids a company, except as authorized by certain specific statutory provisions not applicable here, to sell, offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue without first receiving a permit from the Commissioner of Corporations permitting it to do so. Deering's Gen. Laws 1937, Act 3814, § 3.

Section 33 of the same act authorizes the taking of subscriptions for shares without a permit, but the same section specifically provides that "nothing herein contained shall be construed as permitting the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection."

[1] From the foregoing it is apparent that regardless of whether we consider the transaction entered into on February 18, 1938, a sale, an offer to sell, or a mere attempted subscription, and the document a mere receipt, the plaintiff having parted with and the defendant corporation having accepted the sum of $2,500 in pursuance thereof, without a permit, the defendants were guilty of a public offense. Deering's Gen.Laws 1937, Act 3814, §§ 17 and 18. This violation of the Corporate Securities Act rendered void the transaction consummated on February 18, 1938.

[2] "* * * where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se, or merely malum prohibitum." This rule stated by our Supreme Court in the oft-cited case of Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, 15, has been adopted and consistently applied in situations involving violations of the Corporate Securities Act. Otten v. Reisener Chocolate Co., 82 Cal.App. 83, 254 P. 942; Boss v. Silent Drama Syndicate, 82 Cal.App. 109, 255 P. 225; Reno v. American Ice Machine Co., 72 Cal.App. 409, 237 P. 784; Payne v. De Vaughn, 77 Cal.App. 399, 246 P. 1069; Tatterson v. Kehrlein, 88 Cal.App. 34, 263 P. 285; Brewis v. Toffelmier, 97 Cal.App. 329, 275 P. 819; Castle v. Acme Ice Cream Co., 101 Cal.App. 94, 281 P. 396; Herkner v. Rubin, 126 Cal.App. 677, 14 P.2d 1043; Duntley v. Kagarise, 10 Cal.App.2d 394, 52 P.2d 560; Levinson v. Boas, 150 Cal. 185, 88 P. 825, 11 Ann.Cas. 661, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661; Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36.

[3, 4] The subsequent conduct of the parties did not give validity to the sale, because the contract of December 15, 1938, was connected with, in fact, grew immediately out of, the previous illegal transaction. It is well settled that: "If an agreement grows immediately out of, or is connected with, an illegal or immoral act or agreement, a court cannot lend its aid to enforce it, though it is in fact a new agreement. If the connection between an original illegal transaction and a new promise can be traced, if the latter is connected with, and grows out of, the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery." 12 Am.Jur. p. 717, § 210.

[5] We are not unmindful of the case of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, and subsequent decisions following the rule therein announced to the effect that even though a subscription agreement may be void and incapable of acceptance in the first instance, it should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the Commissioner of Corporations, which ultimately becomes the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement has been overcome. As pointed out in California Western Holding Co. v. Merrill, 7 Cal.App.2d 131, at page 151, 46 P.2d 175, at page 185, the doctrine announced in Moore v. Moffatt, supra, "is intended to be, an exception to the general rule, and applies only to those situations in which a representative of creditors is attempting to recover from parties to whom stock has been issued without full payment, or where the rights of innocent third parties intervene."

It is obvious that neither of the above exceptions exists in this case. Furthermore, our approval of the method adopted by the parties to this action to issue the stock in question would hinder the effective enforcement of regulations which public policy demands shall be strictly enforced.

[6] Many of the decisions involving the sale of securities in violation of the Corporate Securities Act appear to place the purchaser's right to recover upon the theory that the securities are void. It is true, as pointed out by defendants, that the shares in this case cannot be held to be void because they were not "issued" to plaintiff until after a permit had been obtained, and then only in strict compliance with the requirements of the permit. In other words, the factual situation is one not contemplated by section 16 of the act which declares that shares issued without a permit or in non-conformity therewith shall be void. However, as we pointed out at the outset, the question here involved is the validity of the sale, not the validity of the shares. The distinction is clearly pointed out in the case of Otten v. Riesener Chocolate Co., supra; see, also, Duntley v. Kagarise, supra. The fundamental theory underlying all of these cases is the fact that a sale, which for any reason is in violation of the Corporate Securities Act should on the grounds of public policy be held to be illegal. In the furtherance of this policy we so hold in the case at bar.

[7-9] This holding, however, does not determine all of the issues involved in this case. Even though the sale was illegal, there still remains the question whether or not the plaintiff was in pari delicto. The trial court found that the plaintiff was

"estopped from asserting against defendants any claim * * *." This was the wrong designation of the applicable doctrine. In 12 Am.Jur., page 740, section 222, it is stated: "The doctrine of estoppel by conduct or by laches has no application to an agreement or instrument which is illegal because it violates an express mandate of the law or the dictates of public policy. Neither action nor inaction of a party to such an agreement can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity." See, also, Reno v. American Ice Machine Co., supra; Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 3 P.2d 557. However, although the learned court below did not affix the appropriate legal tag, it is plain that he had in mind the doctrine of in pari delicto.

In an action between the purchaser of stock sold in violation of the Corporate Securities Act and the corporation, ordinarily such purchaser will not be held to be in pari delicto, because the Corporate Securities Act was enacted primarily for the protection of the investing public. Where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men—the one from their station and condition being liable to be imposed upon by the other—in the furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. Browning v. Morris, 98 English Reports [Full Reprint] 1364; Tatterson v. Kehrlein, supra; Mary Pickford Co. v. Bayly Bros. Inc., 12 Cal.2d 501, 86 P.2d 102; Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P.2d 302; Walker v. Harbor Realty, etc., Corp., supra; Pollak v. Staunton, supra. This is true even though both parties are to some extent involved in the illegality. In such event, since the policy of the law designed to discourage illegal agreements comes in conflict with that policy which demands the effective enforcement of the Corporate Securities Act, the law differentiates the guilt of the parties, because refusal of relief to the less culpable would involve harmful effects wholly out of proportion to the requirements of individual punishment or the discouragement of illegal contracts. Williston on Contracts, 1938 Ed., vol. VI, pp. 5085, 5086, § 1789.

[10] When the action is between the purchaser and the corporation, the law attaches such great importance to the policy underlying the Blue Sky Law that the purchaser must be equally culpable with the corporation before he will be held to be in pari delicto. Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271; Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.2d 331; Walker v. Harbor Realty, etc., Corp., supra; Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040. A less degree of culpability may be sufficient where the rights of innocent third parties have intervened. Domenigoni v. Imperial Live Stock, etc., Co., supra; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418.

[11] In the case at bar we are not dealing with a situation where the buyer was "imposed upon" or was "induced" to make the purchase by any conduct of the seller. Quite the contrary, it appears that the plaintiff was more interested in acquiring the stock than the defendants were in selling it. The plaintiff himself testified that he was the one "who broached the subject of purchasing the stock right after he had been employed by the defendants." The trial court found "that at and before the time that plaintiff actually paid to defendant corporation the said sum of $2,500 for the purchase price of the stock in defendant corporation on February 18th, 1938, plaintiff was informed by the defendants and knew that defendant corporation was not at that time authorized to issue stock to plaintiff and that legal proceedings would have to be taken before any stock could be issued to plaintiff." Plaintiff attacks this finding on the ground that it is unsupported by the evidence. On this issue the plaintiff testified emphatically that the necessity for legal proceedings before the stock could be issued to him was never discussed with him or in his presence, and that the first time he learned that defendants had no permit on February 18, 1938, was on or about October 1, 1940, after he had consulted his own attorney regarding the pending termination of his employment. The defendant Edwards testified, however that he had numerous discussions with the plaintiff before February 18, 1938, on the necessity of taking care of the legal formalities before a permit to sell stock could be obtained, and that when the $2,500 was paid on February 18, 1938, it was understood by

all parties that no certificate could issue until the corporation's attorney could take the necessary legal steps. The defendant Phelps testified that he recalled a conversation between plaintiff and Edwards at or about the time when the money was paid in, at which the question came up as to when the stock would be issued; that Edwards told plaintiff that certain legal proceedings would have to be taken first; that the matter would be turned over to the corporation's attorney to do whatever was necessary; that plaintiff voiced no objection to this arrangement; and that before the agreement of December 15, 1938, was signed the reasons for such agreement were explained to plaintiff by Edwards in his (Phelps') presence. The record shows that this agreement was signed by plaintiff himself, a fact which is inconsistent with plaintiff's emphatic testimony which fixes the date of his first knowledge of the lack of a permit at October 1, 1940. We conclude that the finding complained of is not only supported by substantial evidence, but by what appears to have been a decided preponderance thereof.

When plaintiff was being examined concerning this agreement, to the question, "What was your object in signing it?" he replied, "There is nothing to cause me not to sign it, I still thought I was a stockholder."

By this document all of the parties in effect represented to the Commissioner of Corporations that no sale had yet taken place and that $2,500 in new capital was to come into the corporation, when in truth and in fact the plaintiff already considered himself a stockholder and the $2,500 had been received by the corporation some ten months before and had been used by it in the expansion program. The plaintiff knew from the first that a permit was required, he also knew that none had been obtained when he parted with his money, and he was so intent in his determination to obtain a financial interest in the defendant company that he was willing to execute an agreement, the effect of which constituted a fraud upon the Commissioner of Corporations.

[12] Plaintiff did not institute his action until almost two years after the shares were issued, and we are inclined to agree with the opinion of the trial court that "had business conditions been different, the suit would probably have never been filed." Viewing the transaction as a whole, we believe the plaintiff was equally culpable with the defendants, therefore in pari delicto and not entitled to recover. Campbell v. Julian Merger Mines, supra.

Plaintiff contends that his motion to strike defendants' memorandum of costs and disbursements should have been granted because the cost bill was served and filed too late.

The findings and judgment were drafted by defendants and submitted to the trial judge, who signed them on June 30, 1941. The judgment was entered on July 1, 1941. On July 9, 1941, defendants served plaintiff with a notice of entry of judgment and a memorandum of costs and disbursements. These documents were filed with the clerk of the court on July 14, 1941.

Section 1033 of the Code of Civil Procedure as amended in 1931, St.1931, p. 1761, reads as follows: "The party in whose favor the judgment is ordered, and who claims his costs, must serve upon the adverse party, and file at any time after the verdict or decision of the court, and not later than five (5) days after the verdict, or, if the action is tried without a jury, not later than five (5) days *after notice of the entry of the judgment,* a memorandum of the items of his costs and necessary disbursements in the action or proceeding * * * ." (Emphasis added.)

[13] Defendants contend that by virtue of the provisions of section 1010 of the Code of Civil Procedure the notice referred to in section 1033 means written notice. However, this point was decided adversely to defendants' contention in Kallmeyer v. Poore, 52 Cal.App.2d 142, 125 P.2d 924, wherein it was held that actual notice was sufficient. This decision is consistent with the earlier cases interpreting section 1033 as it read prior to 1929, when it required the service and filing of the memorandum within five days "after the verdict, or notice of the decision of the court * * *." See Dow v. Ross, 90 Cal. 562, 27 P. 409; Mullally v. Irish-American Benevolent Society, 69 Cal. 559, 11 P. 215; 7 Cal.Jur., p. 292, § 32.

[14, 15] Although knowledge or actual notice is sufficient under Code of Civil Procedure, section 1033, there appears to be nothing in the record which would evidence such knowledge prior to July 9, 1941, the date on which defendants signed the notice of entry of judgment. See,

Kallmeyer v. Poore, supra. This being the case, the memorandum was served and filed within the time required by the Code, and the motion to strike same was properly denied. Plaintiff argues that when the judgment was formally entered on July 1, 1941, it then became notice to all parties, and that it must be presumed that defendants had notice on said date. In 1929, St. 1929, p. 846, section 1033 was amended to require the filing of a cost bill within five days "after entry of the judgment"—no reference being made to "notice." This amendment placed upon the successful party the burden of constantly checking the records of the clerk of the court. It was to eliminate this burden that the 1931 amendment was enacted. If notice were to be presumed merely from the entry of the judgment, that portion of section 1033 added by the Legislature in 1931 would be rendered meaningless. Such an interpretation must be rejected.

The judgment and order denying the motion to strike the cost bill are affirmed.

PETERS, P. J., and WARD, J., concurred.



55 Cal.App.2d 489

CUPPLES v. CASTRO.

Civ. 12205.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1942.

Elections ⊂=305

Where contestant was declared elected and contestee appealed after which contestant died, rights of parties could not be determined in absence of contestant and his representative and submission would be set aside and cause taken from calendar to be heard only after representative of contestant should be substituted.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Election contest by Samuel E. Cupples against Clarence A. Castro. From a judgment for contestant, the contestee appeals.

Order in accordance with opinion.

David M. Burnett and John M. Burnett, both of San Jose, and Charles Wilcox, of Los Gatos, for appellant.

Rea, Free, Jacka & Frasse, of San Jose, for respondent.

STURTEVANT, Justice.

This is an appeal by the contestee in an election contest. He has brought up the judgment roll only. On April 7, 1941, a municipal election was held in the city of Santa Clara. Among the offices to be filled was the office of mayor. Clarence A. Castro, Samuel E. Cupples, and Peter Dies were the contesting candidates. The canvassing board found that Cupples and Castro each received 911 votes and declared Castro elected. The contestant Cupples filed a contest. The contestee Castro answered. The trial court made findings in favor of the contestant. It found that the contestant received 907 legal votes and that the contestee received 898 legal votes. Thereupon the trial court ordered a judgment to be entered in favor of the contestant. From that judgment the contestee appealed July 25, 1941. His transcript was filed May 15, 1942. The contestant died February 12, 1942. On July 24, 1942, Mr. Free, who had been one of the attorneys for the contestant in the trial court, filed an affidavit advising this court of the date of the death of the contestant. On October 14, 1942, the cause was on the calendar of this court for hearing. At that time our attention was called to the fact that the contestant died February 12, 1942, and the contestee submitted the matter. He now contends that no substitution under the facts would be proper and that the contestee may assert such rights as he has.

That assertion may not be sustained. It is not an open question in this state. Snibley v. Palmtag, 127 Cal. 31, 59 p. 200, involved a set of facts that is parallel in all material respects. Snibley and Palmtag were rival candidates for the office of supervisor in San Benito County. The canvassing board, the board of supervisors, declared a tie and also declared Palmtag elected. Snibley contested the election and the trial court also declared a tie and adjudged that the election of Palmtag by

the board of supervisors be annulled. Palmtag appealed. Later Snibley died. In presenting his appeal Palmtag contended that as the trial court found the election resulted in a tie the action should be remanded and that the trial court should be ordered to dismiss it. He asserted the action abated on the death of Snibley, that the representative of the decedent could not be interested in the action, that Snibley's estate would not be benefited by any possible judgment, that such estate is not an elector, and its representative may not be such. On page 32 of 127 Cal., on page 200 of 59 P., the court said:

"Were the cause of action one which would die with the person, still after judgment the action does not abate. It is then property, and goes to the estate of the successful party if he dies after judgment. The judgment may be attacked and set aside on appeal, but so long as it stands it is not affected by the death of either party. [Citing cases.]

"It is not correct to say that the estate of the deceased has no interest in the controversy. It is provided in section 1125 that, if the proceeding be dismissed for want of prosecution, or if the election be affirmed, 'judgment must be rendered against the party contesting such election for costs.' Having commenced the proceeding, and prosecuted it to judgment, by which the contestee is deprived of an office to which he had been declared elected, neither he nor his estate could escape the responsibility he has assumed. Appellant has a right to his appeal, and there is a chance that the judgment may be reversed, and that upon a retrial the election will be affirmed.

"The motion of the appellant is denied, but upon causing the representative of the estate of Snibley to be substituted the case will be heard."

So in the instant case, in the absence of the contestant and his representative this court may not determine that the contestee has rights, or what those rights may be.

It is ordered that the submission be set aside and that the cause go off calendar. Upon causing the representative of Cupples to be substituted the case will be heard.

SPENCE, Acting P. J., and DOOLING, J. pro tem., concurred.

55 Cal.App.2d 366

GRAFFIO v. BESSIRE et al.

Civ. 13796.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1942.

Hearing Denied Dec. 31, 1942.

1. Taxation ⇐699

The statute providing that if tax sold property was sold to state on or before July 6, 1940, and was redeemed on or before 90 days after statute becomes effective, the amount necessary to redeem property would be amount of sold taxes, with interest at five per cent. per year computed beginning day property was sold to state until time of redemption, but in no event computed beyond three years from day property was sold to state, would not be construed as intending to extend period of redemption, in view of other positive statutory provisions on subject of right of owner to redeem. St.1939, pp. 1325, 1345, §§ 3476–3478, 4101.5; St.1941, p. 2467, § 4101.-5.

2. Taxation ⇐695

The right of a property owner to redeem property from a tax sale comes from statutory provisions on the subject and all provisions set forth in statute must be followed.

Appeal from Superior Court, Los Angeles County; John G. Clark, Judge.

Action by M. Graffio against Grace M. Bessire and others to quiet title to certain parcel of land. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

J. Everett Brown, of Los Angeles, for appellants.

Joseph L. Altagen, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Defendants have appealed from a judgment quieting plaintiff's title in a certain parcel of land situated in the city of Los Angeles.

Defendant Bessire was the record owner of the property in dispute in the year 1936. She failed to pay the taxes assessed against the property and in that year it was sold to the State of California. Ever

since that time and up to the date of the trial she has failed to pay any taxes on the property. The tax collector of Los Angeles County on July 3, 1941, sold the property at public auction to plaintiff. A deed to the property was delivered to plaintiff on August 2, 1941, and was recorded on August 16, 1941.

It is the contention of defendants that the sale was premature and that their redemption period was extended for a period of 90 days from July 1, 1941, by an emergency act which became effective on that date. This act repealed section 4101.5 of the Revenue and Taxation Code and in place thereof provided a new section bearing the same number, reading in part as follows: "If tax-sold or tax-deeded property was sold to the State on or before July 6, 1940, and is redeemed on or before 90 days after this section becomes effective, the amount necessary to redeem the property is the amount of sold taxes, with interest on the amount of sold taxes at 5 per cent per year computed beginning the day the property was sold to the State to the time of redemption, but in no event computed beyond three years from the day the property was sold to the State. No other interest, costs, delinquent penalties, or redemption penalties accruing before 90 days after this section takes effect need be paid under such redemption." St.1941, p. 2467. Before its repeal by the emergency legislation section 4101.5 read as follows: "If tax sold or tax deeded property was sold to the State on or before July 6, 1938, and is redeemed on or before April 20, 1940, the amount necessary to redeem the property is the amount of sold taxes, with interest on the amount of sold taxes at 7 per cent per year computed beginning July 1, 1936, to the time of redemption. No other interest, costs, delinquent penalties, or redemption penalties accruing before April 20, 1940, need be paid on such redemption." St.1939, p. 1345.

Provisions governing the sale of property sold to the state for taxes and prescribing methods for redemption of the property are to be found in sections 3476, 3477, 3478 of the Revenue and Taxation Code, St.1939, p. 1325. It is therein provided that after a bid has been accepted at the sale the right of redemption is terminated except as to the purchaser, who shall pay the amount bid immediately and redeem the property within 30 days thereafter. If the purchaser does not redeem, the original owner's right of redemption is revived. In the case now before us it appears from the record that the purchaser did in fact redeem the property.

[1, 2] It is to be noted that the act which became effective on July 1, 1941, lowered the rate of interest on the amount of the taxes from 7 per cent to 5 per cent and provided that in no event should interest be computed beyond three years from the date the property was sold to the state. No language is found in the new statute which purports to extend the period within which redemption may be made. In view of the clear and positive provisions in section 3478 on the subject of the right of the owner to redeem, it is apparent that the Legislature would have used language which clearly provided for an extension of the period of redemption if indeed it had intended to extend the period. It is worthy of note that on earlier occasions the Legislature enacted moratorium legislation in which the time for the payment of taxes and for the redemption from tax sales was extended in unmistakable terms. See Stats.1933, p. 555; Stats.1935, p. 1062. The right of a property owner to redeem his property from a tax sale comes from the statutory provisions on the subject and all provisions set forth in the statute must be followed. Defendants have not complied with the statutory requirements.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

55 Cal.App.2d 417

PEOPLE v. STEIN.

Cr. 3603.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1942.

1. Criminal law ⇐59(5)

A person other than person who commits crime is not guilty thereof as "principal", unless he aids and abets in its commission. Pen.Code, §§ 31, 971.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

2. Criminal law ⇐507(1)

Witnesses conducting bawdy houses were not "accomplices" of man charged with offenses of permitting his wife to remain in such houses, in absence of evidence that such witnesses knew that defendant was such inmate's husband, as required to make them abetters, for word "abet" implies knowledge of wrongful purpose of perpetrator of crime. Pen.Code, §§ 31, 266g, 971, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Abet" and "Accomplice".

3. Prostitution ⇐4

In prosecution of husband for permitting his wife to remain in house of prostitution, evidence *held* sufficient to sustain trial court's findings that defendant knew that his wife was engaged in prostitution, permitted her to remain in such a house, and permitted and encouraged her to practice prostitution. Pen.Code, § 266g.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Josef Robert Stein was convicted of permitting his wife to remain in a house of prostitution, and he appeals.

Affirmed.

Alfred F. MacDonald and Carl B. Sturzenacker, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments finding him guilty on each of five counts of violating section 266g of the Penal Code (a husband permitting his wife to remain in a house of prostitution) after trial before the court without a jury defendant appeals. There are also appeals from orders denying his motions for a new trial.

Defendant concedes that:

(1) Geraldine Stein was his wife on the dates mentioned in the information, to wit, on or about February 15, August 16, and September 21, 1940, March 5, 1941, and January 14, 1942;

(2) His wife practiced prostitution on or about the dates and at the places mentioned in the information; and

(3) His wife entered such places for the purpose of carrying on the business of prostitution.

The evidence further discloses that defendant met his wife in December, 1939, and that she was then known as Geraldine Rice or Terry Nailes. In January, 1940, they were married in Reno, Nevada. They then went to Fresno, California, where defendant remained with his wife for about a week. He then left her there and came to Los Angeles where he was arrested on a report that Geraldine Rice was a missing person. He was permitted to return to Fresno and bring her to Los Angeles, where they were questioned by the Federal Bureau of Investigation and she admitted that prior to her marriage to defendant she had practiced prostitution.

Being released by the authorities, defendant and his wife remained in Los Angeles. Patricia Evans, who conducted a house of prostitution in the 1200 block on North Cienega Street in Los Angeles, testified that in the latter part of 1939 or the early part of 1940 a man named Dago Frank came to her house accompanied by defendant and his wife and introduced the latter as Terry Nash; that a discussion then ensued between the four of them relative to Terry Nash's entering her house as a prostitute; that during the conversation either Dago Frank or defendant asked her how much a girl could make, to which she replied, "It is all up to the girl; some girls could make more than others." She further testified that Terry Nash (defendant's wife) worked as a prostitute for her during the months of February, March,

and April, 1940; that while so employed the said Terry Nash averaged from $20 to $25 a day for herself, which was one-half of her earnings, the balance being paid to the witness; and that every night defendant came to her house of assignation, which closed at 2:00 or 2:30 in the morning, and took his wife home. On some occasions he would have to wait until his wife had finished entertaining a man who was in the house, to which defendant made no objection. The witness testified that she did not know defendant or his wife prior to the time that she was introduced to them by Dago Frank, on which occasion defendant was introduced as Miss Terry Nash. There is no evidence in the record that the witness every knew that defendant and Terry Nash were married.

Mrs. Frances Rosegarten, who conducted a bawdy house at 621 North Lillian Way, Los Angeles, testified that defendant and Terry Nash (defendant's wife) came to see her and discussed the matter of defendant's wife going to work for her and that one or the other inquired whether she could make $40 a day, $20 for herself and $20 for the house. Following the conversation defendant's wife remained in the house and practiced prostitution. On one occasion defendant came to the house and inquired of the witness where Terry was, and, when the witness stated to defendant that Terry was out, the defendant said that he would take the money due Terry. Whereupon the witness stated that she gave him $20 or $25 in cash for delivery to his wife. This was in the month of August, 1940. Later the witness moved her house of prostitution to 731 North St. Andrews Street, Los Angeles, where she conducted the business of prostitution and where defendant's wife worked for her. In September, 1940, this witness also testified, that while she was operating the last mentioned house defendant came to her place of business and visited with his wife. She also testified that she subsequently opened a house of ill repute at 1150 North Curson Street, where defendant's wife worked as a prostitute, and during the time that she was working there defendant visited his wife once or twice a week. The witness testified that she did not know that Terry Nash was defendant's wife.

The evidence further discloses that on July 26, 1941, defendant's wife under the name of Mrs. Dave Montrose rented a house at 8546 West Knoll Drive; that defendant appeared at the West Hollywood branch of the Southern California Edison Company and under the name of Dave Montrose contracted for electric service for said premises; that defendant's wife lived at the house with a maid until January 14, 1942, when a deputy sheriff, pursuant to an appointment with defendant's wife, went to the house and after waiting a short time was ushered into a bedroom where in response to a question to her as to the amount of her charge, she replied $10, whereupon she undressed and he took off his shoes and necktie. Whereupon the officer disclosed his identity and placed her under arrest. At about 12:00 o'clock defendant came to the front door and was admitted to the house, whereupon he looked around and said, "Well I guess this is the end of this house." Defendant had in his possession a key which fitted the front door and there was found on the premises a bathrobe that belonged to defendant. Defendant further stated to the officers that he didn't mind going to the penitentiary on a charge of robbery but he didn't want to be returned on a morals charge, for on such a charge he would be looked down upon by the inmates of the penitentiary.

Defendant urges reversal of the judgment on this proposition:

There is no substantial evidence to sustain the finding that defendant permitted his wife to remain in a house of prostitution, in the absence of the inferences which may be drawn from the testimony of the witnesses Evans and Rosegarten, which testimony defendant asserts must be disregarded because said witnesses were accomplices within the meaning of section 1111 of the Penal Code.

[1] This proposition is untenable and is governed by the following rule of law: Aside from the person who commits a criminal offense, no other party is guilty as a principal unless he aids and abets in the commission of the offense. (§§ 31 and 971, Pen.Code; People v. Dole, 122 Cal. 486, 492, 55 P. 581, 68 Am.St.Rep. 50.)

[2] The word "abet" implies knowledge of the wrongful purpose of the perpetrator of the crime. People v. Dole, supra. In the present case there is no evidence that either of the witnesses knew that defendant and Terry Nash were husband and wife. Therefore it is obvious that neither of the witnesses could have aided

and abetted in the commission of the crimes of which defendant was convicted, to wit, a husband permitting his wife to remain in a house of prostitution contrary to the provisions of section 266g of the Penal Code.

[3] Therefore, viewing the testimony of these witnesses in the light most favorable to the People (respondent) it is evident that the trial court properly found that the defendant knew that his wife was engaged in prostitution and permitted her in violation of section 266g of the Penal Code to remain in a house where this business was being conducted and also permitted and encouraged her to practice prostitution.

For the foregoing reasons the judgments and orders are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 383

CONNOLLY v. ZAFT et al.

Civ. 12143.

District Court of Appeal, First District, Division 2, California.

Nov. 5, 1942.

1. Appeal and error ⇐931(1)

Upon appeal from judgment in favor of plaintiff, evidence must be viewed in light most favorable to plaintiff.

2. Automobiles ⇐217(5), 245(72)

Pedestrian struck by automobile would be contributorily negligent as a matter of law if he took no precaution for his own safety in that he failed to look at all or to glance to either side or was in a position where he could not see, whereas contributory negligence would be a "question of fact" if pedestrian looked but did not see approaching automobile or, seeing it, erroneously misjudged its speed or distance or for some other reason assumed he could avoid injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Automobiles ⇐217(5)

Pedestrian about to cross city street is under no positive duty to stop, look and listen, but the question of pedestrian's negligence, under usual rule of ordinary care, that devolves upon pedestrians, must be examined in the light of all attendant circumstances.

4. Automobiles ⇐206

Pedestrian crossing street at intersection in marked cross lane could properly assume that automobile approaching intersection would yield the right of way to him. Vehicle Code, § 560(a), St.1935, p. 188.

5. Automobiles ⇐245(72)

Pedestrian's testimony that before crossing street in marked crosswalk at intersection and again before reaching nearest street car track he looked in both directions but did not see approaching automobile which under the circumstances must have been plainly visible had he looked did not warrant holding as matter of law that pedestrian was contributorily negligent in view of fact that he was entitled to assume motorist would yield him the right of way and that automobile was proceeding at lawful rate of speed. Vehicle Code, § 560(a), St.1935, p. 188.

6. Automobiles ⇐206

Pedestrian crossing street in marked crosswalk at intersection was entitled to assume that approaching automobile was proceeding at a lawful rate of speed.

7. Automobiles ⇐245(72)

Whether pedestrian struck by automobile while crossing street in marked crosswalk was contributorily negligent in failing to step backward when he saw approaching automobile at a distance of 70 or 75 feet when he had reached nearest rail of street car track nearest opposite side of street was a "question of fact" under evidence showing pedestrian was almost beyond the path of automobile when struck, and that automobile was traveling about 35 miles per hour and zigzagging. Vehicle Code, § 560 (a), St.1935, p. 188.

8. Automobiles ⇐245(72)

In pedestrian's action for injuries sustained when struck by automobile while crossing street in marked crosswalk at intersection, conflicting evidence as to whether pedestrian was contributorily negligent was for jury. Vehicle Code, § 560 (a), St.1935, p. 188.

9. Appeal and error ⇐1011(1)

District Court of Appeal could not disturb trial court's finding from conflicting evidence that pedestrian struck by automobile while crossing street was not contributorily negligent where there was substantial competent evidence to support such finding.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by John P. Connolly against Alfred Zaft and another for injuries suffered by plaintiff when struck by an automobile driven by the named defendant with the consent and permission of owner. Judgment for plaintiff, and defendants appeal.

Judgment affirmed.

Albert Picard, of San Francisco, for appellants.

Elton C. Lawless and Vincent W. Hallinan, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Defendants have appealed from a judgment in favor of plaintiff after a trial by the court sitting without a jury. The action was one to recover damages for personal injuries alleged to have been incurred when the plaintiff, a pedestrian, was struck by an automobile driven by the appellant Zaft with the consent and permission of appellant Sommers, the owner of the car. Neither the amount of the judgment nor the sufficiency of the evidence to sustain the finding of defendant's negligence is challenged. Appellants' sole contention is that the evidence required a finding as a matter of law that plaintiff was guilty of contributory negligence. We, of course, must view the evidence in the light most favorable to respondent.

The accident occurred at the well lighted intersection of Mission and 30th Streets in the City and County of San Francisco on July 15, 1939, at about 1:40 o'clock in the morning. Mission Street runs north and south and 30th Street runs east and west. There are pedestrian lanes at the intersection marked by metallic discs. There are street car tracks on Mission Street and a marked loading zone immediately to the north of the north pedestrian lane. Defendant Zaft was driving the automobile south on Mission Street. Plaintiff was walking west in the north pedestrian lane. As plaintiff left the east curb he looked up and down Mission Street but did not observe any traffic. When he reached the east rail of the northbound tracks he again looked up and down the street but did not observe any traffic. When he reached the east rail of the southbound tracks he looked to his right and then, for the first time, observed the defendant's car, then about 70 to 75 feet away traveling in the area of the southbound tracks, going about 35 miles per hour and zigzagging. The headlights were illuminated and threw a beam of about 100 feet. The plaintiff moved back and forth and when struck was in approximately the same position as when he had first observed the car. He was struck by the right front headlight, which was broken. After the impact Zaft traveled about 40 feet into the middle of the intersection carrying or dragging the plaintiff with him. The plaintiff was found immediately in front of the right front wheel in an unconscious condition.

[2-6] The rule of law applicable to the question presented is so well settled that a review of the numerous decisions wherein it has been repeatedly reiterated could serve no purpose. It is adequately expressed in the oft quoted language in White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, 1091: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." Appellants expressly concede this to be the rule but seek to avoid its application upon the assertion that it may only be invoked when there are circumstances which account for the failure to see, such as heavy pedestrian traffic or the confusion of a busy intersection. The decided cases do not recognize any such qualification but to the contrary they have applied the rule frequently where no such circumstances were present. Nor do the

three authorities cited by appellants support their contention. It is appellants' position that if plaintiff had looked, as he testified he did, he must have seen that which was plainly visible and that therefore he could not have looked. The identical contention was made and is answered in Mann v. Scott, 180 Cal. 550, at pages 553 and 554, 182 P. 281, at page 282, where the court said: "Appellants contend that, before leaving the sidewalk to board the street car as it stood in Main Street opposite her, respondent, as a matter of law, was in duty bound to look toward the north to see if any automobile was approaching, and, further, that, had she so looked, she necessarily must have seen appellants' on-coming automobile, and that, therefore, her testimony that she did look and saw no automobile is not enough to support a verdict in her favor—citing in support of this contention Chrissinger v. Southern Pacific Ry. Co., 169 Cal. 619, 149 P. 175, an action against a steam railway company. * * * There is no positive duty to stop, look, and listen when a pedestrian is about to cross a city street. * * * Blackwell v. Renwick, 21 Cal.App. 131, 131 P. 94; * * * Clark v. Bennett, 123 Cal. 275, 55 P. 908. Compare, also, Scott v. [San Bernardino Valley] Traction Co., 152 Cal. 604, 610, 93 P. 677. The question of negligence under the usual rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing certain fixed regulations for observance by automobile drivers. And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *" Here, as in the Mann case, plaintiff was entitled to the right of way (Vehicle Code, § 560(a), St. 1935, p. 188) and could properly assume that it would be yielded to him (Ladas v. Johnson's B. & W. Taxicab Co., 43 Cal. App.2d 223, 228, 110 P.2d 449) at least until the contrary was evident. In the instant case there is a further answer to appellants' argument. Plaintiff's purpose in looking was to ascertain signs of danger. The trial court, in view of the testimony as to the speed of the car, might reasonably have inferred that when plaintiff looked the first and second times the car was so far distant as not to be an apparent menace and that, therefore, its presence made no impression on plaintiff's mind. We certainly cannot say that such an inference is unreasonable as a matter of law, particularly in view of the fact that plaintiff was entitled to assume that the car was proceeding at a lawful rate of speed. Collom v. Bloch, 70 Cal.App. 33, 38, 232 P. 486.

The three cases relied upon by appellant are clearly distinguishable upon their facts. In Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031, the street was wet, it was very dark, the plaintiff was carrying a box on his shoulder which obstructed his vision, the defendant was traveling at a slow rate of speed, and the accident did not happen at an intersection. The distinction seems manifest. In Horton v. Stoll, 3 Cal.App.2d 687, 40 P.2d 603, 604, the court said: "It was plaintiff's further duty from the position she was in upon the highway to yield to defendant the right of way (California Veh. Act, * * * § 131½c)." Here the contrary was true. In Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 59 P.2d 856, the plaintiff stepped off the curb contrary to the direction of a police officer and without looking in either direction walked into the side of a street car which had started to cross the intersection before the signals had changed to indicate that traffic should proceed in the other direction. That the Flores case must be confined to its particular facts is clear from the opinion in Young v. Tassop, 47 Cal.App.2d 557, 118 P.2d 371, wherein it is distinguished.

[7] At the oral argument appellants argued that when plaintiff did observe the car about 70 to 75 feet away he could have avoided the accident by merely taking a step backwards and that it was contributory neg-

ligence for him not to have done so. This argument is fallacious for at least three reasons: first, it was not yet apparent that the car could not be stopped before reaching the pedestrian zone, and we certainly cannot say as a matter of law that plaintiff was not entitled to presume that it would be; second, in view of the fact that the point of impact was the right front light, or under appellants' theory the right front fender, the trial court might very properly have concluded that had the car been proceeding at a lawful rate plaintiff would have been clear of its path before it reached the intersection; and third, appellants' car was zigzagging so that the lower court could have concluded that this erratic conduct confused plaintiff and that it was this confusion which caused him to step forward and backward not knowing immediately the safest course to pursue.

[8, 9] This case presents nothing more than the ordinary case of a conflict in the evidence. As we are compelled to reiterate with tiring regularity we cannot disturb a finding based upon such a conflict where there is substantial competent evidence to support it.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



55 Cal.App.2d 484

In re SHAFTER–WASCO IRR. DIST.

BOARD OF DIRECTORS OF SHAFTER–WASCO IRR. DIST. v. WESTENBERG et al.

Civ. 3069.

District Court of Appeal, Fourth District, California.

Nov. 9, 1942.

1. Appeal and error ⇐41(1)

A proceeding for the dissolution of an irrigation district is a "special proceeding provided by law" within meaning of provision of Constitution that district courts of appeal shall have original appellate jurisdiction on appeal from superior court in such special proceedings as may be provided by law. St.1903, p. 5, § 4; Const. art. 6, § 4b.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding Provided by Law".

2. Appeal and error ⇐439, 455

The proper filing of a notice of appeal removes the cause from the jurisdiction of the trial court, and such cause is no longer "pending" in such court for the purpose of amending or vacating the judgment for errors apparent on the face of the record. Code Civ.Proc. § 940.

See Words and Phrases, Permanent Edition, for all other definitions of "Pending".

3. Appeal and error ⇐454

When a cause has been removed from the jurisdiction of the trial court by the proper filing of a notice of appeal, the consent of the parties cannot reinvest the trial court with jurisdiction of the subject matter of the cause. Code Civ.Proc. § 940.

4. Appeal and error ⇐439

After a timely and valid notice of appeal has been given, the jurisdiction of the trial court as to any matter relating to the correctness or validity of the judgment is suspended, and the power to determine those questions rests in the court in which the appeal is pending. Code Civ.Proc. § 940.

5. Appeal and error ⇐1181

Section of Constitution providing for suspension of right of justices of district court of appeal to draw salaries in event of failure to decide cases within 90 days after submission for decision indicates intention on part of the people to give appellate court 90 days after the submission of the case in which to decide it. Const. art. 6, § 24.

6. Constitutional law ⇐50

It is within the power of the Legislature to impose reasonable rules and regulations governing the exercise of a constitutional power, but Legislature may not impose such unreasonable rules as to virtually nullify such powers.

7. Statutes ⇐181(1), 212

The legislative intent in passing a statute will be given effect by the courts, but absurd or unjust results will never be ascribed to the Legislature and the Legisla-

ture will never be presumed to have used inconsistent provisions as to the same subject in the immediate context.

8. Statutes ⇐200, 208

In the interpretation of statute, courts are not bound by grammatical rules, and may ascertain the meaning of words by the context.

9. Constitutional law ⇐48

Courts should construe statutes so that they may be held constitutional where it is reasonably possible to so hold.

10. Statutes ⇐227

The use of the word "must" in a statute does not always require the holding that the duties imposed are "mandatory" though that is usually the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory" and "Must".

11. Appeal and error ⇐1181

The statutory provision that an appeal in proceeding to confirm dissolution of irrigation district must be heard and determined within three months after the taking of such appeal is "directory" and was merely intended to give appeal as early a hearing and decision as orderly procedure in appellate court would permit and did not entitle respondent to dismissal of appeal from judgment refusing to confirm dissolution of irrigation district, where strict application of statute would have required determination of appeal 33 days after record was filed, three days after appellant's brief was filed, and 27 days before respondent's brief was due. St.1903, pp. 3, 5, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory".

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the Shafter-Wasco Irrigation District on dissolution. From a judgment refusing to confirm the dissolution proceeding, the Board of Directors of the Shafter-Wasco Irrigation District appeals. Charles Westenberg and others were respondents. On motion to dismiss the appeal.

Motion denied.

H. E. Schmidt, of Bakersfield, and Ernest H. Tuttle, of Fresno, for appellant.

Maddox & Abercrombie, of Visalia, for respondents.

MARKS, Justice.

This is a motion to dismiss the appeal of the Shafter-Wasco Irrigation District (hereinafter called the district) from a judgment refusing to confirm the dissolution proceedings of the district. The motion is made upon the ground that the time fixed by statute for the hearing and determination of the appeal has expired and that this court has lost jurisdiction to hear and determine the same.

The district was duly organized and is existing under the laws of the state. It took proceedings for its voluntary dissolution under an act entitled "An act to provide for the dissolution of irrigation districts, the ascertainment and discharge of their indebtedness, and the distribution of their property." Stats.1903, p. 3, as amended. We will hereinafter refer to this legislation as the act.

After taking proceedings for its dissolution under the prior sections of the act, the district filed its petition in the Superior Court of Kern County, being the county in which it is located, to determine the validity of the proceedings and plan for dissolution. Respondents appeared and contested the proceedings and judgment went against the district. The appeal followed.

The last two sentences of section 4 of the act, under which section the proceedings in the court below were had, provide as follows: "Such action shall be speedily tried and judgment rendered. Either party shall have the right to appeal at any time within thirty days after the entering of such judgment, and the appeal must be heard and determined within three months after the taking of such appeal."

It would appear that the petition was filed in the court below on December 16, 1941. The contest of respondents was filed on April 22, 1942, and the cause proceeded to trial on that day. Findings of fact and conclusions of law were signed and filed on May 20, 1942, and the judgment was filed and entered on the same day. Notice of appeal to this court was filed on June 19, 1942. Notice of request for transcript was filed on June 25, 1942. The clerk's transcript was certified on July 13th and the reporter's transcript on August 13, 1942. Both transcripts were filed in the office of the clerk of this court on August 17, 1942, and appellant's opening brief

was filed on September 16, 1942. The motion to dismiss was filed on October 1, 1942, and was argued on October 13, 1942, both dates being prior to the time in which respondents' brief must be filed.

It thus appears that all the proceedings in this appeal have been taken within the times established for appeals in ordinary cases and unless the quoted provisions of section 4 of the act are mandatory and the lapse of time has divested this court of jurisdiction to hear the appeal the motion should be denied.

[1] Section 4b of article VI of the Constitution provides in part as follows: "The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts * * * in such other special proceedings as may be provided by law * * *." As this is a special proceeding provided by law this court is given original appellate jurisdiction in this case.

An appeal is taken by the filing of a proper notice of appeal in the trial court. § 940, Code Civ.Proc.

[2-4] When the notice of appeal is properly filed it has the effect of removing the cause from the jurisdiction of the trial court. "It was no longer pending therein for the purpose of amending the judgment or of vacating it for errors apparent on the face of the record. The consent of the parties could not reinvest the court with jurisdiction of that subject-matter." Kinard v. Jordan, 175 Cal. 13, 164 P. 894, 895. After a timely and valid notice of appeal has been given the jurisdiction of the trial court as to any matter relating to the correctness or validity of the judgment is suspended and the power to determine those questions rests in the court in which the appeal is pending. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805; Field v. Hughes, 134 Cal. App. 325, 25 P.2d 241; Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355.

No attack is made on the procedure followed in taking this appeal. Therefore, by virtue of the appeal the case is now pending in this court under the direct authority of the Constitution. The question here presented may be thus stated: May the Legislature divest this court of its constitutional jurisdiction over the case and its duty to decide it by limiting the time in which a decision must be rendered, to a period within which it is impracticable, if not impossible, to decide the issues?

[5] We find but one limitation in the Constitution on the time within which an appeal must be decided. § 24, art. VI, Const. The penalty there provided for failing to decide a case within ninety days after it has been submitted for decision is not loss of jurisdiction over the case by the court, but suspension of the right of the justices to draw their salaries. While this provision does not necessarily answer the question before us, it indicates an intention on the part of the people in adopting it to give an appellate court ninety days after the submission of a cause in which to decide it.

[6] Of course it is within the power of the Legislature to impose reasonable rules and regulations governing the exercise of a constitutional power. It is equally true that those constitutional powers may not be so restricted by unreasonable rules as to virtually nullify them. If the statute in question be strictly construed as mandatory and as divesting this court of jurisdiction in three months after the appeal was taken we would have had to decide the case by September 19, 1942, one month and two days after the record was filed here, three days after appellant's opening brief was filed and twenty-seven days before respondents' brief was due for filing. We regard such a limitation on our constitutional power to decide the case as unreasonable under the circumstances here presented. While the record is not formidable it is not inconsiderable. While we have not examined it, there may be presented serious questions for decision that might require careful consideration which could not be given within the time provided by the statute.

Of course it is true that the statute provides that the appeal must be heard and determined within three months after it has been taken. Such language is usually construed as mandatory.

[7, 8] It is a general rule of statutory construction that the legislative intent in passing a statute is to be given effect by the courts. One rule of construction was laid down in Re Washer, 200 Cal. 598, 254 P. 951, 954, as follows:

"We are mindful of the rules of construction which must bind us, which said rules are as follows:

"'Absurd or unjust results will never be ascribed to the Legislature and it will not be presumed to have used inconsistent

provisions as to the same subject in the immediate context. The courts will be astute to avoid such results (Wells Fargo & Co. v. Mayor, etc., of Jersey City [D. C.], 207 F. 871). In the interpretation of statutes courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. Cavender v. Hewitt, 145 Tenn. 471, 239 S.W. 767, 22 A.L.R. 755.'" See, Fresno City H. S. Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668; Southern Pacific Co. v. Riverside County, 35 Cal.App.2d 380, 95 P.2d 688.

[9] It is also true that courts should construe statutes so they may be held constitutional where it is reasonably possible to do so.

In view of these rules we are required to so construe the last sentence of section 4 of the act so that it may be held to be constitutional rather than to construe it literally and thereby have to hold it an unreasonable limitation on the constitutional powers of the appellate and supreme courts.

[10] The use of the word "must" in a statute does not always require the holding that the duties imposed are mandatory. In Estate of Chadbourne, 15 Cal.App. 363, 114 P. 1012, 1014, the court said: "In accordance with this primary rule of interpretation, courts have construed 'may' as mandatory giving it the meaning of 'shall' or 'must' (Estate of Ballentine, 45 Cal. [696], 699; Hayes v. County of Los Angeles, 99 Cal. 74, 33 P. 766; Sutherland on Statutory Construction, 634); and in many cases it is held that 'shall' and 'must' are directory merely (Wallace v. Feely, 61 How.Prac.N.Y. 225; Merrill v. Shaw, 5 Minn. 148, (Gil. 113); In re Thurber's Estate, 162 N.Y. 244, 56 N.E. 631; Stone v. Pratt, 90 Hun 39, 35 N.Y.S. 519; First Nat. Bank of Séneca v. Lyman, 59 Kan. 410, 53 P. 125; Cooke v. Spears, 2 Cal. 409, 56 Am.Dec. 348; People v. Sanitary Dist. of Chicago, 184 Ill. 597, 56 N.E. 953)." See also, Estate of Atkins, 121 Cal.App. 251, 8 P.2d 1052.

[11] We therefore conclude that the quoted sentence of the act is directory and was intended to give this appeal as early a hearing and decision as orderly procedure in this court will permit.

Respondents cite the cases of Crall v. Poso Irrigation District, 87 Cal. 140, 26 P. 797; Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769, 45 P. 822, 1047, and Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885, not as direct authority on the question here (they admit there is none) but by analogy as supporting their position. We have studied the cases and find nothing in them requiring us to change the conclusions we have reached.

The motion to dismiss is denied.

BARNARD, P. J., and GRIFFIN, J., concurred.



55 Cal.App.2d 444

BRUNSWIG DRUG CO. et al. v. SPRINGER et al.

Civ. 13780.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1942.

1. Judgment ⇐622(2)

Where buyer sued for rescission of conditional sales agreement on ground of fraud and asked for damages if rescission was denied, it was incumbent on sellers under codal provisions requiring pleading of new matter constituting defense, and prohibiting subsequent maintenance of action arising out of "transaction" sued on if counterclaim is not made, to recoup for any claims held against buyer and not having done so, although court early announced there was no effective rescission and sellers thereafter amended their answer, judgment for buyer for damages barred a subsequent action by sellers for moneys due under conditional sales agreement and open account, since they arose out of the "transaction" alleged in buyer's action, which upon court's ruling that there was no effective rescission became converted to a "demand for money". Code Civ.Proc. §§ 437, 439.

See Words and Phrases, Permanent Edition, for all other definitions of "Demand for Money" and "Transaction".

2. Action ⇐53(1)

A party cannot by negligence or design withhold issues and litigate them in consecutive actions.

3. Action ⇐12, 53(1)

A party may not split his demands or his defenses.

4. Equity ⇐39(1)

Equity will not deal with a case by piecemeal.

5. Judgment ⇐713(2)

In testing the merits of a plea of "res judicata" it is not what actually was done but what might have been done that is concluded by a former judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Fraud ⇐36

A seller may offset his money demands against the damages awarded for seller's own fraud.

7. Election of remedies ⇐7(1)

Where buyer sued for rescission of conditional sales agreement on ground of fraud and asked for damages if rescission was denied, buyer did not lose his action for damages by suit for rescission.

8. Set-off and counterclaim ⇐60

"Transaction" as used in section of Code of Civil Procedure providing that if defendant omits to set up a counterclaim upon a cause arising out of the "transaction" set forth in the complaint as foundation of plaintiff's claim he cannot afterwards maintain an action against plaintiff therefor means the entire series of acts and mutual conduct of the parties. Code Civ.Proc. § 439.

9. Judgment ⇐622(2)
Sales ⇐131

Where buyer sued for rescission of conditional sales agreement on ground of fraud and asked for damages if rescission was denied and sellers failed to recoup claims held against buyer, judgment for buyer for damages barred subsequent action by sellers for moneys due under conditional sales agreement and buyer was entitled to return of note pledged to secure buyer's performance of agreement and all sums paid to sellers on account of it. Code Civ.Proc. §§ 437, 439.

10. Judgment ⇐743(3)

Where fixtures covered by conditional sales agreement were attached in proceeding to which buyer was a party and seller filed a third party claim, judgment awarding fixtures to seller was "res judicata" of ownership of fixtures asserted by buyer in subsequent action against seller. Code Civ. Proc. § 689.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge.

Action by Brunswig Drug Company and another against H. H. Springer and others on note, moneys due on open account and balance due under conditional sales agreement, wherein defendants filed counterclaim and cross-complaint for moneys allegedly due. From the judgment rendered, plaintiffs appeal.

Judgment amended and as amended affirmed.

J. Everett Blum, of Los Angeles, for appellants.

Dailey S. Stafford and William H. Haupt, both of Los Angeles, in pro per. for respondents.

MOORE, Presiding Justice.

An action having been prosecuted by respondent Springer for rescission of a conditional sales agreement wherein rescission was denied but damages were awarded on account of the fraud of these appellants, the question is whether appellants may in this second action recover moneys which Springer was obligated to pay under such agreement, appellants having neglected to demand such moneys as a recoupment or as defensive matter in the first action. Incidentally also, it must be determined whether such vendee is entitled to recover a certain security pledged by him to secure his own performance of the sales agreement.

On January 12, 1939, defendant Springer entered into the conditional sales agreement, hereinafter referred to as "the agreement," with the Angeles Credit Company, Ltd., hereinafter referred to as "Angeles," for the purchase of certain property consisting of furniture, fixtures and stock of merchandise in a certain drug store on La Brea Street in the city of Los Angeles. The consideration passing from Springer for such property was (1) a contract and note for the sum of $4,872.30; (2) a promissory note in the sum of $300; (3) his agreement to purchase certain merchandise from Angeles and Brunswig Drug Company, hereinafter referred to as Brunswig, to replenish his stock. Subsequently, cer-

tain merchandise was purchased from Brunswig in the sum of $926.76.

Thereafter Springer instituted action No. 442-785 against Brunswig and Angeles for rescission of the agreement on the ground of fraud in the inducement of the contract. He thereby demanded rescission with damages, and his prayer was "that in the event it be determined upon the trial of this action that plaintiff is not entitled to a rescission of said sale, then that plaintiff have judgment against the defendants in the sum of $7,500 as and for his damages by reason of said fraud." To such complaint Brunswig and Angeles answered by a general denial and nothing more. At the termination of the trial, findings and conclusions were made in favor of Springer denying his rescission, but judgment was entered December 13, 1939, awarding him damages in the sum of $3,568.53 against Brunswig and Angeles. Upon appeal the judgment was affirmed. Springer v. Angeles Credit Co., 44 Cal.App.2d 712, 113 P.2d 7.

Two events of factual importance will here be recorded for they must be reckoned with in deriving a total solution of the pending problem. (a) On the 29th of January, 1940, 47 days after entry of the Springer judgment, an action was pending in the Municipal Court of the City of Los Angeles under and by virtue of which the fixtures and other chattels described in the agreement were attached. Angeles thereupon filed a third party claim, asserting ownership of such fixtures. Under appropriate proceedings, § 689, Code Civ.Proc., it was determined that Angeles was the owner of the fixtures held under the attachment and that Springer was the owner of the other chattels held under the same levy. (b) Contemporaneously with the execution of the agreement, Springer pledged to Angeles a certain note of Walter Glessener as additional security for the performance of the agreement. At the time of the entry of the Springer judgment there remained unpaid on the Glessener note the sum of $3,882.45. After the entry of the Springer judgment in December, 1939, Brunswig and Angeles collected from Glessener on said note and retained $2,-111.34. Springer having made demand for such money and the Glessener note and for the fixtures involved in the third party claim, his demands were rejected.

Appellants filed their complaint in the present action August 29, 1941, to recover the balance due on (1) the $300 note given by Springer to Brunswig in November, 1938; (2) the open account of Springer with Brunswig in the sum of $926.76; (3) the balance of $2,990 in favor of Angeles on the conditional sales agreement.

In their complaint appellants allege that each of the above mentioned items of indebtedness "arose out of the same transaction and were transactions connected with the same subject of action," recite the entry of the Springer judgment in action 442-785 in the approximate sum of $4,000 and the assignment by Springer of his judgment to respondents Stafford and Haupt.

After making certain denials in their answer respondents herein alleged: (1) The satisfaction of appellants' demands; (2) the finality of the Springer judgment and its affirmance on appeal; (3) the institution of the Springer action (442-785) and the omission by appellants to allege Springer's obligations under the agreement as a counterclaim; (4) the provision in the agreement that upon default of Springer Angeles might declare the unpaid balance of the contract and terminate the rights of Springer in and to the goods and chattels described in the contract; (5) the election by Angeles, on December 11, 1939, to terminate the agreement and the forfeiture of the rights of Springer thereunder; (6) the filing of its notice and claim of ownership of the fixtures in the municipal court action above mentioned, the consequent judgment that Angeles was the owner of the fixtures and that Springer was the owner of other chattels held under attachment; and finally, (7) the illegality of the consideration for the $300 note of Springer to Brunswig in that such loan was contrary to the Alcoholic Beverage Control Act.

In addition to such defenses, respondents alleged "that the plaintiff Angeles Credit Company engaged in all of the transactions hereinbefore alleged to have been had, for and in co-operation with the plaintiff Brunswig Drug Company"; that they are entitled to the return from appellants of the Glessener note and all moneys collected on it, because Springer had paid and discharged all of his obligations under the sales agreement; that Angeles had undertaken to forfeit Springer's rights under the agreement and had taken possession of the fixtures and the merchandise on hand, but neglected to return either the Glessener note or the moneys collected

from him or the fixtures of the value of $1,000 although Springer was entitled to all of them by virtue of the agreement.

By his cross-complaint Springer alleged all the facts set forth in the counterclaim; also, that under the sales agreement the seller had two remedies, viz.: right to the purchase price or the right to forfeit vendee's interest and possess the fixtures and merchandise; that appellants had declared a forfeiture and had taken possession of the Glessener note and retained the moneys collected from Glessener; that Springer under the agreement was owner of the fixtures and equipment of the value of $1,000 which had been converted by appellants; that Springer had given his promissory note dated November 21, 1938, to Angeles in the sum of $4,872.30, which had not been cancelled; that upon payment of the sums due by Springer under the agreement, appellants had withheld the Glessener note upon which was still unpaid the sum of $2,192.45, and that appellants had asserted ownership thereof; also that they had withheld from Springer the sum of $2,111.32 collected from Glessener on account of such note.

By his prayer Springer asked rejection of the demands of plaintiffs; demanded $2,111.32 collected on the Glessener note and the Glessener note or in lieu thereof the sum of $2,192.45; also $800 as the value of the fixtures, and the cancellation of his note in the sum of $4,872.30.

The court made findings in accordance with the prayer of respondents and by its judgment denied all relief to appellants, cancelled Springer's note to Angeles, awarded Springer judgment for the sums of $2,192.45 and $2,111.32 with interest, and for $800, the value of the fixtures.

[1] (1) It is at once apparent that the paramount issue is whether the judgment in the Springer action for rescission was an adjudication of all the rights of appellants under the agreement. The authorities seem to establish the correctness of the judgment. When Angeles and Brunswig were sued for the fraud that induced the agreement, it was incumbent upon them to recoup for any claims they had against Springer. Section 437 of the Code of Civil Procedure provides that the answer shall contain not only denials but also a statement of "any new matter constituting a defense" or a counterclaim. Section 439 provides that if defendant "omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." There can be no doubt that appellants' demands here are based upon the agreement and that they therefore arose out of the "transaction" alleged in Springer's complaint for rescission of that instrument. Appellants contend that the Springer action was not a demand for money but that it was an action in equity and that they were not in such an action required to counterclaim. With this we cannot agree. While Springer asked for rescission with damages, he also prayed for damages in the event he should not be entitled to rescission. Moreover, in the early stages of the first trial the court stated: "I am inclined to think that the preponderance of the evidence tends to show that there was no effective rescission." In such eventuality, the parties became engaged in a contest solely for money. Hence, when appellants thereafter amended their answer during the progress of the first trial the law required them to plead their demands based upon the agreement. They were not privileged to take their chances of defeating Springer there and later, in a separate action, to ask for a performance by Springer of all his obligations under the agreement.

[2-4] A review of the authorities leaves no doubt of the correctness of the views above expressed. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497. He may not split his demands or his defenses. Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.2d 1003; 15 R.C.L., § 226, p. 969. Equity will not deal with a case by piecemeal. Bank of America v. Feig, 21 Cal.App.2d 247, 252, 68 P.2d 985; 10 Cal.Jur. 496.

[5, 6] In testing the merits of the plea of res judicata, it is not what actually was done, but what might have been done that is concluded by a former judgment. Olney v. Cavell, 138 Cal.App. 233, 236, 32 P.2d 181. In an action for rentals, a cross-complaint for damages for the fraud in the inducement of the contract alleged "defensive" matter and was therefore proper. Gardner v. Cookson, 213 Cal. 359, 2 P.2d 370. The converse must be also true. In an action to enforce a forfeiture of a ven-

dee's rights under a contract of sale, defendants are entitled to recover in the same action any damages suffered by reason of the fraud of the vendor in inducing the sale. Nevada Land & Investment Corp. v. Sistrunk, 220 Cal. 174, 177, 30 P. 2d 389. By the same token the vendor may recover to the extent of the nonperformance on the part of plaintiff who has taken the initiative and sued the vendor for fraud committed as an inducement of the sale. If the buyer may counterclaim the seller's fraud as a defense without offering restitution, as held in the Sistrunk case, no good reason appears why the seller should not offset his money demands against the damages awarded for the seller's own fraud. The unpaid portion of the moneys Springer was obliged to pay appellants under his agreement was a necessary part of the consideration for the merchandise and chattels purchased by Springer, and it should have been alleged in the former action as an offset against the damages pleaded by Springer. English v. English, 9 Cal.2d 358, 363, 70 P.2d 625, 128 A.L.R. 467. Since it was within the scope of Springer's action and related to the subject matter thereof and relevant to the issues raised by Springer's complaint so that it could have been raised, "the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." Sutphin v. Speik, supra, at page 202 of 15 Cal.2d, at page 655 of 99 P.2d. Where G, after sale of lands to W, declared a default, excluded W from the lands and obtained a judgment quieting title, it was held that G's subsequent action for moneys due under their contract was adjudicata by reason of the judgment in the former action. Gaskill v. Wallace, 32 Cal.App.2d 354, 89 P.2d 687.

[7, 8] Springer did not lose his action for damages by his suit for rescission. Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445; Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039. By reason of this principle his action for damages was constantly in the background from the moment of filing his action to enforce a rescission. Since his action for damages was a continuous threat and a potential judgment, appellants can offer no reasonable justification or excuse for their failure to counterclaim in the Springer case to the extent of Springer's debt under the agreement. They further rendered their position untenable by their allegation that the claims alleged in their complaint "arose out of the same transaction and were transactions connected with the same subject of action." Such was substantially the findings in the Springer case. The balance claimed by their complaint herein is based upon the very contract which Springer sought to have cancelled. The transaction alleged in appellants' complaint includes "the entire series of acts and mutual conduct of the parties." Story & Isham Commercial Co. v. Story, 100 Cal. 30, 32, 34 P. 671, 674.

The authorities relied upon by appellants (Ward v. Goetting, 44 Cal.App. 435, 186 P. 640; Parish v. Studebaker, 50 Cal.App. 719, 195 P. 721, and Wolcott v. Salyer, 217 Cal. 225, 17 P.2d 1000) contain nothing contrary to the conclusions above announced or to the decisions herein cited with approval. The Ward case was an action on the ground of fraud to cancel a note given a few days prior to his filing suit. He demanded no affirmative relief, while Springer asked, in the alternative, for damages. In the Wolcott case Salyer was a defendant in the former action in which plaintiff sought to impress a trust upon corporate stock or in the alternative to recover money. The only issue disposed of then was the debt of her codefendant, Leonard. The trial court there declined to consider the issue of ownership of the stock although it was of the view that Leonard was the owner. Consequently, in the reported case (second action) it was held that there was nothing to hinder plaintiff, who had acquired the stock by levy and sale, from quieting his title against Mrs. Salyer.

[9] Inasmuch as appellants yielded all their rights or advantages by failure to counterclaim in the Springer action, Springer was entitled to a return of the Glessener note which had been pledged to secure Springer's performance of the agreement. It ceased to perform such office upon the discharge of Springer's indebtedness. Therefore, Springer was entitled to a return of the Glessener note and all sums paid to appellants on account of it. Elm v. Sacramento Suburban Fruit Lands Co., supra.

[10] To that part of the judgment awarding Springer $800 for the fixtures taken by appellants we cannot give approval. The very doctrine of res judicata must be applied to Springer's claim for

that sum as it has been applied above against appellants. At the time Angeles filed its third party claim it invoked the benefits of section 689 of the Code of Civil Procedure. In the ensuing trial, Springer appeared as an interested party. The judgment awarded appellant Angeles the ownership of the fixtures. Under the authorities heretofore cited that judgment was decisive of all the rights of Springer to the ownership of the fixtures; hence neither the agreement, Springer's default, the declaration of forfeiture nor the Springer judgment was of any avail against a judgment that had specifically determined the ownership of the fixtures.

It is therefore ordered that the judgment be amended by striking therefrom the item of $800 awarded to Springer. As thus amended the judgment is affirmed, each party to pay his own costs on appeal.

W. J. WOOD and McCOMB, JJ., concurred.



55 Cal.App.2d 279

PEOPLE v. SIGEL et al.

Cr. No. 2239.

District Court of Appeal, First District, Division 2, California.

Oct. 30, 1942.

Hearing Denied Nov. 27, 1942.

1. Criminal law ⇐29

Accused could have been guilty of grand theft, robbery and extortion although there was only one taking of money if he intended to commit such offenses. Pen. Code §§ 213, 489, 520.

2. Criminal law ⇐29

Where under evidence offense committed might have been grand theft, robbery or extortion, according to which group of facts jury relied on but facts disclosed that defendants intended but one offense and that there was but one taking of money, one offense, and not three, was committed. Pen.Code, §§ 213, 489, 520.

3. Criminal law ⇐1208(9)

When the term of imprisonment imposed is for not less than a designated number of years, the maximum punishment is a life term. Pen.Code, §§ 213, 489, 520.

4. Criminal law ⇐984

A conviction of grand theft, robbery and extortion was not erroneous because record disclosed that defendants intended but one offense and that there was but one taking of money, where such one unlawful act was pleaded under three different statutes and in pronouncing judgment on each count and causing judgments to run concurrently, defendants were punished but once for such wrongful act. Pen.Code, §§ 213, 489, 520, 654.

5. Criminal law ⇐808½

In prosecution for grand theft, robbery and extortion wherein evidence disclosed the commission of but one unlawful act, an instruction consisting of statute relating to charging of two or more offenses or same offense in different counts was not erroneous as telling jury that it could find defendant guilty on both of two inconsistent charges. Pen.Code §§ 213, 489, 520, 654, 954.

6. Criminal law ⇐824(15)

In prosecution for grand theft, robbery, and extortion wherein evidence disclosed the commission of but one unlawful act, trial court was not bound of its own motion to give instruction that jury could find defendant guilty on only one of the counts contained in indictment. Pen.Code §§ 213, 489, 520, 654, 954.

Appeals from Superior Court, Alameda County; Lincoln S. Church, Judge.

Frank L. Sigel and another were convicted of grand theft, robbery and extortion, and they appeal.

Affirmed.

Leo A. Sullivan, Willard W. Shea, Public Defender, and Joseph R. Deasy, Asst. Public Defender, all of Oakland, for appellants.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph Hoyt, Dist. Atty., and James F. Coakley, Asst. Dist. Atty., both of Oakland, for respondent.

STURTEVANT, Justice.

In the above entitled case Frank L. Sigel, Benjamin Elkins, Walter Simpson, and Richard Roe, were all charged by indict-

ment with the crimes of grand theft, robbery, extortion and kidnapping. At the time of the trial the defendants Sigel and Elkins only had been apprehended and they were jointly tried and both convicted of the first, second, and third counts of the indictment and acquitted of the fourth. The defendant Elkins only has filed briefs.

The complaining witness, George Acheson, is 53 years of age and is a salesman for an oil company in San Francisco which specializes in the manufacture of materials for surfacing roads and highways. He left his home in Berkeley on December 25, 1939, and took a train to Seattle for the purpose of closing a contract with the city of Seattle. Acheson had previously been in said city for the purpose of negotiating a contract and his present trip was made pursuant to a telephonic request of the purchasing agent of said city. He arrived in Seattle on the evening of December 26, 1939, and registered at the Olympic Hotel. Leaving his room, he intended to go to the coffee shop in the hotel basement but after arriving on the first floor he decided to go for a short walk. Leaving the hotel, he walked several blocks down Fourth Avenue and as he was returning to the hotel he stopped at a lavatory in the public library. The entrance to this lavatory was on Fourth Avenue and could be entered without going into the library itself. As he was walking out the doorway to the sidewalk, he saw defendant Sigel, who remarked that the lavatory was untidy. Acheson made some reply in answer thereto and continued on to the Olympic Hotel which was about one block away. Sigel walked beside him to the hotel and as Acheson approached the entrance, Sigel asked if he lived there. Acheson replied that he was staying there, whereupon Sigel asked him if he was in the lumber business and remarked that the wood paneling on the mezzanine floor was of unusual quality and design and suggested that Acheson see it. Sigel then turned and walked up a short stairway, followed by Acheson. When he reached the top he turned around quickly, at which Acheson noticed that Sigel's pants were unbuttoned and that part of his underclothing was visible. Acheson turned to descend and as he did so a second man appeared (hereinafter called number two man) and told Acheson that he was under arrest, at the same time holding his hand in his pocket in such a manner as to lead Acheson to believe that he had a gun. The number two man also exhibited a badge, as did Sigel, who buttoned his clothing, and said to the number two man, "This is the fellow, we caught him." These men then carried on a rapid conversation between themselves, stating that the churches and newspapers of Seattle had been after the police department for a series of sex crimes; that the witness was a degenerate, that he was under arrest; that the chief would be happy in clearing up the matter.

Acheson was then taken out of the hotel to a car which was parked nearby, where they said to him, "You don't look like a degenerate. My God, you ought to be dead." They told him that they ought to get rid of him and suggested taking him to the hospital to see his victims. They then got into the car and drove for several blocks, when the car was stopped and the number two man got out and informed him he was going in to book him. In a few minutes the number two man returned and said that they had to go back to the hotel and search Acheson's room, at the request of the chief. After getting to the room, Sigel began going through all of Acheson's luggage and personal effects, while the number two man itemized the various articles that were found. Among the articles examined was a savings account book of the American Trust Company in Berkeley, showing a balance in Acheson's name of approximately $20,000. Acheson was questioned regarding his business, his purpose in being in Seattle at that time, his appointment with the purchasing agent the following day, and also his destination after leaving Seattle and his expected time of departure on the following day for Salem, Oregon.

The following day Acheson completed his business with the purchasing agent of Seattle and in the afternoon went to the railroad station to get a train for Salem, Oregon, where he also planned to transact some business, of which he informed Sigel and the number two man. While waiting for the train the number two man and the appellant Elkins approached him at the depot. Elkins flashed a badge and accused Acheson of trying to run away; Elkins told him that the detectives of the night before had not done their work; that they had no business to let him go; that he would have to return to the police station. During this conversation Elkins seized Acheson by the arm and shoved him around; he is lame and off balance and he

stumbled. He thought they were crooked police officers taking his money. They then left the station, Acheson between Elkins and the number two man, both holding to his arms. They took him two or three blocks away to the doorway of a vacant building and went through his pockets and wallet, where they found certain credentials indicating Acheson was a member of the Masonic Lodge. Upon seeing these credentials, Elkins then said to him it was too bad, he would have to do something for him. The number two man then left, saying that he was going across the street to see the judge. The conversation then turned to the matter of a bail bond and Elkins suggested Acheson write a check for $800 and that, plus $200 which Acheson had in his wallet, would be sufficient bail. Elkins then gave Acheson a fountain pen and the latter wrote out a check for $800 and handed it over, together with the $200 cash. Elkins then took Acheson back to the railroad station, where the latter boarded the train to Salem.

On February 2, 1940, at about 11 a. m., Acheson received a phone call at his office in the Monadnock Building in San Francisco, purporting to come from a man named Davis, relating to life insurance. A few minutes later Elkins appeared and told Acheson to come out in the hallway of the building. When Acheson got in the hallway he saw a man who has since been identified as Walter Simpson, referred to in the transcript as number four man. He put something hard against Acheson's back and commanded him to keep walking to the end of the hallway. At that point the number four man exhibited a badge and stated he was an inspector from the Seattle Police Department; that the other officers in Seattle were on the spot and were going to lose their jobs; that he would have to return Acheson to Seattle to stand trial for the sex crimes which he had committed. They told Acheson they were going to take him to the San Francisco Police Department. They took him down Kearny Street and on the way threatened to shoot him, the witness testifying in this respect: "Well, they referred to these crimes again, as they had in the past, referred to the dirty mess, it would be better to shoot me, to get rid of me, throw me in a slough." At the end of the first block off Market, they pushed him into a doorway and went through his pockets and found his Masonic credentials, whereupon the attitude of number four man changed, he professing that he too was a Mason, that he was going to help him; that they could not go to the Chief of Police in San Francisco because he was of a different religion; that he would call the Chief of Police at Seattle, who was a Mason. They then took him to the lobby of the Palace Hotel. Elkins stayed with him while the number four man went to a telephone booth. Elkins told him that the number four man went to a telephone booth. Elkins told him that the number four man could take care of him. The number four man then returned and told him it would take $2,500 to clear the thing; that he would have to produce $2,500. Acheson told him that he did not have the $2,500; they replied: "We will go over to Berkeley and get it." They then took Acheson and boarded a train for Berkeley. While on the train to Berkeley, there was some conversation about the witness being a degenerate, of taking him back to Seattle to stand trial, which they said would ruin him and his family. The number four man was Walter Simpson, a party defendant, who said to Acheson: "If you think we are fooling, feel this." He put Acheson's hand on an object, which felt hard and like a gun of some kind. It felt like a gun and he thought it was a gun.

Upon arriving at the bank in Berkeley, Acheson withdrew $2,500 from his savings account, which he deposited in his checking account, then cashed a check for $2,500. The money was handed to Simpson on the train while returning to San Francisco, near Ashby Station in Berkeley. Upon arrival at the Terminal Station in San Francisco upon their return, they took him back to the lobby of the Palace Hotel, where they told Acheson they were quite sure everything would be all right; that he should go back to his office and go to work; that everything would be taken care of. Simpson told him he would phone him the next morning after talking with the chief in Seattle. Immediately upon his return to his office, Acheson telephoned the District Attorney of Alameda County and told him what had happened. After he spoke to District Attorney Hoyt, Simpson phoned him and told him he had been in touch with Seattle; that everything was all right; that everything had been taken care of.

Acheson believed at all times that Sigel, Elkins and Simpson were police officers of the Seattle Police Department; that they were corrupt officers; they told him the

money was going to the Chief of Police of Seattle; Simpson showed him a badge and said he was an inspector of the Seattle police; he paid the money because he feared for his life and that he would be taken back and charged with these sex crimes. Elkins confessed his participation in the crime and implicated Sigel.

[1-4] The defendant Elkins contends that the verdicts are inconsistent. He cites and relies on People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168. It is not in point. In that case the defendant was charged with two different offenses which involved two different inconsistent intents on his part. The defendant quotes authorities to the effect that robbery and extortion involve two different intents on the part of the victim—not on the part of the defendant. The foregoing statement of facts shows that one group thereof tended to prove grand theft, another group to prove robbery, and still another group to prove extortion. The accused could have been guilty of all three offenses if he intended to commit them. If he intended to commit but one offense he was guilty of but one. An examination of the facts recited above discloses that the defendant and his associates intended but one offense and that there was but one taking. That act was the taking of $2,500 from the complaining witness Acheson. Conceding that the offense might have been grand theft, robbery or extortion, according to which group of facts the jury relied on, one offense and not three was committed. People v. Stephens, 79 Cal. 428, 430, 21 P. 856, 4 L.R.A. 845. The sentences ran concurrently. The defendant's punishment on the first count may be not less than one nor more than ten years. Pen.Code, § 489. On the second count, robbery, his punishment may be not less than one year. Pen.Code, § 213. On the third count, extortion, the punishment may be the same as on the first count. Pen.Code, § 520. When, as here, the term of imprisonment imposed is for not less than a designated number of years, the maximum punishment is a life term. People v. McNabb, 3 Cal.2d 441, 444, 45 P.2d 334. We think it is clear, therefore, that the record shows the commission of one unlawful act; that said act was properly pleaded under three different statutes; and that in pronouncing judgment on each count and causing the judgments to run concurrently the defendant has been punished but once for his said wrongful act. The court followed the provisions of the statute (Pen.Code, § 654) and the approved practice. People v. Kynette, 15 Cal.2d 731, 761, 762, 104 P.2d 794.

[5] While instructing the jury the trial court read section 954 of the Penal Code. The defendant contends the trial court erred. He claims that the instruction had the effect of telling the jury that it could find the defendant guilty on both of two inconsistent charges. Comparing section 954 with section 654, it is quite clear that the instruction had no such meaning.

[6] Finally the defendant contends that the trial court of its own motion should have instructed the jury that it could find defendant guilty on only one of the counts contained in the indictment. We think not. Not intimating that the defendant was entitled under any circumstances to such an instruction, it is clear that the trial court was not bound to give the instruction of its own motion. 8 Cal.Jur. 309, and cases there cited.

Appeal of defendant Sigel.

The cause was placed on the court's calendar to be heard September 14, 1942. Both defendants were fully notified. On the calling of the calendar both defendants Elkins and Sigel requested ten days within which to file a brief. Later the defendant Elkins waived his right to file a brief. Although again notified the defendant Sigel did not file a brief within the time allowed and has not since filed one. On October 28, 1942, the appeals of both defendants were ordered submitted.

The judgments and orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

55 Cal.App.2d 272

PEOPLE v. PRUITT.

Cr. 3626.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1942.

Hearing Denied Nov. 27, 1942.

1. Gaming ⇐98(5)

Evidence was sufficient to sustain conviction for occupying a room or place for receiving bets and wagers on horse races. Pen.Code, § 337a, subd. 2.

2. Criminal law ⇐1159(6)

Merely because from the circumstances in evidence an inference of innocence might have been drawn does not justify an appellate court in reversing a judgment of conviction where the same evidence warrants an inference of guilt.

3. Gaming ⇐98(5)

In prosecution for occupying a room or place for receiving bets and wagers on horse races, it is not necessary that the corpus delicti be proved by direct or positive evidence. Pen.Code, § 337a, subd. 2.

4. Criminal law ⇐1159(2)

Where there is any substantial evidence sufficient to convince fair and impartial men of the existence of a fact, an appellate court has no right to set aside the judgment of the trial court.

5. Criminal law ⇐1159(2)

An appellate court may set aside judgment of trial court only when, upon a review of the entire case, it appears that upon no hypothesis whatever is there sufficient evidence to support the judgment.

6. Criminal law ⇐1159(1)

It is the prerogative of the trial court to draw proper inferences and its conclusions will not be disturbed so long as it does no violence to reason.

7. Criminal law ⇐1159(1)

The trial court is the constitutional arbiter of the ultimate facts in issue and the reviewing court cannot substitute its own findings in lieu thereof.

8. Criminal law ⇐472

Proof of character of documents taken from room which defendant was charged with having occupied for receiving bets and wagers on horse races as well as the significance of the letters and digits, unintelligible to the layman, appearing on such documents was a part of expert knowledge gained by those who had devoted years to the pursuit of such criminals and to a study of their devices, crafts and methods so as to authorize admission of expert testimony regarding such matters. Pen.Code, § 337a, subd. 2.

9. Criminal law ⇐1186(4)

In prosecution for occupying a room for receiving bets and wagers on horse races, where evidence of defendant's guilt was sufficient without considering opinion of officer regarding meaning of certain letters and numbers appearing on documents found in the room, permitting officer to give his opinion regarding meaning of the letters and numbers did not result in miscarriage of justice and judgment could not be disturbed. Pen.Code, § 337a, subd. 2; Const. art. 6, § 4½.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Leone Pruitt was convicted of occupying a room or place for receiving bets and wagers on horses, and she appeals.

Affirmed.

Horace H. Appel, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was accused by information of violating 337a, subdivision 2 of the Penal Code which forbids the occupying of a room or place for receiving bets and wagers on horse races. The date of the alleged crime was December 22, 1941, when the police called to inspect the room in question. From a judgment of conviction and from an order denying motion for new trial defendant has appealed. The grounds of appeal are as follows: (1) the insufficiency of the evidence to support the judgment; (2) errors of the court in receiving expert testimony as to the meaning of certain symbols appearing upon documents taken from the room occupied by the defendant.

(1) At the time the officers entered the double residence on Tamarind Street de-

fendant was standing on the back porch. She thereupon promptly departed. In the dining room the officers found a telephone on a shelf which was about eighteen feet from the place where defendant had stood on the porch. Near the telephone on the shelf were found a Daily Turf Reporter and a Metropolitan Scratch Sheet. For about an hour the officer answered the telephone calls which were requests for the placing of bets on horse races. They came from "Frank," "Mrs. Phillips," "Burr," "Scott," "Kiffy," "Boardman," "Sampson." Two of the parties calling asked for "Leone."

Officer Appel testified that he had been a member of the police department for fourteen years; that he had made about fifty arrests in connection with gambling and bookmaking; that he was familiar with the customs and manners with which bookmakers conducted their business in Los Angeles County; that he was familiar with the papers and paraphernalia commonly used in bookmaking activities; that bookmakers there used a scratch sheet in which are found numbers assigned to particular horses; that such type of scratch sheet is generally used at a phone spot; that the use of numbers facilitates the operations of bookmakers; that the Metropolitan Scratch Sheet is commonly at a phone spot for the reason that the results of the races are announced over the radio; that the scratch sheet is necessary to use in connection with the Turf Reporter which has made the assignments of numbers to the horses. Certain betting markers were identified by Officer Hicks as having been found in the double residence. The numbers on the betting markers corresponded with those on the scratch sheet. Also, he had taken from a desk in the Tamarind house two receipts for rental of those premises in the name of "Mrs. Leona Pruitt," dated respectively October 20, 1941, and December 18, 1941, as further proof of the identity of the occupant of the Tamarind premises during the month of December. The officers identified the cat seen there as the same cat they found when appellant was arrested on January 6, 1942, in apartment 204 at 836 Sanborn Avenue. She then stated to the officers that when she left the Tamarind residence on December 22, she had gone next door to see a friend.

[1] The facts established to the satisfaction of the trial court are sufficient to support the judgment. The corpus delicti was established by the following facts:

(1) The presence of the Daily Turf Reporter, the Metropolitan Scratch Sheet, and the betting markers whose numbers corresponded with those of horses running that day; (2) the numerous telephone calls to place bets on horses running that day; (3) the absence of the occupant for more than an hour during which time the telephone calls were numerous. Such facts were amply sufficient to justify the finding that the crime charged had been committed, i. e., the room was occupied for the purpose of bookmaking. People v. Borrego, 211 Cal. 759, 297 P. 17; People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633; People v. Roseberry, 23 Cal.App.2d 13, 71 P.2d 944; People v. Helt, 100 Cal.App. 279, 279 P. 1046.

[2, 3] Merely because from the circumstances in evidence an inference of innocence might have been drawn does not justify the appellate court in reversing a judgment of conviction where the same evidence warrants an inference of guilt. People v. Martinez, 20 Cal.App. 343, 128 P. 952. It is not necessary that the corpus delicti be proved by direct and positive evidence. Circumstances may be more convincing. People v. Spencer, 58 Cal.App. 197, 208 P. 380. It is neither the fashion, the custom nor the disposition of violators of penal statutes to choose an audience or the glare of calcium lights as conditions for the commission of their crimes. Of this courts must be ever mindful in considering the crime, the parties involved and the circumstances detailed. People v. Patello, 125 Cal.App. 480, 13 P.2d 1068; People v. Bonilla, 114 Cal.App. 219, 225, 299 P. 784; People v. Baker, 94 Cal.App. 628, 271 P. 765.

The trial court could reasonably infer that appellant occupied the premises from the following circumstances: (1) her presence at the double residence on the day it was visited by officers; (2) the two telephone calls for her by name; (3) the receipts for rental of the Tamarind residence to Mrs. Leona Pruitt; (4) the presence of the same cat at the double residence on December 22, as that which was found with defendant on the day of her arrest on Sanborn Avenue two weeks later.

[4-7] Where there is any substantial evidence sufficient to convince fair and impartial men of the existence of a fact the

appellate court has no right to set aside the judgment of the trial court. This it may do only when, upon a review of the entire case, it appears that upon no hypothesis whatever is there sufficient substantial evidence to support it. It is the prerogative of the trial court to draw proper inferences and its conclusion will not be disturbed so long as it does no violence to reason. It cannot be over-emphasized that the trial court is the constitutional arbiter of the ultimate facts in issue and the reviewing court cannot substitute its own findings in lieu thereof. People v. Patello, supra; People v. Schneider, 36 Cal.App.2d 292, 296, 98 P.2d 215.

(2) The second assignment made by appellant is that the court erred in allowing Officer Appel to testify as an expert concerning the papers, books, and paraphernalia commonly used by bookmakers in Los Angeles County and as to the meaning of certain letters and numbers appearing on the scratch sheet. The following are the questions and answers of the witness, to which appellant registered the general objection and that it is not the subject of expert testimony:

"By Mr. Thomas: Q. Are you familiar with the signs, symbols, letters and figures used by bookmakers? A. I am.

"Q. In Los Angeles County? A. Yes.

"Q. What papers, books and paraphernalia are commonly used in Los Angeles County by bookmakers?

"The Witness: Bookmakers in this town, as a rule, use a scratch sheet, one that has numbers assigned to horses, no two horses having the same number. This particular scratch sheet is almost always used on a phone spot, so that the bookmaker may write the number of the horse down instead of the name, thereby saving time, and as a matter of convenience.

"By Mr. Thomas: Q. How are bets commonly recorded by bookmakers in Los Angeles County?

"The Witness: If the bookmaker is operating a bookmaking phone spot, he records the number or name of the horse, to the side of that amount of money bet on the position which the bettor bets on. The Metropolitan Scratch Sheet is commonly used in phone spot bookmaking places because they receive the results on the radio, and in order to get these results correctly it is necessary for them to have both types of scratch sheets, because the radio gives the number as given in the Metropolitan Scratch Sheet and not in the Reporter Scratch Sheet.

"By Mr. Thomas: Q. I will show you People's Exhibit D for identification. What are these papers commonly called? A. Those papers are commonly called betting markers.

"Q. In your opinion, as an expert on bookmaking, what do the numbers appearing upon this first line indicate? A. This first bet on the top line, or the number '117' is a number which has been allotted to a horse purportedly running that day on a race track; and the number '59' to the right of that is also a number which has been allotted to a horse. The bet is called a 'parlay' bet. The bettor has bet one dollar to win—one dollar to place. If horse No. 117 wins the total amount is then bet on horse No. 59.

"The next figure beneath that is No. 38, which is also a number which has been assigned to a horse.

"Q. And the name of that horse is what? A. No. 38 has been assigned to a horse by the name of Distant Isle running in the second race at Tropical Park. The previous number I have testified to, No. 117, has been assigned to a horse named Rodin. The No. 59 has been assigned to a horse named Old Nick * * *.

"Q. And what information does a scratch sheet contain? A. A scratch sheet contains the name of the track, the weather conditions, the condition of the track, the horses listed and post positions; the length of the race, post time—approximate post time of the race—the type of the race that it is, the names of the jockeys; the names of horses which are running in that race and the numbers which have been assigned to those horses by the scratch sheet.

"Q. In your opinion, Officer, as an expert on bookmaking, are the papers marked 'C' and 'D,' racing paraphernalia? A. They are."

[8] Appellant contends that under the holding of People v. Davis, 47 Cal.App.2d 331, 334, 117 P.2d 917, it was prejudicial error for the court to allow the officer to testify what the numbers and figures found on the betting markers indicate. It was evidently the intention of the prosecutor to prove that bookmakers in Los Angeles County use certain combinations of figures and letters to conceal the mysteries of their school. To that end they called officers of

long experience in running down bookmakers to explain the nature and character of the papers found in the room occupied by appellant and to state their opinions as to the peculiar significance attaching to the symbols appearing on the betting markers and the scratch sheets. Proof of the character of such documents taken from appellant as well as the significance of the letters and digits unintelligible to the layman appearing on such papers is a part of expert knowledge gained by those who have devoted years to the pursuit of such criminals and to a study of their devices, crafts and methods. People v. Hinkle, 64 Cal.App. 375, 221 P. 693. But because such officers may so testify does not authorize them to assume the role of omniscience and advise the jury as to the thought recorded by means of such symbols on betting markers found in the possession of the accused. Such testimony is speculation and is not admissible for any purpose.

[9] But the evidence of defendant's guilt is sufficient without considering the opinion of the officer as to what the numbers indicate. Upon an examination of the entire cause, we are unable to say that a miscarriage of justice has resulted by permitting an officer to give his opinion as to the meaning of the letters and numbers (Const., art. VI, § 4½). We cannot, therefore, disturb the judgment.

Affirmed.

W. J. WOOD, J., concurred.

McCOMB, Justice.

I dissent. The majority opinion is contrary to the law as announced by this court in People v. Davis, 47 Cal.App.2d 331, 334, 117 P.2d 917, in which case the Supreme Court denied a hearing.

The evidence being viewed in the light most favorable to the people (respondent), the essential facts are:

December 22, 1941, Officer Appel of the Los Angeles Police Department went to 1423 Tamarind Avenue, Los Angeles. The premises were described as a "double residence." Defendant was seen standing on the south side of the "double residence." As Officer Appel entered the house, she left the premises. In the house he found a telephone and on a shelf by the telephone there were two papers described as:

(1) "Daily Turf Reporter" dated December 22, 1941, and

(2) "Metropolitan Scratch Sheet" dated December 22, 1941.

Officer Appel for approximately one and one-half hours answered the telephone and received requests for the placing of bets upon horses. At the time of the trial Officer Appel was qualified as being familiar with the customs and manner in which bookmakers conducted their business in Los Angeles County and also as being familiar with the papers and paraphernalia commonly used in bookmaking activities. He was shown People's Exhibit "D," which was the Metropolitan Scratch Sheet dated December 22, 1941, mentioned above and with reference thereto he was questioned and answered as follows:

"By Mr. Thomas: Q. I will show you People's Exhibit D for identification. What are these papers commonly called?

"A. Those papers are commonly called betting markers.

"Q. *In your opinion, as an expert on bookmaking, what do the numbers appearing upon this first line indicate?*

"Mr. A. J. Chotiner: Objected to as not the subject of expert testimony and incompetent, irrelevant and immaterial as to what his opinion may be as to that. That would be calling for hearsay opinion.

"The Court: Objection overruled.

"A. This first bet on the top line, or the number '117' is a number which has been allotted to a horse purportedly running that day on a race track; and the number '59' to the right of that is also a number which has been allotted to a horse. The bet is called a 'parlay' bet. The bettor has bet one dollar to win—one dollar to place. If horse No. 117 wins the total amount is then bet on horse No. 59.

"The next figure beneath that is No. 38, which is also a number which has been assigned to a horse.

"Q. And the name of that horse is what?

"A. No. 38 has been assigned to a horse by the name of Distant Isle running in the second race at Tropical Park. The previous number I have testified to, No. 117, has been assigned to a horse named Rodin. The No. 59 has been assigned to a horse named Old Nick." (Italics added.)

This is the sole question necessary for us to determine:

Was it prejudicial error for the trial court to permit Officer Appel to give his

opinion as to what the numbers appearing upon the "Scratch Sheet" (People's Exhibit "D") indicated?

This question must be answered in the affirmative. The rule is established in California that testimony of a police officer that numerals and letters on a sheet of paper represent the amounts of a bet, the initials of the bettor, and the horse upon which the bet is placed are inadmissible, since they are pure surmise and merely expressions of a witness on matters not the subject of expert testimony. People v. Davis, 47 Cal.App.2d 331, 334, 117 P.2d 917.

Since there was no admissible evidence as to what the numbers and writing on the scratch sheet found in defendant's house meant, the corpus delicti of the present offense was not established and there was insufficient evidence to sustain a judgment of guilty.

For the foregoing reasons in my opinion the judgment should be reversed and a new trial ordered.



55 Cal.App.2d 452

RILEY et al. v. DUNBAR et al.

Civ. 13683.

District Court of Appeal, Second District, Division 3, California.

Nov. 9, 1942.

Hearing Denied Jan. 6, 1943.

1. Appeal and error ⇐113(4), 870(2)

An order striking dismissal of action, which order was not made after final judgment was not appealable, but since order preceded final judgment which was appealed from, order could be reviewed upon a proper record on appeal from the judgment. Code Civ.Proc. §§ 956, 963.

2. Appeal and error ⇐553(2)

The clerk's transcript is incompetent to authenticate for purpose of review upon appeal any portion of record other than the judgment roll and notice of appeal.

3. Appeal and error ⇐544(1)

If any matters other than such as appear upon face of judgment roll are sought to be reviewed upon appeal, record thereof must be presented by bill of exceptions or by reporter's transcript.

4. Appeal and error ⇐901

An appellant has burden of producing a record affirmatively showing error and if any matters could have been presented to court below which would have authorized the order complained of, it will be presumed that such matters were presented.

5. Appeal and error ⇐554(3)

A judgment of dismissal was required to be affirmed where record disclosed neither a bill of exceptions nor a reporter's transcript but merely contained a clerk's transcript which set forth the judgment roll and copies of certain other documents and record entries.

6. Appeal and error ⇐907(3)

A judgment dismissing action was not reviewable even if judge's certificate could transform the clerk's transcript into a bill of exceptions or reporter's transcript, where certificate stated that on hearing of motion to strike the dismissal, court considered evidence theretofore taken and all proceedings had, which statement required appellate court to assume that evidence which court had already taken fully supported the order and judgment.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Guy S. Riley and another, suing on behalf of themselves and all other beneficiaries of the Bell View Oil Syndicate, a trust, against Hooper C. Dunbar and others, trustees, for an accounting and to recover money allegedly improperly expended. From a judgment for defendants and from an order striking dismissal of the action, plaintiffs appeal.

Judgment affirmed and appeal from order dismissed.

Hearing denied; SHENK and CARTER, JJ., dissenting; EDMONDS, J., not participating.

LeRoy B. Lorenz, of Los Angeles, for appellants.

Haight, Trippet & Syvertson, of Los Angeles, for respondents.

SCHAUER, Presiding Justice.

Plaintiffs, as unitholders of a trust, brought an action "on behalf of themselves and all other beneficiaries of the Bell View Oil Syndicate" against the trustees, seeking an accounting and the recovery of money

allegedly improperly expended. Issues of fact were joined, trial was entered upon and evidence received. During an overnight recess the plaintiffs filed with the clerk a direction to enter dismissal of the action. After the recess and such attempted dismissal trial was resumed despite the absence of counsel for plaintiffs, defendants' motion for vacation of the dismissal was granted, defendants rested and judgment on the merits was rendered in their favor.

[1] Plaintiffs' Notice of Appeal declares that it is taken from "that certain ex parte order made after final judgment herein, to-wit [sic]: the minute order * * * striking 'the purported dismissal of the action;' and * * * also, from the purported judgment entered herein on or about Sept. 29, 1941." It does not appear that the order attempted to be appealed from is in fact an order "made after final judgment"; and hence it is not appealable, Code Civ.Proc. § 963. However, since it precedes the final judgment which is appealed from, it could be reviewed, upon a proper record, on the appeal from the judgment. Code Civ.Proc. § 956.

As to the merits of the appeal, plaintiffs make no attack on the judgment other than the claim that it is void on the theory that the action had been effectually dismissed, and thereby terminated, prior to its entry. They rely on an asserted absolute right of a plaintiff to dismiss his action, pursuant to the provisions of section 581 of the Code of Civil Procedure, before submission, where no affirmative relief is sought by a defendant, and cite the cases of Rogers v. Transamerica Corp., 1935, 6 Cal.App.2d, 340, 44 P.2d 635; Provencher v. City of Los Angeles, 1935, 10 Cal.App.2d 730, 52 P.2d 983, and King v. Superior Court, 1936, 12 Cal.App.2d 501, 56 P.2d 268.

Defendants do not dispute the law as enunciated in the cases cited but assert that a different rule applies in derivative actions; i.e., that in actions where the plaintiff sues not for himself alone but as the representative of a class, in a fiduciary capacity, he is not the real party in interest and has no right or power individually to dismiss the action and that such action may be dismissed only by order or with the sanction of the court. In support of this theory defendants rely on Spellacy v. Superior Court, 1937, 23 Cal.App.2d 142, 72 P.2d 262.

Primarily, however, defendants contend that on the record before us there is no occasion to determine the proposition of law above stated and that in any event we are bound to affirm the judgment. This contention is sound.

[2, 3] The record discloses neither a bill of exceptions nor a reporter's transcript. It does contain a clerk's transcript which sets forth the judgment roll and copies of certain other documents and record entries. There is no question as to the law that "the clerk's transcript is incompetent to authenticate for the purpose of a review upon appeal any portion of the record other than the judgment roll and notice of appeal. 2 Cal.Jur., p. 633. If any matters other than such as appear upon the face of the judgment roll are sought to be reviewed upon appeal, the record thereof must be presented either by a bill of exceptions or by a reporter's transcript." Jeffords v. Young, 1925, 197 Cal. 224, 227, 239 P. 1054, 1055; Sutcliffe v. Sutcliffe, 1934, 220 Cal. 398, 401, 31 P.2d 195.

[4, 5] Likewise there is no question as to the law that an appellant has the burden of producing a record affirmatively showing error (2 Cal.Jur., sec. 499, p. 852 et seq.) and if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented. Caruthers v. Hensley, 1891, 90 Cal. 559, 560, 27 P. 411; Myers v. Canepa, 1918, 37 Cal.App. 556, 561, 174 P. 903, 906; Kelly v. Liddicoat, 1939, 35 Cal.App.2d 559, 565, 96 P.2d 186.

[6] The clerk's transcript presented here bears the certificate of the trial judge as well as that of the clerk. If we were to assume that the judge's certificate could transform the clerk's transcript into a bill of exceptions or reporter's transcript the appellants would be in no better position. The judge's certificate contains this language: "On the hearing of said motion to strike the purported dismissal, the Court considered the evidence theretofore taken and all the proceedings had in the case." In view of that statement the further declarations in the certificate that "the *papers* in the foregoing transcript are the *papers,* and all of the *papers,* used or considered in the determination of the matters appealed from herein" (italics added) and that "No further evidence was taken on the hearing of said motion on Sep.

19–1941," are without material significance. We are bound to assume that the evidence which the court had already taken fully supports the order as made and the judgment as rendered. See 2 Cal.Jur., sec. 508, p. 868; Waymire v. California Trona Co., 1917, 176 Cal. 395, 399, 168 P. 563; Haase v. Central Union H. S. Dist. 1938, 27 Cal. App.2d 319, 325, 80 P.2d 1044; Yurkas v. Zampatti, 1942, 49 Cal.App.2d 95, 96, 121 P.2d 17; In re Lasker, 1942, 51 Cal.App.2d 120, 121, 124 P.2d 72.

The judgment is affirmed; the appeal from the order striking "the purported dismissal of the action" is dismissed.

PARKER WOOD, J., and SHAW, J. pro tem., concur.



55 Cal.App.2d 456

SMOLL v. WEBB et al.

Civ. 2966.

District Court of Appeal, Fourth District, California.

Nov. 9, 1942.

1. Contracts ⇐319(2)
Work and labor ⇐14(2)

The mere failure to pay an installment as it becomes due unless such payment is under the contract a condition precedent does not amount to "prevention" which will authorize a building contractor to abandon the work and sue for the benefits he would have received from full performance but is constitutes a "breach" which will justify a rescission and recovery for the work already done.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach" and "Prevention".

2. Work and labor ⇐14(2)

Where the contractor fails to complete the contract after the breach of a condition precedent by the owners his action is in "quantum meruit" after his rescission and not on the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Quantum Meruit".

3. Contracts ⇐214

Where building contract did not provide for any progress payments, the owners were only obligated to pay contractor when the building was completed, and their failure to make requested progress payments did not constitute a "breach" of a "condition precedent" or of the contract that would justify contractor in rescinding the contract or in leaving the job.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

4. Mechanics' liens ⇐281(1)

In action to foreclose liens for labor and materials furnished in construction of a building, finding that contractor had abandoned the contract and failed to complete it was justified where a contractor quit job on failure of owners to make a progress payment for which contract did not provide.

5. Mechanics' liens ⇐281(4)

In action to foreclose a lien for labor and materials furnished in the construction of a building finding that contractor had been paid in full was sustained by the evidence.

6. Judgment ⇐256(1)

In action to foreclose a lien for labor and materials furnished in the construction of a building finding that contractor abandoned the contract and failed to complete his part of it and that contractor had been fully paid supported judgment for owners.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Fred M. Smoll against Earl S. Webb and another to foreclose a lien for labor and materials furnished in the construction of a building for defendants. From a judgment for defendants plaintiff appeals.

Affirmed.

Duckworth, Mussell & King, of San Bernardino, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

MARKS, Justice.

This is an action to foreclose a lien for labor and materials furnished in the construction of a building for defendants by

plaintiff. Defendants had judgment and this appeal followed.

Defendants, the owners, employed plaintiff to construct a two-story building for them. Its dimensions were about twenty by twenty-two feet. The first floor was to be used as a tool room and the second floor as a rumpus room. The walls were to be of reenforced concrete faced with country rock and the roof was to be of tile. No plans, specifications or written contract were prepared. The building was to be constructed on a sloping hill with one side of the second story on about the level of the ground. Defendants did all the excavation work, furnished forty-five sacks of cement, 1,500 bricks for a fireplace, all of the rock for facings and some lumber at their own cost.

Plaintiff was to be paid his costs of materials used and labor furnished, plus ten per cent. It was agreed that the building was to be constructed in a good and workmanlike manner. One of the defendants testified that the total cost was not to exceed $1,200. This last was denied by plaintiff.

Plaintiff started work during the first week in March, 1940, and left the job uncompleted about May 7, 1940, when defendants failed to advance him any more money.

He filed a lien which recited that the total cost of labor and materials, plus his ten per cent was $1,939.58, that he had been paid $1,134.75, leaving a balance of $804.83 due. This included a $200 charge for employer's liability insurance. The action is to foreclose this lien.

Defendants in their answer pleaded the oral contract as they understood it; that plaintiff did not complete it; that the labor and materials furnished by plaintiff were of a value of not to exceed $800; that they had paid him $1,100; that plaintiff had been paid in full; that the work done by plaintiff was very inferior and not done in a good and workmanlike manner. The trial court found these allegations of the answer to be true.

Plaintiff urges two grounds for reversal of the judgment: (1) That the trial court erred in finding that plaintiff abandoned the contract and failed to complete his part of it, and, (2) that it was error to find that plaintiff had been fully paid.

The argument under the first ground for reversal is based on the theory that as defendants refused to advance more money as requested by plaintiff they breached the contract so that plaintiff was excused from further performance and was justified in failing to complete the building.

[1] The rule governing cases in which a building contractor is excused from completing his contract by acts of the owners is stated in Monson v. Fischer, 118 Cal.App. 503, at page 519, 5 P.2d 628, at page 634, as follows:

"In the case of building contracts it has long been the general rule in this state that the mere failure to pay an installment as it becomes due, unless such payment is under the contract a condition precedent, does not amount to prevention which will authorize a contractor to abandon the work and sue for all the benefits he would have received from full performance; but it nevertheless constitutes a breach which will justify a rescission and recovery for the work already done. Cox v. McLaughlin, 52 Cal. 590; Id., 54 Cal. 605; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; Fairchild[-Gilmore-Wilton] Co. v. Southern [Refining] Co., 158 Cal. 264, 274, 110 P. 951."

[2] Where the contractor fails to complete the contract after the breach of a condition precedent by the owners his action is in quantum meruit after his rescission and not on the contract. Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164.

[3, 4] The contract before us did not provide for any progress payments. Thus the defendants were only obligated to pay plaintiff when the building was completed (20 Cal.Juris. 901) and their failure to respond to the request for a progress payment did not constitute the breach of a condition precedent or of the contract that would justify plaintiff in rescinding the contract or in leaving the job. It follows that the finding that plaintiff abandoned the contract and failed to complete it was fully justified.

[5] The evidence on the question of full payment is conflicting. The evidence supporting this finding is to the effect that the workmanship in the portion of the building completed by plaintiff was very poor and the structure defective; that had it been erected in a good and workmanlike manner its reasonable value at that time would have been between $900 and $1,300.

If the value of the structure was $900 when abandoned by plaintiff, as one wit-

ness testified, and he was paid $1,100, which is admitted, it is clear that he had been paid in full and that the finding to that effect has sufficient evidentiary support.

[6] Thus the evidence supports the findings and the findings support the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



55 Cal.App.2d 286

DIBBLEE v. TITLE INS. & TRUST CO.

Civ. 13753.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1942.

Hearing Denied Dec. 28, 1942.

1. Joint stock companies and business trusts ⇐19

Where trust agreement required thrift corporation as trustor to pay to trustee cash or securities equal to 110 per cent. of cancellation value of outstanding certificates and imposed on trustee duty not to certify any certificate when trustor to knowledge of trustee did not have such percentage on deposit and not to permit withdrawals of securities while trustor to knowledge of trustee was in default, and where trustee was entitled by terms of trust to rely on statements of trustor as to amount of security required, in absence of allegation or proof of knowledge of trustee of default, mere showing of shortage of assets at any given time was insufficient to establish "prima facie case" of breach of trust by trustee necessary to overcome motion for nonsuit.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

2. Joint stock companies and business trusts ⇐19

In action by certificate holder in thrift corporation against trustee for breach of trust which was established for benefit of certificate holders, where record disclosed that complaint was filed four years after appointment of federal receiver for corporation and case was brought to trial more than five years after filing of complaint, denial of permission to amend complaint during trial where amendment would have changed scope of issues and might have been to prejudice of defendant and was not sought to conform to proof was discretionary.

3. Pleading ⇐245(2)

Where a long time has elapsed between accrual of cause of action and bringing cause therefor to trial, trial court is justified in refusing to permit during trial amendment to complaint not necessary to enable plaintiffs to proceed with action.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by O. R. Dibblee on behalf of himself and 500 others against the Title Insurance & Trust Company as trustee of trust securing payment of cancellation value of investment certificates issued by National Thrift Corporation of America for breach of trust. From a judgment for defendant entered after motion for non suit was granted at the close of plaintiff's case, plaintiff appeals.

Affirmed.

Wm. L. Baugh, Jr., Hill, Morgan & Bledsoe, and Charles P. McCarthy, all of Los Angeles, for appellant.

O'Melveny & Myers, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment for defendant, entered after a motion for nonsuit was granted at the close of plaintiff's case. The action was one brought by the named plaintiff on behalf of himself and some five hundred other people who owned investment certificates or contracts issued by National Thrift Corporation of America and secured as to payment of cancellation value thereof by a trust agreement entered into by said corporation with the defendant and respondent Title Insurance and Trust Company as trustee. A copy of the trust agreement was annexed to and made a part of the complaint. Prior to the commencement of this action a federal equity receiver was appointed for National Thrift Corporation.

The basis for the action herein is set forth in the following paragraphs of the complaint, as amended prior to the trial:

"X. That under the terms of said trust indenture, Exhibit 'A', and particularly the provisions of Section 2 of Article IV, and Section 2 of Article III, thereof, it is provided that at all times there should be paid into said trust by said National Thrift Corporation of America, in cash or securities, an amount equal in face value to 110 percent of the cancellation value of the outstanding certificates of said National Thrift Corporation of America, and it is further provided that the defendant, Title Insurance and Trust Company, as trustee of said trust, shall not identify or certify any certificates or contracts to be issued by said National Thrift Corporation of America at any time when said National Thrift Corporation of America is in default in the respect that said National Thrift Corporation of America has not paid into said trust, in cash or securities, an amount equal in face value to 110% of the cancellation value of such outstanding certificates or contracts. It is further provided by said trust indenture, Exhibit 'A', and particularly by the provisions of Sections 1 and 2 of Article III thereof, that no participation certificate or contract shall be secured by said trust indenture or entitled to any security, right, or benefit thereunder, or be valid for any purpose whatsoever, and that no participation certificate or contract shall be delivered by said National Thrift Corporation of America under said trust indenture, until and unless such participation certificate or contract is identified and certified by defendant Title Insurance and Trust Company. Plaintiff is informed and believes and therefore alleges that at various times during the active operation of said trust, and extending down to the time when said trust ceased to be operated as an active trust by reason of the appointment of said receiver for said trust estate, March 17, 1933, the defendant Title Insurance and Trust Company in violation of the terms of said trust agreement, identified and certified certificates to be issued by, and which were issued by, said National Thrift Corporation of America, at various times when said National Thrift Corporation of America, to the knowledge of said defendant, was in default in the respect above mentioned in that it had not paid into said trust, in cash or securities, an amount equal in face value to 110% of the cancellation value of the participation certificates which it had issued and which were outstanding. Plaintiff is informed and believes and therefore alleges that on September 8, 1932, the cancellation value of the participation certificates of said National Thrift Corporation of America then outstanding was $294,874.69, and 110% thereof was $324,362.15, as fixed by the terms of said certificates; that as a result of said acts of the defendant Title Insurance and Trust Company in certifying and identifying certificates of said National Thrift Corporation of America at a time when said corporation had not deposited in said trust cash or securities in an amount equal in face value to 110% of the cancellation value of the outstanding certificates, there were in said trust estate on September 8, 1932, assets of a face value of only $251,009.15, whereas there should have been in said trust estate at said time assets of a face value of $324,362.15, and that the difference between the face value of the assets which should have been in said trust at said time and the face value of the assets which were in said trust at said time was $73,353.00; that upon the appointment of defendant Frank C. Mortimer as receiver of said trust of defendant Title Insurance and Trust Company, as set forth in Paragraph VII of this complaint, the defendant Title Insurance and Trust Company, as trustee, turned over and delivered to said receiver, as the assets of said trust, assets of a face value of only $251,009.15, instead of assets of a face value of $324,362.15 which should have been in said trust estate; that the cancellation value of the certificates of said National Thrift Corporation of America held by the plaintiffs in this action exceeds by more than the amount of $73,353.00 the value of the assets held by defendant Title Insurance and Trust Company under said trust B-5918 and turned over by said defendant to said receiver, and the amount which can be realized thereon.

"XI. That by reason of the failure of defendant Title Insurance and Trust Company to comply with the provisions of said trust agreement, as aforesaid, and its said acts in certifying participation certificates of said National Thrift Corporation of America at a time when said National Thrift Corporation of America had not deposited in said trust cash or securities equal in face value to 110% of the cancellation value of the outstanding certificates, and by reason of the failure of said defendant Title Insurance and Trust Company to have in said trust and turn over and deliver to the defendant Frank C. Mortimer as receiver of

said trust, assets of a face value of $324,362.15, as required by said trust, and by reason of the act of said defendant Title Insurance and Trust Company in turning over and delivering to the defendant Frank C. Mortimer as receiver of said trust assets of said trust of a face value of $251,009.15 instead of assets of a face value of $324,362.15, the above named plaintiff and all other of said holders of said certificates of said National Thrift Corporation of America are damaged in the sum of $73,353."

The complaint prayed judgment for $73,353, "or any sum that may be found due by the court under said trust," and for such other and further relief as to the court might seem meet and proper.

The record reveals that on the date of the last authentication of certificates by respondent trustee the trust liability (i. e.: the minimum amount that should have been in trust) was $219,539.98, while there was actually held in trust at that time securities of a face value of $302,019.32. At the termination of respondent's trusteeship respondent trustee had on hand and turned over to the federal equity receiver assets of a face value of only $251,364.47, which was less than the trust liability as of that time.

At the trial appellant sought to question a witness as to whether, after the last certification of certificates, there were not substitutions made from time to time in the securities held in trust. To this question respondent interposed an objection upon the ground that such a question was entirely incompetent, irrelevant and immaterial. After argument upon the point the question was withdrawn and appellant asked leave to amend his complaint to include allegations charging respondent with permitting improper withdrawals from the trust funds. Leave to so amend was denied, the trial judge stating: "I cannot escape the conclusion that you are attempting to assert a new and different cause of action under which you must inevitably be asking, and resulting in an accounting of this whole trust." Appellant attempted no further inquiry along the line thus sought to be introduced and made no offer of proof in this respect. At the close of plaintiff's case a motion for nonsuit was granted.

The record also reveals that an expert witness, an accountant, testified that the only explanation found for the discrepancy between the amount of assets turned over by the trustee and the amount of the actual trust liability was the manner in which a certain formula had been applied by accountants for National Thrift Corporation in calculating the amount of securities required to be deposited in trust.

Under the trust agreement it was the duty of the National Thrift Corporation to deposit the required amount of security in trust. The agreement also contained the following clauses, all included in article IX thereof, under the heading "Concerning the Trustee":

"Section 2. The Trustee shall be fully protected in, and shall incur no liability for acting upon, any notice, request, consent, certificate, affidavit, statement, resolution, or other paper or document believed by it to be genuine and to be signed or certified to by the person therein stated to be familiar with the facts therein set forth. The Trustee may in its sole discretion require any such instrument, paper or document to be sworn to, before its acceptance thereof or before any duty shall devolve upon it to act thereon."

"Section 12. All recitals herein contained are made solely by and on behalf of the Corporation (National Thrift Corporation of America) and the Trustee assumes and shall be charged with no responsibility whatsoever as to the correctness of any statements herein contained. The Trustees shall have or be charged with no responsibility as to the validity of this instrument, as to the execution or acknowledgment thereof, *or as to the amount or extent of the security afforded by the property desposited and pledged and to be deposited and pledged hereunder,* and shall not be liable in any way for the consequences of any breach on the part of the Corporation of any of the covenants herein contained." (Italics supplied.)

"Section 14. The certificate of the Corporation under its corporate seal, executed by its president, and attested by its secretary, shall be, except where otherwise expressly provided in this instrument, at any and all times sufficient evidence for all the purposes hereof, of the existence or nonexistence of any fact or as to the necessity or expediency of any particular action, dealing or transaction, affecting, arising under or in any way connected with this instrument or with the trusts hereby created; and the Trustee shall be entitled to and may at all times accept and rely upon such certification, except where otherwise expressly provided in this instrument, without

any other or further evidence of the facts or matters therein set forth. The Trustee, in its discretion, may require that any such certificate in addition to such attestation, be sworn to by the president of the Corporation."

Appellant contends that in any event they had established a prima facie case, that the proposed amendment to the complaint was unnecessary and that the court therefore erred in granting a nonsuit. Appellant further contends that if the proposed amendment to the complaint were necessary the court erred in refusing to permit the amendment, arguing that the power of the court to permit amendments should be liberally allowed in advancement of justice and that the amendment sought did not inject a new or different cause of action but simply constituted an enlargement or variation of the cause of action stated in the complaint.

[1] It may at once be seen that the charge that the respondent trustee had permitted an *over issue* of certificates was not substantiated, since it was shown that at the time of the last indentification or authentication of certificates there was on deposit in the trust a sufficient amount of securities to cover the trust liability thereby created. Nevertheless, appellant argues that it was incumbent upon the trustee to explain the shortage of assets existing at the time the trustee turned over the trust fund to the federal receiver; that such a shortage having been revealed by the evidence, a prima facie case of a breach of trust had been established. Such an argument overlooks the plain terms of the trust agreement as set forth in the complaint by annexation and reference. Respondent properly points out that but two duties devolved upon the trustee under the trust, namely: Under section 2 of article III, a duty not to authenticate certificates when the trustor was *to the knowledge of the trustee* in default. Under section 3 of article, VI, a duty not to permit withdrawals or releases of the security while the trustor was *to the knowledge of the trustee* in default. In this connection, section 1 of article VI of the trust agreement reads as follows: "Unless some one or more of the events of default by the Corporation as hereinafter defined shall have occurred, which default or defaults shall have come to the Trustee's knowledge, the Trustee from time to time upon the written request of the Corporation, but subject to the provisions, conditions and limitations in this instrument set forth, and not otherwise, shall release from the lien and operation of this instrument any part or parts of the trust estate." It becomes obvious, therefore, that a mere showing of a shortage of assets at any given time would be insufficient to substantiate a charge of a breach on the part of the trustee. The trustee was entitled by the terms of the trust to rely upon the statements of the trustor as to the amount of security required, and hence could not be held liable for a shortage in that respect without proof that the shortage had been brought to the knowledge of the trustee. Appellant failed to allege any such knowledge and offered no evidence thereof, and no prima facie case of a breach of the trust was established in any event.

[2] In discussing the propriety of the trial court's action in denying appellant leave to amend the complaint at the trial, it is pertinent to point out that the record shows the federal receiver for National Thrift Corporation to have been appointed September 8, 1932; that the complaint in the present action was filed on September 8, 1936; that this action was not brought to trial until February 4, 1942. It should also be pointed out that the question is not one of judicial error but one involving the sound discretion of the court.

Work v. County National Bank, etc. Co., 4 Cal.2d 532, 51 P.2d 90, strongly relied upon by appellant, is of little help here. That case discussed the question of whether an amended complaint, filed after the statute of limitations had run, set up a new cause of action in a second count. Actually, the question presented in the case at bar, in this respect, is whether the court abused its discretion in denying leave to amend during the trial, which question does not necessarily depend upon a determination as to whether the proposed amendment set up a new cause of action, although the trial court was of the view that the amendment stated a new and different cause of action requiring an accounting of the entire trust. Born v. Castle, 22 Cal.App. 282, 134 P. 347, also cited by appellant, supports the contentions of respondent rather than those of appellant. There a proposed amendment made at the trial was refused by the trial court, which refusal was held on appeal to have constituted an abuse of judicial discretion. But in that case leave to amend the complaint was asked in order to conform to proof given by the defendant of a

fact known to defendant and unknown to the plaintiff until presented in evidence; and the rule there stated in the opinion, as to amendments during the course of trial, and the tests there suggested for determining the propriety thereof, uphold the action of the trial court here in refusing to allow the proffered amendment. It should also be noted that the record in the case at bar reveals that the amendment proposed was not made to conform to any proof or evidence introduced by either party.

Briefly, the situation here is one in which appellant charged the respondent trustee with creating the "shortage of assets" by improperly authenticating the issuance of certificates. When it was shown at the trial, upon presentation of appellant's own case, that the trustee had not breached the trust in this respect, appellant then proposed to try the case on a charge that the trustee had created the "shortage" through improperly allowing withdrawals from the fund held in trust. In other words, upon discovering that appellant's first charge as made was unfounded, appellant then proposed to make a new charge of a different type of breach; and this proposal was made during the course of a trial held almost ten years after the active operation of the trust had ceased and nearly six years after the action for a breach of the trust had been instituted. Moreover, the nature of the case and the record presented would indicate that the true situation, disclosed by appellant's own evidence, might have been discovered and the defect, if any, in appellant's case, as presented by the pleadings, remedied before so long a time had elapsed. It cannot be said that an amendment of the type offered, at the time it was offered, would not prejudice the defendant. It is also reasonably clear that the amendment in question changed the scope of the issues to be decided; and that in all probability the amendment would necessitate a continuance of the cause by reason of the apparent extent of the accounting required. In view of such circumstances, coupled with the unusual length of time the action had been pending, it cannot be held that the trial court abused its discretion in refusing to grant leave to amend as requested at the trial. See 21 Cal.Jur. 191, § 133, and cases cited. "The rule that the amendment of a pleading immediately before or during a trial is not a matter of right but is placed within the sound discretion of the trial judge is too well established to need the citation of supporting authorities. It is equally well established that an appellate court will not interfere with the action of the trial judge unless it clearly appears that there has been an abuse of discretion. It is also true that the exercise of his discretion must be sound and reasonable and not arbitrary nor capricious. To a certain extent the measure of the soundness of the discretion used must be found in the facts of each case." Richter v. Adams, 43 Cal.App.2d 184, at page 187, 110 P.2d 486, at page 487, also, see, Hagar v. Home Stores, Inc., 85 Cal.App. 533, 259 P. 1007. Measured by the facts of the case at bar the trial judge exercised sound discretion in the situation presented.

[3] The foregoing discussion of the propriety of refusing leave to amend the complaint is of course based upon an assumption that such an amendment was necessary to enable appellant to proceed with his action. If such an amendment were not necessary, that alone would have justified the trial court in refusing to permit it under the circumstances presented.

The judgment is affirmed.



55 Cal.App.2d 413

FABIAN et al. v. ALPHONZO E. BELL CORPORATION et al.

Civ. 13665.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1942.

Rehearing Denied Dec. 3, 1942.

Hearing Denied Dec. 31, 1942.

1. Action ⇐63
Appeal and error ⇐1010(1)

The question of "laches" is one for determination of trial court and its conclusion thereon will not be set aside if such conclusion finds substantial support in the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

2. Vendor and purchaser ⇐119

To bar an action for rescission of contract for purchase of realty on ground of

"laches", it is unnecessary to show that defendants were prejudiced by the delay. Civ.Code, § 1691, subd. 1.

3. Vendor and purchaser ⇐119

A definite period of time cannot be designated within which party must give notice of rescission of a contract to purchase realty because of misrepresentation, fraud, etc., but the facts peculiar to each case are determinative thereof.

4. Vendor and purchaser ⇐341(3)

Evidence supported finding that purchasers were guilty of "laches" barring their action to rescind contract for purchase of parcel of realty and to recover value of improvements placed thereon on ground that vendors failed to disclose to purchasers existence of certain geological faults and represented that ground materials comprising parcel were suitable for erection of a residence, in view of 14½ months delay in asserting their rights. Civ.Code, § 1691, subd. 1.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Louis M. Fabian and another against Alphonzo E. Bell Corporation and others to rescind a contract for purchase of real property and to recover the value of improvements placed thereon. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Gibson, Dunn & Crutcher and Herbert F. Sturdy, all of Los Angeles, for appellants.

Overton, Lyman & Plumb, Irving H. Prince, P. B. Plumb, Jr., and B. R. Ware, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to rescind a contract for the purchase of real property and to recover the value of improvements placed thereon, for the reason that the contract had been induced through (1) fraud, (2) misrepresentation, (3) nondisclosure of material facts, (4) mistake, and (5) failure of consideration, plaintiffs appeal.

For the purpose of this appeal we may assume the following facts:

On or about July 9, 1935, plaintiffs purchased from defendants a parcel of real property located in the county of Los Angeles. At such time two major geological faults crossed through said parcel of property, which faults were unknown to plaintiffs or either of them and known to defendants. Defendants failed to disclose to plaintiffs or either of them the existence of these faults and represented that the ground materials comprising the parcel of land were suitable and safe for the erection and maintenance of a residence. Thereafter plaintiffs erected a dwelling house with adjacent buildings upon the property. February 6, 1937, a slide occurred which resulted in injury to the buildings plaintiffs had erected. April 19, 1938, plaintiffs first orally notified defendants of their election to rescind their contract on the ground of misrepresentation.

As a third separate affirmative defense defendants alleged that plaintiffs' causes of action were barred by laches.

This is the sole question necessary for us to determine:

Were plaintiffs barred from rescinding their contract because of laches?

This question must be answered in the affirmative. The trial court in response to the issues raised by defendants' third affirmative defense of laches, made the following finding:

"As to the third separate defense, the Court finds that by reason of the slide that occurred in February, 1937, in the westerly portion of the bank, plaintiffs then knew that the westerly portion of the bank, including the overburden, was unstable and unsafe and the knowledge that they had reasonably gave notice to them that further slides were likely to occur in the westerly portion of said bank, and they were thereby put on inquiry, and ordinary prudence and judgment would have required them to take adequate means to ascertain whether the bank as it then remained was so unstable and incompetent as to be unsafe without the installation of a retaining wall or without other measures taken to prevent further slides; but plaintiffs did not make such further inquiry nor did they make any effort to ascertain whether, or to what extent, the representations theretofore made to them by said defendant Bell Corporation were untrue."

The foregoing finding finds substantial support in the evidence. It is conceded that

a slide occurred on the property in February of 1937 and there was testimony that plaintiffs were above the average in prudence, intelligence, training, and education; that plaintiff Louis M. Fabian graduated from the United States Naval Academy; that he was trained as an engineer and had a great deal of engineering experience; that at the time he was negotiating for the property involved in this action he investigated excavations made in the vicinity of the property which he purchased and was shown the topography of the surrounding country. He designed, planned, and supervised the construction of the dwelling house located upon the land he purchased, the house being constructed by day labor under his supervision.

These rules of law are settled in California:

[1] (1) The question of laches is one for the determination of the trial court and its conclusion thereon will not be set aside by an appellant court, if such conclusion finds substantial support in the evidence. (Kramer v. Associated Almond Growers, 111 Cal.App.595, 601, 295 P. 873; see, also, cases cited 10 Cal.Jur.(1923) 527, § 64, notes 4 and 5; 5 Cal.Jur. Ten-Year Supp.(1936) 504, § 64, notes 4 and 5.)

[2] (2) To bar an action for rescission on the ground of laches it is unnecessary to show that the defendants were prejudiced by the delay. (Stevens v. Bryson, 135 Cal.App. 684, 686, 27 P.2d 932; Neff v. Engler, 205 Cal. 484, 488, 271 P. 744; § 1691, subdiv. 1, Civ.Code.)

[3] (3) It is not possible to designate a definite period of time within which a party must give notice of rescission of a contract because of misrepresentation, fraud etc., but the facts peculiar to each case are determinative thereof. (Hunt v. L. M. Field, Inc., 202 Cal. 701, 705, 262 P. 730).

[4] Applying the foregoing rules to the facts of the instant case, we find that the finding of the trial court set forth above is binding upon this court, since there was substantial evidence to sustain such finding. It was also unnecessary to prove that defendants were prejudiced by plaintiffs' delay in giving notice of rescission. It merely remains to determine that, if fourteen and one-half months have elapsed between the date plaintiff discovers facts which with reasonable diligence would place him on inquiry, which inquiry would disclose the defects in his property, such period constitutes laches. We are bound under rule (1), supra, by the finding of the trial court that in the instant case it would.

The following cases are in accord with our view:

In Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 736, 159 P. 163, twelve months elapsed before plaintiff attempted to rescind.

In Stowe v. Kaetzel, 38 Cal.App.2d 356, 359, 101 P.2d 719, eleven months elapsed before plaintiff attempted to rescind.

In Campbell v. Title Guarantee, etc., Co., 121 Cal.App. 374, 376, 9 P.2d 264, nine months elapsed before plaintiff attempted to rescind.

In Maginess v. Western Securities Corp., 38 Cal.App. 56, 60, 175 P. 277, six months elapsed before plaintiff gave notice of rescission.

In Gamble v. Tripp, 99 Cal. 223, 33 P. 851, four and one-half months elapsed before plaintiff gave notice of rescission.

In Sanders v. Magill, 9 Cal.2d 145, 155, 70 P.2d 159, four months elapsed before plaintiff gave notice of rescission.

In each of the foregoing cases the plaintiff's cause of action was held to have been barred by laches, because of the plaintiff's failure to more promptly give notice of rescission after learning of the facts upon which his cause of action was predicated.

In view of our conclusions, it is unnecessary for us to discuss the numerous other propositions urged by plaintiffs as reasons for reversing the judgment of the trial court.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurred.

WOOD, J., deeming himself disqualified, did not participate in the foregoing decision.

55 Cal.App.2d 421

WILSON v. WILSON.

Civ. 12025.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1942.

As Modified on Denial of Rehearing Dec. 7, 1942.

Hearing Denied Jan. 6, 1943.

1. Appeal and error ⇐927(3)

On appeal from judgment of nonsuit all conflicts in evidence were required to be resolved in favor of plaintiff.

2. Judgment ⇐435, 443(1)

Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or excusable neglect which was not the result of negligence or laches by complainant.

3. Judgment ⇐518

An equitable action for relief from decree entered on plaintiff's default on ground that her absence from trial and failure to secure presence of counsel was caused by unavoidable illness, was a "direct attack" on the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

4. Judgment ⇐589(1)

The fact that complainant filed motion to have decree based on default set aside and motion was denied did not bar complainant from maintaining equitable action to set aside the decree on ground that complainant's absence from trial and failure to secure presence of counsel was caused by plaintiff's unavoidable illness, since the two remedies were distinct and cumulative. Code Civ.Proc. § 473.

5. Judgment ⇐447(1), 460(10)

Equity will not overturn a judgment for fraud or mistake unless it appears that a like judgment would not follow and it is incumbent on complainant to plead and prove that the result in main action would have been different had the fraud or mistake relied on not occurred.

6. Judgment ⇐436

Equity will not overturn judgment for fraud or mistake unless complainant was without fault, and if she was guilty of negligence in committing fraud to be practiced or mistake to occur, equity will deny relief.

7. Divorce ⇐161

In determining whether complainant who sought relief from interlocutory decree entered on default was guilty of negligence so as to preclude her from obtaining relief on ground that her absence from trial and failure to secure presence of counsel was caused by unavoidable illness, complainant was not entitled to rely on statement of physician that the case would be continued, even though complainant was a layman and inexperienced in court procedure.

8. Divorce ⇐161

Where counsel for complainant who had obtained several continuances of trial of divorce suit withdrew from case and complainant had several months before hearing to obtain new counsel, and complainant's testimony that an attorney informed her that attorney would represent her at hearing was denied by attorney who testified that he had informed complainant that he could not represent her, complainant was not entitled to have decree set aside on ground of "mistake", by reason of illness and reliance on belief that a continuance would be granted.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake".

9. Appeal and error ⇐1061(3)

Where motion for nonsuit was properly granted judgment of nonsuit would not be reversed on ground that the respondent failed to specify the grounds of the motion with particularity required.

10. Appeal and error ⇐856(4)

A ruling granting motion for nonsuit will be sustained if it was properly granted on any ground, regardless of whether such ground was specified in the motion.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action in equity by Bertha Wilson against Ernest Wilson to set aside an interlocutory decree entered in a divorce action on ground that plaintiff's absence from the trial and failure to secure presence of counsel which resulted in default being entered against her was caused by her unavoidable illness. From judgment of nonsuit, the plaintiff appeals.

Affirmed.

John B. Ehlen, of San Francisco, for appellant.

Crist & Beene, of Palo Alto, for respondent.

PETERS, Presiding Justice.

In September of 1938 Ernest Wilson sued his wife, Bertha Wilson, for divorce on the ground of desertion. In November, 1938, Bertha Wilson filed an answer and cross-complaint through attorney Coolidge of San Jose in which she asked for a divorce from Ernest Wilson on the ground of cruelty. After several postponements of the date of trial, all secured by plaintiff, the case was set for trial on September 8, 1939. On that date, Bertha Wilson did not appear in person or by counsel and her default was entered. Ernest Wilson was granted a divorce, and the community property divided by awarding Bertha Wilson the home of the parties, which was subject to a mortgage, all household furniture, furnishings and equipment, a 1933 Plymouth automobile, and for life $50 a month cash, and $30 a month credit at a restaurant operated by Ernest Wilson. Before judgment was entered, Bertha Wilson, through her then counsel, discussed her default with the trial judge who gave counsel a period of time to make a showing why judgment should not be entered. No such showing having been made, judgment was entered. Thereafter, Bertha Wilson moved to set aside the judgment under section 473 of the Code of Civil Procedure, which motion, after a modification favorable to appellant, was denied. No appeal was taken from the interlocutory decree, and an abortive appeal was taken by appellant's then counsel from the order denying the motion under section 473 of the Code of Civil Procedure. A short time after the denial of the motion, Bertha Wilson instituted the present action in equity to set aside the interlocutory decree upon the ground that her absence from the trial and her failure to secure the presence of counsel was caused by her unavoidable illness. The trial court entered a judgment of nonsuit, from which Bertha Wilson appeals.

[1] This being an appeal from a judgment of nonsuit, under elementary principles, all conflicts in the evidence must be resolved in favor of appellant. Keeping that rule in mind, the record shows the following:

The appellant and respondent have been married thirty-seven years, but separated at least twelve years prior to the date the divorce action was filed. After appellant filed her cross-complaint in December of 1938, the case was set for trial for February 21, 1939. On that date, at the request of appellant's then counsel, Mr. Coolidge, the trial was continued to March 30th. Thereafter, further continuances were secured on March 30th, April 13th and May 23d. The last three continuances were secured without prior notice to the respondent on the oral motion of Duncan Oneal, one of appellant's then attorneys, the motions being supported by letters from Dr. Blake Wilbur, each stating that appellant's health was such that it would be dangerous for her to appear for trial. No attempt was made during this period or at any time thereafter by appellant's then counsel to take appellant's deposition.

On May 23, 1939, Duncan Oneal withdrew from the case and the trial was continued to September 8, 1939. Appellant was notified by letter from Oneal of the continuance, and the letter further informed appellant that in Oneal's opinion "it would be in his opinion most difficult to obtain any further continuance." On July 6, 1939, there was served upon appellant notice that the time of trial had been set for September 8, 1939, and a demand that she appoint another attorney. The critical question on the present appeal is whether appellant, between July 6th and September 8th, exercised reasonable care in her various attempts to secure a lawyer to represent her.

The record is somewhat vague as to dates, but it is apparent that immediately after July 6th appellant did make some attempt to get a lawyer. She called on a San Francisco municipal judge for advice as to how to protect her rights. The judge sent her to a San Francisco attorney who refused to take the case but recommended attorney Jensen of San Jose. She called at the office of Jensen, and he was out. All this was done the first week after July 6th. Thereafter, according to appellant's testimony, she was confined to her bed for two weeks. That would bring the time to the end of July. Apparently nothing was done at all by appellant during the entire month of August. About September 6, 1939, she again became active. She called at the offices of John McNab in San Francisco, but found he was out of town. On September 6th, she sought the advice of Bishop Karl Block of San Francisco who rec-

ommended that she consult the law firm of McCutchen, Olney, Mannon and Greene. Bishop Block made an appointment for her to see Mr. Greene of that office. Mr. Greene was unable to represent her and asked attorney John Parker of the same firm to handle the case. Parker conferred with Mrs. Wilson and then told her he could not handle the case, but recommended attorney John G. Eliot of San Francisco. Mrs. Wilson then went to the office of Eliot. According to his testimony, he told her he could not appear for her on September 8th, inasmuch as he was to be out of town, but thought a continuance could be secured if Dr. Wilbur would again write to the judge. Eliot testified that Mrs. Wilson told him of her condition of health and that attorney Coolidge had represented her. He telephoned to Coolidge, and the latter informed Eliot that he had declined to further represent Mrs. Wilson. Eliot further stated that he told Mrs. Wilson that he did not care to represent her because the case was pending in San Jose, but that he would do all he could, short of appearing for her, to have the trial postponed. He also testified that Mrs. Wilson told him of the prior continuances secured upon letters from Dr. Wilbur, but there is no evidence that she told Eliot of the letter she had received from Oneal indicating that further continuances would be difficult to secure. Eliot thereupon telephoned Dr. Wilbur in Palo Alto, and the doctor told him he would be glad to again examine Mrs. Wilson, and, if her health had not improved, would write to Judge James as he had on prior occasions. Eliot arranged for Mrs. Wilson to be examined by Dr. Wilbur on September 7th.

Late in the afternoon of September 7th Mrs. Wilson was examined by Dr. Wilbur. He testified that he then found she was still suffering from coronary heart disease, arteriosclerosis and hypertension; that, in his opinion, it would have been dangerous for her to appear in court. He thereupon wrote a letter to Judge James, addressed to the Court House in San Jose, which reads as follows:

"Dear Judge James:

"I believe the divorce case of Mrs. Ernest Wilson is to come before you tomorrow morning. I wrote you several months ago that she was too ill to appear in Court, and I have examined her again today. She has made a great deal of improvement but I still believe that it would be definitely dangerous for her to appear in Court at the present time. She might easily suffer a coronary occlusion, which could be fatal. This is my own opinion and also that of my brother who is a practicing physician in San Francisco and who has been consulted by Mrs. Wilson.

"If possible, I believe this case should be put off for a few months more."

Mrs. Wilson testified that Eliot told her he would represent her at the trial, and that she was not to worry because she would be represented. She further testified that Dr. Wilbur told her she would be represented; that the case would be continued; that she left his office with the assurance that the case would be continued. Both Eliot and Dr. Wilbur failed to corroborate Mrs. Wilson in these particulars, in fact, the evidence of Eliot contradicts that of Mrs. Wilson in several material respects.

It was stipulated that Dr. Wilbur sent the letter above quoted to Judge James, special delivery, and that the letter was placed in the mail slot of Judge James' chambers at 6:53 a. m., September 8, 1939. Whether Judge James received the letter does not appear. Prior to September 8, 1939, the case had been transferred to the department presided over by Judge Syer. It is admitted that Judge Syer did not see the letter. When the case was called, there being no appearance by appellant, her default was entered.

[2] It is, of course, apparent that respondent was in no way to blame for the nonappearance of appellant. The case in no way involves fraud, extrinsic or intrinsic, or mistake, on the part of respondent. It is the theory of appellant that by reason of her illness and reliance upon the belief that a continuance would be granted there was a mistake on her part sufficient to authorize a court of equity to set the judgment aside. It is well settled that equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or excusable neglect which was not the result of negligence or laches on the part of the complainant. Anglo California Trust Co. v. Kelley, 117 Cal.App. 692, 4 P.2d 604; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 221 P. 368; Clavey v. Loney, 80 Cal.App. 20, 251 P. 232; Jeffords v. Young, 98 Cal.App. 400, 277 P.

163. In the recent case of Olivera v. Grace, 19 Cal.2d 570, 575, 122 P.2d 564, 567, 140 A.L.R. 1328, the Supreme Court stated the rule as follows, quoting from 5 Pomeroy, Equity Jurisprudence (Equitable Remedies, 2d Ed.), pages 4671, 4672: "* * * where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. * * * The ground for the exercise of this jurisdiction is that there has been no fair adversary trial at law."

[3-6] Such an action is a direct attack on the judgment (Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 353; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598), and the fact that the complainant applied for and was denied relief under section 473 of the Code of Civil Procedure is not a bar to equitable relief. The two remedies are distinct, and cumulative. Anglo California Trust Co. v. Kelley, supra; Bacon v. Bacon, supra; Jeffords v. Young, supra; Lake v. Bonynge, 161 Cal. 120, 118 P. 535; Carp v. Superior Court, 76 Cal.App. 481, 245 P. 459; Nielsen v. Emerson, 119 Cal. App. 214, 6 P.2d 281; Baker v. Baker, 217 Cal. 216, 18 P.2d 61; Sontag v. Denio, 23 Cal.App.2d 319, 73 P.2d 248. Equity will not overturn a judgment unless it appears that a like judgment would not follow. It is incumbent upon the complainant to plead and prove that the result in the main action would have been different had the fraud or mistake not occurred. Miller v. Ambassador Park Syndicate, 121 Cal.App. 92, 9 P. 2d 267; Riddle v. Baker, 13 Cal. 295; Gregory v. Ford, 14 Cal. 138, 73 Am.Dec. 639; Preston v. Hill, 38 Cal. 686; Allen v. Currey, 41 Cal. 318; Harnish v. Bramer, 71 Cal. 155, 11 P. 888; Richardson v. Loupe, 80 Cal. 490, 22 P. 227; Collins v. Scott, 100 Cal. 446, 34 P. 1085; Eldred v. White, 102 Cal. 600, 36 P. 944; Heim v. Butin, 109 Cal. 500, 42 P. 138, 50 Am.St. Rep. 54; Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798. It is also fundamental that equity will not grant such relief unless the complainant was without fault. If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur equity will deny relief. Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, L.R.A.1918F, 1029; Fonner v. Martens, 186 Cal. 623, 200 P. 405; Hendricks v. Hendricks, 216 Cal. 321, 14 P.2d 83; Borland v. Thornton, 12 Cal. 440; Quinn v. Wetherbee, 41 Cal. 247; Rudy v. Slotwinsky, 73 Cal.App. 459, 238 P. 783.

Applying these fundamental principles to the facts of the present case, we have no hesitancy in holding that the trial court properly granted the nonsuit. It is not every "mistake" that will justify equity in setting aside a final judgment. Thus, a final decree of distribution will not be set aside where it cuts off an heir of the testator who was not known to the executor or administrator or heirs even though the complainant through no fault of his own had no knowledge of the death of his ancestor. Lynch v. Rooney, 112 Cal. 279, 44 P. 565; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Beltran v. Hynes, 40 Cal.App. 177, 180 P. 540; Hewett v. Linstead, 49 Cal.App.2d 607, 122 P.2d 352. In Bacon v. Bacon, supra, which is the leading case on mistake as a ground for relief from a final judgment, the court intimated that for mistake to be a ground for relief it must be a mistake induced by the other party to the action. In Thayer v. Fish, 49 Cal.App.2d 618, 122 P.2d 358, it was held that where no duty of trust exists, and where the judgment is entered as much by the fault of one party as the other, equity is powerless to grant relief.

[7] Appellant places her main reliance on the case of Jeffords v. Young, supra. That was an action in equity to set aside a final judgment in a quiet title action. The complaint alleged that the quiet title action was set for trial on October 25, 1923, in a county other than that in which complainants lived; that on October 23d attorney Randall, complainants' local counsel in the county of the place of trial, telephoned to complainants and told them that it would not be necessary to appear for trial; that (98 Cal.App. page 403, 277 P. page 164) "said cause was to be continued, by stipulation of counsel * * * and that he had arranged * * * for the filing of an amended complaint therein";

that, as a result, complainants did not attend the trial; that attorney Randall on the day of trial was very ill and died a few days thereafter. The trial court sustained demurrers to this complaint, and judgment was entered for defendants. That judgment was reversed by the appellate court. At page 404 of 98 Cal.App., at page 165 of 277 P., it was held: "The serious illness of complainant's counsel which prevents an appearance at the trial or a fair presentation of his cause, and which situation by the exercise of due diligence could not have been anticipated or avoided, may warrant the intervention of equity." At page 405 of 98 Cal.App., at page 165 of 277 P., the rule is stated as follows: "Ordinarily a client is chargeable with the negligence of his own attorney. [Citing cases.] But manifestly, when, without the knowledge or fault of a client, his attorney becomes physically or mentally incapacitated so that his acts or conduct which are controlled thereby leads to a damaging result in pending litigation so detrimental and unjust as to shock the conscience, surely equity will furnish relief." Appellant urges that the rule of that case is applicable here. It seems quite clear to us that the factual and legal situations involved in that case differ fundamentally from those here presented. In the Jeffords case neither the complainant nor her attorney was guilty of negligence. The mistake which prevented an adversary trial of the quiet title action occurred through no fault of complainant. But that is not so in the present case. The record shows that in May, 1939, Oneal withdrew from appellant's case. Sometime before July 6, 1939, Coolidge wrote appellant that he had withdrawn from her case. Shortly thereafter, early in July, 1939, respondent's attorneys served notice on appellant personally that "C. C. Coolidge, Esquire, and Duncan Oneal, Esquire, heretofore your attorneys, having withdrawn and ceased to act as your attorneys, plaintiff and cross-defendant hereby demands that you appoint another attorney, or that you appear in person, in the above-entitled action." On August 15, 1939, Coolidge again notified appellant that he could no longer represent her and that she would have to get other counsel. Appellant, therefore, had more than two months to secure other counsel. She testified that she was sick in bed for two weeks in July, and that she was quite active for a period of about a week in that month trying to secure another attorney. She did nothing to secure an attorney during the entire month of August. She did nothing at all until September 6th. As to what happened on September 6th and 7th, the evidence presents a conflict. According to appellant's testimony, Eliot told her that he would represent her at the trial and not to worry, that she would be represented; whereas, according to Eliot's testimony, his service to appellant was purely an accommodation for the purpose of arranging through Dr. Wilbur to postpone the trial, and that he told appellant he would not and could not represent her but that he would do everything he could, short of appearing for her, to secure a postponement. The evidence is susceptible of but two possible interpretations: Assuming that appellant's testimony is true, Eliot was neglectful in failing to have some one present on September 8th to request the continuance, or in not communicating with the judge. On the other hand, assuming that Eliot's testimony is true, appellant was negligent. She had no reasonable basis for believing that a letter from Dr. Wilbur, with no one present to present it, would secure the continuance. On every prior occasion when a continuance had been secured, an attorney had presented the motion. Attorney Oneal had informed her immediately after May 23d that "it would be in his opinion most difficult to obtain any further continuance." Certainly, even though a layman and inexperienced in court procedure, she had no lawful right to rely on any statement made by Dr. Wilbur that the case would be continued. If final judgments may be set aside because of reliance on advice secured by a litigant from a layman, there would be no finality at all in a final judgment. There can be no escape from the conclusion that, under the evidence, complainant or her counsel were guilty of inexcusable neglect. For that reason the case is not governed by the rule of the Jeffords case.

The factual and legal situation presented in the instant case is substantially similar to that involved in Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220. That, too, was an action to vacate a final judgment. The trial court vacated the judgment but on appeal that determination was reversed. The facts there involved were as follows: R. A. Wattson was under contract with the city of Los Angeles to construct certain street improvements. He sublet a portion of the work to the Hollywood Granite Company, who, in turn, sublet a portion of

the work to the Lewis Construction Company. The latter company negligently performed a portion of the work resulting in injury to the property of the Dillons. The Dillons sued Wattson, the Hollywood Granite Company and the Lewis Construction Company. Wattson was served on October 8, 1930. He immediately telephoned the agent of the bonding company for the Hollywood Granite Company and told that agent that his company was looking to it to take care of the suit. The agent advised that the complaint and summons should be sent to him and promised that his company "would take care of it." Wattson sent the complaint and summons to the bonding company, and in his letter of transmittal reviewed the telephone conversation, and concluded (page 36 of 6 Cal. 2d, page 221 of 56 P.2d): "Please be advised that we look entirely to you for protection in this matter." On October 15, 1930, the bonding company acknowledged receipt of the complaint, summons and letter of transmittal and further informed Wattson that the matter had been turned over to their claims department, and that the problem had been taken up with the Union Indemnity Company, the bonding company for Lewis Construction Company, and that (page 37 of 6 Cal.2d, page 221 of 56 P.2d) "the latter company will handle this matter." About a week or ten days after October 8, 1930, Wattson talked with Lewis of the Lewis Construction Company and was informed by him (page 37 of 6 Cal.2d, page 221 of 56 P.2d) "that the matter had been handled satisfactorily." On October 21, 1930, Lewis informed Wattson that the matter had been attended to and there was nothing further for Wattson to do. As a result, Wattson paid no further attention to the action, made no appearance therein, and, as a result, his default was taken in December, 1930. Judgment against Wattson was entered in May of 1931 and a writ of execution levied in December of 1931. Upon the levy of the execution, Wattson, for the first time, learned that no appearance had been made on his behalf and immediately instituted the present action to set the judgment aside. The decree in his favor was reversed, the court holding that under the facts he was guilty of inexcusable neglect. In this connection the court stated (page 37 of 6 Cal.2d, page 222 of 56 P.2d): "We are of the view that plaintiffs Wattson from the first did not give the attention to the suit filed against them which ordinarily prudent business men would give to a matter of serious concern." This conclusion was reached, as a matter of law, although the trial court found that, prior to the action by the Dillons, Wattson had referred all claims arising out of the performance of the contract to the bonding company and all such claims had been satisfactorily adjusted. The court emphasized that there was no negligence or fraud on the part of the Dillons. It was recognized that mistake alone, under the proper circumstances, will warrant equitable relief, but it was held that that power is limited to situations where the mistake is not the result of the complainant's negligence. In this connection, the court stated (page 40 of 6 Cal.2d, page 223 of 56 P. 2d): "The only mistake which the evidence indicated was present was that respondents believed that some appearance in the action * * * would be made in their behalf. It must, however, be conceded that this mistake of itself would not warrant the very broad relief which they sought in the form of a decree vacating a solemn judgment duly rendered upon evidence submitted to the court. Upon respondents rested the further burden of showing that the mistake was not due to their own negligence. * * *"

At page 42, of 6 Cal.2d, at page 224 of 56 P.2d, the court stated: "In conclusion we may add that there is no claim made that the defendants are in any way responsible for plaintiffs' default. No collusion or fraud is chargeable to defendants. The facts seem to present a clear case of negligence on the part of plaintiffs to give proper attention to a matter which the law exacts of every person upon whom legal service is made. The failure of plaintiffs to appear in the action was not occasioned by a mistake of law or by mistaking one thing for another or by misrepresentation. It was a case of neglecting to do a necessary act."

[8] The principle laid down in the above-entitled case is conclusive in the instant case. If the facts of the Wattson case justified the court in reversing a plaintiff's judgment on the ground that negligence as a matter of law existed, the trial court was justified in the present case in granting a nonsuit. We see no escape from the conclusion that the facts of the present case demonstrate that complainant was

either guilty of negligence herself, or is chargeable with the neglect of her attorney.

It should be noted that the judgment sought to be set aside is not such as to shock the conscience. It is quite apparent that on the default hearing, and on the hearing of the motion under section 473 of the Code of Civil Procedure, the trial judge carefully considered the extent of the community property of the parties and made an equitable division. In the present trial the court inquired extensively into the property rights of the parties. That evidence demonstrates that the award made to the complainant was fair and equitable.

[9, 10] In a brief filed after the oral argument appellant urges that the judgment must be reversed for the reason that respondent failed to specify the grounds of the motion for nonsuit with the particularity required. Since the decision of Anchester v. Keck, 214 Cal. 207, 4 P.2d 934, it has been the rule in this state that a ruling granting a motion for nonsuit will be sustained if it was properly granted on any ground, whether such ground was specified in the motion or not. See, also, Hanrahan-Wilcox Corp. v. Jenison M. Co., 23 Cal.App.2d 642, 73 P.2d 1241; Estate of Velladao, 31 Cal.App.2d 355, 88 P.2d 187.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



55 Cal.App.2d 357

BUSH v. INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA et al.

Civ. 13620.

District Court of Appeal, Second District, Division 1, California.

Nov. 4, 1942.

1. Trade unions ⇐4

Trade union's by-law requiring charges to be filed with executive board of local of which accused is a member within 30 days after the offense becomes known to the person making the charge is merely "directory".

See Words and Phrases, Permanent Edition, for all other definitions of "Directory".

2. Criminal law ⇐145½

Unless a period of prescription or limitation is fixed by law for a particular offense or crime, a prosecution therefor is not barred by the lapse of time, since the common law rule was that there was no limitation of time within which offenses might be prosecuted.

3. Trade unions ⇐4

Trade union's by-law that charges must be filed with executive board of the local of which accused is a member within 30 days after the offense becomes known to person making the charge is not a "limitation" upon the right of union to try a member, so that the fact that charges were filed more than 30 days after the accuser had knowledge of facts upon which they were based did not bar expulsion proceeding by union against the accused member.

See Words and Phrases, Permanent Edition, for all other definitions of "Limitation".

4. Trade unions ⇐4

Expulsion proceedings trial against member of trade union was not objectionable on ground that he was not given notice of the trial, where the trial was pursuant to his own request and neither he nor his counsel made any request for continuance of the trial and in any event he "waived" notice by having appeared and participated in the trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Trade unions ⇐4

In reviewing the expulsion of member of trade union, the province of court is restricted to the ascertainment of whether there was any evidence whatever before the union to support its conclusion and the court may not consider the weight of such evidence or substitute its judgment thereon for the judgment of the tribunal before whom the member was tried.

6. Trade unions ⇐4

Where trade union's officer arranging for payment of death benefits to deceased member's widow received from widow

money which officer claimed was in repayment of loan but after being accused of extorting the money officer returned it to widow and accepted a receipt stating that it was a refund, evidence justified the trade union's expulsion of the officer.

7. Trade unions ⇐4

In expulsion proceeding trial against member of trade union, the admissibility of evidence was governed by rules adopted by the union and not by rules governing admissibility of evidence in a court of law.

8. Trade unions ⇐3

The constitution, rules and by-laws of a voluntary unincorporated association constitutes a "contract" between the association and its members and the rights and duties of the members as between themselves and in their relation to the association in all matters affecting its internal government and management of its affairs are measured by the terms of such constitution and by-laws.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

9. Trade unions ⇐4

Where constitution of trade union provided that if witness was unable to attend trial his testimony should be taken in the form of an affidavit, an affidavit no part of which was denied in proceeding for expulsion of member of trade union was properly considered by the trial assembly.

10. Trade unions ⇐3

The constitution and by-laws of a trade union constitute a "contract" between member and union binding both upon the member and the union.

11. Mandamus ⇐4(5)

Where the constitution and by-laws of trade union provided for a final appeal by aggrieved member to general convention of international union, expelled member who failed to exercise such right and stopped with his appeal to general executive board was not entitled to writ of mandate to compel reinstatement.

12. Trade unions ⇐4

A member of a trade union must first exhaust rights afforded him by the tribunals of the union before he may secure redress from court, except where the union has violated its own laws and regulations and has arbitrarily violated a member's property right.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for writ of mandate by E. D. Bush against the International Alliance of Theater Stage Employees and Moving Picture Machine Operators of the United States and Canada and others and Local Union No. 728 of the International Alliance of Theater Stage Employees and Moving Picture Machine Operators of the United States and Canada and others. From an adverse judgment the Local Union No. 728 of the International Alliance of Theater Stage Employees and Moving Picture Machine Operators of the United States and Canada and others appeal.

Reversed.

Bodkin, Breslin & Luddy, of Los Angeles, for appellants.

Paul D. McCormick and Francis C. Jones, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Petitioner was a member of Local Union 728 of the International Alliance of Theater Stage Employees and Moving Picture Operators of the United States and Canada. The defendants are the local union, and sundry officers thereof. The local union and a number of others throughout the United States and Canada make up the International Alliance above mentioned. Although named as a defendant, the International Alliance was not served with summons and did not appear in the action. The petitioner was a member of the executive board of the local union and took an active part in its affairs.

A death benefit fund was maintained under the control and direction of the local union. Upon the death of a member in good standing with the fund, $1,000 was payable to his beneficiary. One of the members of the union died, whereupon $1,000 became due from the benefit fund to his widow. Petitioner, acting for the union, interviewed the widow and arranged for the payments due to her from this fund. These payments were to be in installments of $250. Out of the first installment petitioner received from the widow $122.

Complaints of the widow coming to the attention of other officers of the union, an investigation was instituted. At an interview in the office of the city attorney of the city of Los Angeles he was accused of extorting the money from her. He claimed that the widow had borrowed from him

$250 and that the $122, which he admitted receiving from her, was payment to him on account of this loan. He produced no receipt for the money which he stated he loaned to her. At the close of the interview, he agreed to return the money to the widow. Thereafter he paid $122 to an officer of the union and took a receipt for it reading as follows:

"Received From Edward Bush the sum of One Hundred and twenty-two dollars ($122.00) paid to Charles J. Ferguson as refund in full for Mrs. Marshall Seymour, in reference to the Death Fund of the I.A. T.S.E. Locals. Charles J. Ferguson acting Trustee for this money until it is turned over to Mrs. Marshall Seymour."

So far this recital of facts includes only matters about which there is no dispute, either as to the facts themselves or as to the method or manner of the proof thereof. Other facts will be later referred to, concerning which there is dispute as to the manner of proof.

In accordance with the constitution and by-laws of the union, charges were preferred against the petitioner. Upon these charges he was tried at a general assembly of members of the union, found guilty by a majority vote of the members present, and expelled from membership. From this order of expulsion he appealed, first, to the international president, and secondly, to the general executive board of the International Alliance. Both of these appeals were resolved against him. The constitution and by-laws provide for a final appeal to the general convention of the International Alliance.

The petitioner did not take this final appeal, but filed his complaint in the superior court praying that he be restored to membership by writ of mandate. Answer was filed, the matter heard by the trial court, and judgment followed directing the writ, together with damages in favor of petitioner. From this judgment the defendants have appealed.

In the trial tribunals of the union, and in this petition for mandate, petitioner has contended that because the charges against him were filed more than thirty days after the accuser had knowledge of the facts upon which they were based, his prosecution was barred by a provision of the by-laws of the union, which is in the nature of a statute of limitations.

This contention is founded upon article 12 of the by-laws which prescribes official forms to be used in a number of specified contingencies. Section 6 of this article prescribes forms to be used in preferring charges against members, and provides that upon the back of such forms certain instructions shall be set forth. Instruction number 3 is the one upon which petitioner relies and is as follows:

"3. These must be filed with the Executive Board of the Local, of which the accused is a member within thirty (30) days after the offense becomes known to the person making the charge."

Apparently petitioner and his counsel were very firmly convinced that this clause constituted a statute of limitations which protected him from being prosecuted. It was presented to every tribunal of the union as a bar to further proceedings against him, and when each tribunal ruled against him on that point, no testimony was presented in his defense.

[1] There is nothing in the provision under consideration which sets forth any period of limitation of prosecution. It is merely directory with respect to the duty of a member preferring charges against another.

[2] In criminal cases the common-law rule was that there was no limitation of time within which offenses might be prosecuted. Hence, unless a period of prescription or limitation is fixed by law for a particular offense or crime, a prosecution therefor is not barred by lapse of time. 22 C.J.S., Criminal Law, § 223, p. 350. If petitioner's contentions were correct, no member of the union could be brought to trial for any offense, because all that would be necessary to bar prosecution would be to bring the facts to the attention of some other member who would withhold charges for a period of thirty days. Moreover, as a matter of reasonable construction of a provision of this kind, it would be wrong to hold that so short a time as thirty days was a limitation of time within which charges might be filed against an erring member of a trades union, unless the language of the constitution or by-laws was so clear and unmistakable as to require such a construction.

[3] Upon appeal to the president of the International Alliance, and upon subsequent appeal to the executive board of the Alliance, it was held that the provision in question was not a limitation upon the right of the union to try the member,—with which we are in entire agreement.

Petitioner next argued in support of his petition that he had no notice of the time and place of his trial, and that he was forced to trial without opportunity to prepare a defense or produce witnesses in his behalf.

Charges were first presented against him before the executive board of the local union. A date was set for the hearing before this trial board, and petitioner was given personal notice thereof. He and his counsel appeared, and interposed the purported bar of the statute of limitations heretofore discussed. The executive board ruled against him; whereupon, he requested that his trial be held by the general assembly of the local union and left the meeting, a right given to him by the constitution and by-laws.

The executive board then certified the matter to the local union for trial at a general assembly thereof. This was set for a regular meeting date of the union. On that date petitioner and his counsel appeared and participated in the trial.

[4] No objection was made to the proceeding as such. No request for a continuance was made and no denial of the charges was presented. The only thing presented by the petitioner was again the purported bar of the statute of limitations. Indeed, one of the members of the union there present requested the petitioner to make some defense, which he then and there declined to do.

The trial of which the petitioner complains he had no notice was pursuant to his own request. It was a part of a proceeding of which he already had notice, and it was his duty to be present and defend himself. Having appeared and participated in the trial with his counsel, he waived notice in any event.

Neither he nor his counsel at any time made any request for continuance of the trial. Therefore, this objection to the union's proceedings is entirely devoid of merit.

Petitioner has presented with considerable earnestness this next point, which is that no competent evidence was presented to the trial assembly which would support his expulsion.

As already stated, undisputed facts adduced in evidence before the trial assembly were (a) that the petitioner was an officer of the union; (b) that he did receive $122 from the widow, and (c) that after he was accused of extorting the money from the widow, he returned it to her, and by his own receipt admitted it to be a "refund in full from Mrs. Marshall Seymour in reference to the Death Fund of the I.A.T.S.E. Locals." It was a fair inference for the trial body to make that when the petitioner returned the money and accepted a receipt with the word "refund" in it, he abandoned his claim that the $122 was part of a loan which he had made to the widow. And it was but a fair inference that this conduct supported the truth of the accusation against him that he had extorted $122 from the beneficiary of a deceased brother of his union.

[5] The rule to be here applied is set forth in Hugh McConville v. Milk Wagon Drivers' Union, Local No. 226, of San Francisco, California, et al., 106 Cal.App. 696, at page 698, 289 P. 852, at page 853:

"Furthermore, it is held generally that, with respect to the merits of the charges which have resulted in suspension or expulsion of the member, the province of the court is restricted to the ascertainment of whether there was any evidence whatever before the union to support its conclusion, and that it may not consider the weight of such evidence nor substitute its judgment thereon for the judgment of the tribunal before whom the member was tried. Martin's Modern Law of Labor Unions, p. 393; Fritz v. Knaub, 57 Misc. 405, 103 N.Y.S. 1003."

[6] The foregoing evidence satisfies all the contractual requirements as between petitioner and the union, in accordance with the rule in such cases as this which we must follow. Dingwall v. Amalgamated Ass'n, 4 Cal.App. 565, 88 P. 597.

In addition to the undisputed evidence above set forth, there was introduced at the trial of petitioner before the trial assembly, statements certified by the makers thereof before a notary public as true. The first was a statement by the widow, in which she said that petitioner called on her and told her that she was not eligible for the money, that he had been to two or three different meetings about it, that when the first installment check was ready he called on the telephone and said he expected a cut and asked for $250 and told her "I am practically throwing $750.00 in your lap"; and that on the day she got her check from the benefit fund she gave him $122. That he said to her, "My word goes. If you do not want to play ball with

me about the money, I can have the whole thing voided."

The second was an affidavit of two individuals who deposed and said: Affiant A. That he had at the request of the petitioner contacted the widow and offered her $200 for a receipt setting forth that she had borrowed money from the petitioner and that the money which she had turned over to him from her insurance check was in payment of the loan; that affiant A went to affiant B and told him the foregoing, whereupon affiant B called the widow on the telephone and stated to her that there was a couple hundred dollars in it for her if she would give either a receipt or an affidavit setting forth that she had borrowed $200 from petitioner and that the money which she paid him out of her insurance check was merely in repayment of the loan; and that at the conclusion of this telephone conversation affiant B said the widow told him she did not want any part of it and explained that the money petitioner paid her was in payment of what he insisted was his commission for getting her the insurance money.

Upon the trial neither the defendant nor his counsel objected to the reading of these affidavits, nor was any denial made of any of the facts contained therein. This evidence petitioner asserts was incompetent and should not have been received or considered as against him.

[7, 8] In this likewise petitioner is mistaken. It is to be remembered that we are not here considering the admissibility of evidence in a court of law. The rules adopted by those who associate themselves in organizations such as this are controlling.

"The constitution and rules and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws." Dingwall v. Amalgamated Ass'n, supra, 4 Cal.App. page 569, 88 P. page 599. See, also, Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Greenwood v. Building Trades Council, etc., 71 Cal.App. 159, 233 P. 823; Grand Grove of U. A. O. of D. v. Garibaldi Grove and Duchein, 105 Cal. 219, 38 P. 947; and Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 120 P.2d 874.

Article XIV, section 18, of the constitution of the Alliance is as follows: "If a witness be unable to attend the trial a written deposition of his testimony shall be taken in the form of an affidavit, and such portions of it as are not denied by the accused shall be admitted as evidence."

[9] No part of any of the affidavits being denied by the petitioner, it was proper for the trial assembly to take the facts appearing in the affidavits also into consideration.

[10-12] It is apparent from the record that the writ of mandate should have been denied in any event, for the reason that the petitioner failed to exhaust all the remedies provided by the constitution and bylaws of the union. As stated, these constitute a contract between the member and the union, binding both upon the member and the union. And, as heretofore stated, the constitution and bylaws of the union provided for a final appeal by an aggrieved member to the Alliance in convention assembled. This the petitioner failed to do, stopping with his appeal to the general executive board.

The latest case in this state touching upon this point is Simpson v. Salvation Army, 49 Cal.App.2d 371, 374, 121 P.2d 847, 848, in which the rule and the California authorities are stated as follows:

"It is well-settled in this state that a member of an association of this type must first exhaust the rights afforded him by the tribunals of the association before he may secure redress from the courts. Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Levy v. Magnolia Lodge, I. O. O. F., 110 Cal. 297, 42 P. 887; Coffey v. Los Angeles Firemen's R. Ass'n, 22 Cal.App.2d 510, 71 P.2d 328; Hughes v. American Trust Co., 134 Cal.App. 485, 25 P.2d 491; Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823; Dingwall v. Amalgamated Ass'n, etc., 4 Cal.App. 565, 88 P. 597.

"It is true that there is a limited exception to this rule. Where the organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, such as the right to sick benefits, the member need not exhaust his remedies within the organization before resort is had to the courts. Neto v. Conselho

Amor, etc., 18 Cal.App. 234, 122 P. 973; Schou v. Sotoyome Tribe, No. 12, 140 Cal. 254, 73 P. 996. Obviously, that exception is not here involved."

As in the case just cited, it is obvious that in the pending case no exception to the rule is involved.

There is no reason to discuss questions raised as to damages.

For the foregoing reasons the judgment is reversed.

The appeal from the order denying motion for new trial is dismissed; the appeal from the order denying motion to vacate the judgment is disposed of by the reversal of said judgment.

YORK, P. J., and DORAN, J., concurred.



55 Cal.App.2d 437

NEWCOMB & CO., LIMITED, v. SAINTE CLAIRE REALTY CO.

SAINTE CLAIRE REALTY CO. v. NEWCOMB & CO., LIMITED.

Civ. 12169.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1942.

1. Customs and usages ⇐12(2)

A party to a contract may be bound by a custom not inconsistent with terms of contract, even though he is ignorant of the custom if custom is of such general application that he may be conclusively presumed to know of it.

2. Customs and usages ⇐12(2)

The universal custom in hotels throughout the United States to furnish managers and their immediate families without charge, rooms, meals, valet and laundry service, and telephone service connected with hotel business, regardless of whether contract with manager expressly provides therefor, was conclusively presumed to have been known to lessor of hotel property which was entitled to 60 per cent. of net earnings of hotel as rental.

3. Customs and usages ⇐17

The universal custom in hotels throughout the United States to furnish managers and their immediate families without charge, rooms, meals, valet and laundry service and telephone service connected with hotel business regardless of whether contract with manager expressly provides therefor was not inconsistent with lease under which lessor was entitled to 60 per cent. of net earnings of hotel, because of provision that "net earnings" should include balance remaining of gross earnings after deduction of usual and reasonable expenses of conducting business, including certain fixed salary for manager.

See Words and Phrases, Permanent Edition, for all other definitions of "Net Earnings".

4. Customs and usages ⇐15(2)

In determining what was the "usual and reasonable expense" of conducting hotel business within lease under which lessor was entitled to 60 per cent. of net earnings of hotel which were defined as balance remaining of gross earnings of hotel after deducting usual and reasonable expense of conducting the business, resort might be had to evidence of universal custom in the hotel business of furnishing manager and his family without charge, rooms, meals, valet and laundry service, and telephone service connected with hotel business.

See Words and Phrases, Permanent Edition, for all other definitions of "Usual and Reasonable Expense".

5. Landlord and tenant ⇐200(1)

Where lease of hotel property provided for rental of 60 per cent. of "net earnings" of hotel which were defined as balance remaining of gross earnings after deduction of usual and reasonable expense of conducting the business, including specified manager's salary and other items, enumeration of the items was not intended as definition of what should constitute a "usual and reasonable expense" and only as a clarification of that term to extent that their enumeration indicated that the parties included those items within the meaning of the term without regard to the customary definition of words as used in the trade.

6. Action ⇐6

In action for declaratory judgment, evidence sustained finding that on visit to hotel by one of original lessees of hotel

property, the lessee actively engaged in management of hotel as authorized by the lease, which provided as rental 60 per cent. of the net earnings of hotel, so that, pursuant to universal custom, lessee on such occasions was properly furnished without charge, rooms, meals, valet and laundry service and telephone service connected with hotel business.

7. Landlord and tenant ⇐34(2)

Where hotel which was leased under agreement providing for payment of 60 per cent. of the net earnings as rental had a large volume of business and showed as high as $26,256.48 profit in one year, the fact that after death of one of original lessees, his wife stayed at hotel on a few occasions without charge did not constitute substantial breach of the lease, so as to justify cancellation thereof.

8. Customs and usages ⇐19(3)

Evidence established that universal custom in hotels throughout the United States to furnish hotel managers and their immediate families without charge, rooms, meals, valet and laundry service and telephone service connected with hotel business, applied to a lessee actually managing the leased hotel, as well as to an employee of a hotel operator.

9. Landlord and tenant ⇐34(5)

Evidence was insufficient to justify cancellation of hotel lease which provided rental of 60 per cent. of net earnings of the hotel, on ground that certain parties who were interested in the hotel business but not active in its management stayed at the hotel occasionally, without paying for their accommodations.

10. Landlord and tenant ⇐34(5)

Where hotel which was leased under agreement providing for payment of 60 per cent. of net earnings as rental, had large volume of business and showed profits as high as $26,256.48 in one year and total long distance telephone calls made between 1931 and 1938 by lessees who were also managers of hotel was less than $20 per month, finding that total cost of personal calls was trivial item and did not substantially affect net earnings of the business, so as to justify cancellation of lease for substantial breach, was justified, even though such total cost was not clearly established.

11. Landlord and tenant ⇐34(2)

Where lease of hotel property provided for payment of 60 per cent. of the net earnings as rental and required lessees to keep accurate full and detailed books of account, fact that books of account omitted value of rooms, meals, valet and laundry service, and telephone service connected with hotel business furnished without charge to managers of hotel pursuant to universal custom did not constitute substantial breach of the lease so as to justify its cancellation.

12. Landlord and tenant ⇐34(2)

Where hotel was leased under agreement providing for payment of 60 per cent. of net earnings as rental, and lease required lessees to keep accurate, full and detailed books of account, that books failed to show certain items which were held not to be sufficiently substantial to justify forfeiture of the lease, did not constitute substantial breach of the agreement to keep accurate books so as to justify cancellation of lease.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Newcomb & Co., Limited, against Sainte Claire Realty Company for declaratory judgment concerning rights of the parties under a lease, and action in ejectment by the Sainte Claire Realty Company against Newcomb & Co., Limited, which were consolidated. From a judgment in favor of Newcomb & Co., Limited, the Sainte Claire Realty Company appeals.

Affirmed.

Rogers & Clark, of San Francisco, for appellant.

Louis Oneal and Maurice J. Rankin, both of San Jose, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment rendered in favor of respondent, Newcomb & Co., Ltd., in two consolidated cases. In one, which was an action for declaratory relief, the respondent was plaintiff. In the other, an action in ejectment, appellant, Sainte Claire Realty Company was plaintiff.

Appellant is the owner of the Sainte Claire Hotel in San Jose, California. On October 15, 1926, appellant entered into a written lease of this property as lessor with J. A. Newcomb and W. A. Newcomb as lessees for a term of twenty years. On October 20, 1931, the lessees with the consent of appellant lessor assigned the lease to respondent Newcomb & Co., Ltd. Un-

der the terms of the lease the lessees agreed to pay the lessor 60 per cent of the net earnings of the hotel as rental. They further agreed to keep accurate, full and detailed books of account and to furnish the lessor with accurate, full and detailed monthly statements showing the gross earnings and receipts from the business and the disbursements accruing or paid out, together with a statement of the net earnings.

The lease contained the following provisions which are particularly material to the questions presented on this appeal:

"The term 'net earnings' whenever used in this Lease is intended to and shall mean the balance remaining of the gross earnings of the Hotel business conducted upon the demised premises and rentals for any one calendar month after deducting therefrom the usual and reasonable expense of conducting such business, including the wages of all employees necessary in the conduct of the business, including Manager's salary of five hundred and eighty-three and 33/100 (583.33) dollars a month, the cost of necessary supplies, upkeep, fuel, electricity, gas, water, accident insurance, burglary insurance and employers' liability insurance, and all reasonable advertising bills. * * *

"It is understood and agreed that the salary for the manager of said Hotel shall be paid to the manager in active charge, it being provided that so long as either Mr. J. A. Newcomb or Mr. W. A. Newcomb, or both as co-managers remains in active charge as such manager or managers that the salary of $853.22 a month shall be paid to him or them and to him or them only. * * *"

During all of the period from the time of the assignment of the lease to respondent in 1931 to October 20, 1938, W. A. Newcomb resided in the Hotel Sainte Claire with his family consisting of his wife and, after the birth of a child in 1934, the child and a nursemaid. W. A. Newcomb was during all of this period the resident manager actively in charge of the hotel. J. A. Newcomb, who was W. A. Newcomb's father, up to the time of his death in 1935 spent comparatively little time in the Hotel Sainte Claire, since he was traveling about the country visiting other hotel properties operated by the Newcombs. However, there is testimony that J. A. Newcomb always considered himself co-manager of the Hotel Sainte Claire and at times when W. A. Newcomb was away J. A. Newcomb would stay there and manage the hotel.

The evidence shows that W. A. Newcomb and his family paid nothing for their rooms in the hotel, their meals, laundry, valet and telephone service and that when J. A. Newcomb was present in the hotel he and his wife likewise received such services and accommodations without payment. It is further in evidence that after J. A. Newcomb's death, his widow went to the Hotel Sainte Claire on a few occasions and received similar accommodations and services without charge. It was her testimony that on those occasions she was engaged in business connected with the operation of the hotel.

The main contention of appellant is that the lease was breached by the furnishing of these accommodations and services to the Newcombs without accounting to appellant therefor and paying to it 60 per cent of the value thereof. Respondent met this claim by the testimony of many witnesses familiar with the business of operating hotels, including an accountant engaged in the business of supervising and auditing the accounts of hotels throughout the United States of America, that it was the general custom in hotels throughout this country to furnish the managers of hotels and their immediate families without charge rooms, meals, valet and laundry service and telephone service connected with the business operation of the hotel, and this without regard to whether the contract with the manager expressly provided therefor. This evidence of general custom was uncontradicted and appellant concedes the existence of the custom on this appeal.

The trial court found that such custom existed, that it was known to the lessor at the time of the execution of the lease, that pursuant to the custom W. A. Newcomb and J. A. Newcomb were entitled as managers to such accommodations and services for themselves and their families and that the lessor had acquiesced therein.

[1] Appellant attacks the finding that the custom was known to the lessor at the time of the execution of the lease and cites many cases to the effect that custom to become an implied part of a contract must be known to both parties to the contract at the time of its execution. We do not find it necessary to pass upon the question whether there is substantial evidence that the lessor had actual knowledge of the

custom at the time of the lease's execution, nor to consider in detail the many cases on this phase of the appeal cited by the appellant, for the reason that in our judgment these matters are concluded by the decision of our Supreme Court in Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 P. 817, 32 A.L.R. 1215. In that case the majority of the court exhaustively reviews the authorities and announces the applicable rule at page 69 of 193 Cal., at page 819 of 222 P., 32 A.L.R. 1215:

"The rule seems to be uniform that a party to a contract may be bound by a custom not inconsistent with the terms of the contract, even though he is ignorant of the custom, if that custom is of such general and universal application that he may be conclusively presumed to know of the custom. * * *

"The rule that a person will be presumed to have contracted with reference to a general custom or usage whether he knew of that custom or not has frequently been invoked."

[2] An examination of the many cases quoted from in the majority opinion in that case will show a similar statement of the rule in the decisions of the courts of other jurisdictions. It is undisputed in the evidence that the custom here relied upon was general and universal in hotels throughout the United States. It may, under the authority of the Germain case, be conclusively presumed to have been known to appellant herein.

[3, 4] It is further claimed by appellant, however, that the custom was inconsistent with the express terms of the lease entered into by the parties in that the salary of the manager or co-managers was expressly fixed by the terms of the contract at $583.33 per month, and in determining net earnings only this salary was authorized to be deducted from gross income. This argument overlooks the fact that the evidence shows that regardless of whether the contract provided therefor or not it was the universal custom in the hotel business to allow the manager and his family these perquisites. It also overlooks the fact that the lease expressly provides for the deduction of "the usual and reasonable expense of conducting such business." In determining what is the "usual" expense of conducting such business resort may properly be had to evidence of the universal custom in the hotel business of allowing the manager and his family rooms, meals, valet and laundry service and telephone calls as a part of the expense of the operation of the hotel. Such evidence is not inconsistent with any express term of the contract. It is both consistent with, and explanatory of, the express provision of the contract authorizing the deduction of "the usual and reasonable expense of conducting such business."

[5] The enumeration of certain items that are expressly agreed to be included in the usual and reasonable expense of conducting such business "including Manager's salary of five hundred and eighty-three and 33/100 (583.33) dollars a month" does not compel a different conclusion. The enumeration of these items is not intended as a definition of "usual and reasonable expense," but only as a clarification of that term to the extent that their enumeration indicates that the parties by agreement have included those items within the meaning of the term without regard to the customary definition of the words as used in the trade. The enumeration is not exclusive and left it open to the parties to prove what were the usual and reasonable expenses in the operation of that character of business in addidition to the expenses so included by express agreement.

[6] The suggestion that the furnishing of such perquisites to J. A. Newcomb and wife on the occasions when they were present in the hotel did not come within the ambit of the custom as proved is met by the terms of the lease itself which expressly authorized the employment as co-manager of J. A. Newcomb and the evidence that on his visits to the hotel he engaged actively in its management. Conceding that the proof in this regard may have been susceptible of another interpretation it was ample to support the finding of the trial court in this particular.

[7] There remain the few occasions on which after J. A. Newcomb's death his widow enjoyed the same privileges. It may be readily conceded that she did not fall within the custom as proved. But the breach of the lease in this particular can hardly be held to have been a substantial one. In 1936 the hotel business showed a net profit of $25,335.22 and in 1937 of $26,256.48. These figures are cited only to show the extent and volume of the business. It was Mrs. J. A. Newcomb's testimony that from February, 1935, the date of her husband's death, to October 20, 1938: "On

a few occasions I stayed at the Sainte Claire Hotel during that period. * * * As I formerly said, I was there on very few occasions at any time." In view of the volume and extent of the business of the hotel such occasional visits cannot well be held to amount to a substantial breach of the lease justifying its cancellation.

[8] The suggestion that the custom as proved did not apply to a lessee actually managing the leased hotel, but only to an employee of a hotel operator, is met by the testimony of Ernest B. Horwath, who had been engaged in hotel accounting throughout the United States for over twenty-five years, brought out on cross-examination, a portion of which is quoted:

"A. The lessee's case is so much stronger than that of a manager, if you want that in the record, he is practically the owner of the business, the operation for his own benefit.

"Q. It is your testimony he should charge in the case of a percentage lease * * * his meals, room accommodations, personal telephone calls and laundry against his lessor, is that true? A. In the absence of any statement to the contrary in the lease, yes."

He further testified that in his extensive experience he had never known of an agreement for the operation of a hotel in which these customary perquisites of the manager were covered by written agreement.

"Q. * * * Isn't it a fact sometimes the matter of manager's meals, room accommodations, telephone calls, etc., are covered by written agreement between himself and his employer? A. I have not seen such agreement."

[9] It is suggested that Mr. and Mrs. S. J. Newcomb, who are interested in the business but not active in its management, occasionally stayed at the Sainte Claire. The citations to the transcript show that this is true but they do not show that they did not pay for their accommodations. The matter in any event was barely touched on in the testimony and the showing would not support a finding of a substantial, if any, breach of the lease in this particular.

[10] There remains the question of personal telephone calls, as distinguished from those connected with the business. It is admitted that personal telephone calls were not charged against the managers. The total amount of all long distance calls by all of the Newcombs from 1931 to 1938 was $1,518.35, less than $20 per month. Of these those made by Mrs. W. A. Newcomb totaled less than $50 per year and those made by Mrs. J. A. Newcomb were so few as to be negligible. In the operation of a business of the magnitude and character of this one a much larger long distance total exclusively for business purposes might well have been expected, and, while the total cost of personal calls is not clearly established, enough appears to justify a finding that they were a trivial item in comparison to the volume of receipts and disbursements and did not substantially affect the net earnings of the business.

Appellant also complains that respondent failed to keep accurate, full and detailed books of account. The matters complained of were the omission of the value of the managerial perquisites herein discussed. The evidence shows that the custom of hotel managements in this respect was not uniform and Henry T. Mascal, a certified public accountant called by appellant, testified:

"Q. Assuming that these perquisites were proper charges of expense of operation, then from the books as you found them, you could prepare a correct statement of net earnings of the business couldn't you? A. For the period which we audited which was January 1st, 1938 to August 31st, 1938, I would say yes."

[11, 12] Indeed it is obvious that the inclusion of the value of such perquisites as we have held properly allowable would have been offset by their deduction as usual and reasonable expenses of the business in calculating net earnings. As to the others, having held that they were not sufficiently substantial to justify the forfeiture of the lease, we must hold that their omission from the accounts was likewise not a substantial breach.

The points discussed fully dispose of the appeal and it is unnecessary to discuss other matters referred to in the briefs.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

55 Cal.App.2d 335

PEOPLE v. HOPPER.

Cr. 619.

District Court of Appeal, Fourth District, California.

Oct. 30, 1942.

Hearing Denied Nov. 27, 1942.

1. Larceny ⇐57

Evidence supported findings of criminal intent in prosecution for grand theft.

2. Criminal law ⇐1170(1)

In prosecution for grand theft of air compressor, trial court did not commit reversible error in excluding testimony of witness, who had testified that he had loaned defendant money with which to buy the compressor and that a few days later defendant showed him a receipt showing that he had paid a certain person a certain amount on compressor, as to what was said at time witness advanced money to defendant.

3. Criminal law ⇐1170(2)
Larceny ⇐43

In prosecution for grand theft of air compressor which defendant claimed that he purchased from a third person, testimony of defendant that the third person had stated to defendant that prosecuting witness had removed his air compressor from place where third person's alleged air compressor was located, should have been received, but its rejection was not prejudicial, where defendant was allowed to give similar testimony.

4. Criminal law ⇐1186(4)

Where defendant contended that he did not take property in question with any criminal intent, alleged errors in general instructions relating to principal and accessory and the presumption that one intends to do that which he voluntarily and willfully does in fact do, were cured by other instructions given. Const. art. 6, § 4½.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Louis R. Hopper was convicted of grand theft, and he appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

A jury found the defendant guilty of grand theft and he appeals from the judgment and from an order denying his motion for a new trial.

The appellant is a mining engineer and dealer in mining claims and mining products. For several years he has maintained an office in downtown Los Angeles. During 1941, he was interested in and trying to develop a silica mine in Nine Mile Canyon, somewhere above Mojave. At the same time Mr. Charles E. Moore, who lived in Ontario, had a lease on a mining claim on property owned by John Prado at a spot called Crystal Springs in or near Death Valley. It is about 240 miles between these two mines. Mr. Moore's mine was being operated by his son, Vincent Moore. They had at that mine an air compressor, for which Mr. Moore had paid $1,100 the preceding spring, and a jack hammer and certain other tools for which he had paid $500. The compressor was located in some cottonwood trees close to the cabin and spring and up against a bank, and was connected with a pipe line which ran some 200 feet up the hill to the mine itself. On five different occasions between July and the middle of October, 1941, the appellant had visited the Moore mine with one of the Moores in connection with a proposal that he sell the products of that mine. On one of these trips the appellant looked at the equipment and remarked that "it was a mighty good compressor." During the fall of 1941, appellant made several unsuccessful attempts to obtain the use of this compressor, having told the Moores that there was no talc in their mine in paying quantities.

Mr. Moore visited his mine on November 20, 1941, at which time the compressor was there in position and the jack hammer and other tools were locked up inside the compressor. When he returned, about a month later, the compressor, jack hammer and tools were gone. He testified that he had never given the appellant, or anyone else, permission to remove them. Some weeks later, with the aid of a deputy sheriff, the compressor and other tools were found at the appellant's mine in Nine Mile Canyon. A serial number on the compressor had

been chiseled off, the marks indicating that this had been recently done.

On November 22 or 23, 1941, the appellant asked a Mr. Forker, who was engaged in the trucking business at a place near appellant's silica mine, what he would charge for a trip to Death Valley if they got a compressor there. Forker said he would make the trip for $25. Vincent Moore testified that three or four days before November 30, 1941, the appellant came to his home in Ontario and asked him if he was "going up to the mine very soon." He replied "no" and the appellant asked, "You are not going up the next week or two are you?" He replied, "No" and the appellant then said: "I may have a job for you over near Barstow—and I may like to have you take the compressor over there." On November 28, 1941, the appellant had another conversation with Forker, telling him that he had not yet decided whether to get the compressor from Death Valley or one from near Los Angeles. At that time, he drew a map for Forker, showing how to get to the Crystal Springs mine, and gave him an exact description as to where and how the compressor was located and attached, which description coincided exactly with the location of the Moore compressor. He also told Forker that it would be unnecessary to give him a written order as there would be no one at the Crystal Springs mine, and further stated that if he decided to take that compressor he would send him a telegram saying "O. K."

Forker testified that the appellant told him if he made the trip to take along wrenches to disconnect the pipe and to bring the compressor but not the pipe; that on November 30, 1941, he received a telegram from the appellant saying "o. k."; that he found the place and the compressor just as described to him by the appellant; that the cottonwood trees around there were the only ones he saw on that trip; that he disconnected the pipe and loaded the compressor on his truck and took it to the appellant's mine; that the appellant was there when he arrived; that the appellant then said that he had bought the compressor from a man named Monovitch for $750, making a small down payment on it; that the appellant stated that the man from whom he bought the compressor had mislaid his keys to the lock and he ordered them to force the lock; that this was done and the jack hammer and other tools were inside the compressor; that he then noticed that the serial number had been recently removed and asked the appellant "if the compressor was hot"; and that the appellant replied "he didn't think it was, it wasn't supposed to be." It appears, however, that the appellant made no inquiries of the Moores until after his arrest about six weeks later.

The appellant testified that while at the Moore mine he had seen this compressor but had not closely observed it; that he thought the Moores' compressor was then at their home and did not know that the compressor which was at Crystal Springs during the latter part of November belonged to Mr. Moore; that a few days before November 29, 1941, a man who looked like a laborer came into his office in Los Angeles; that this man said his name was Monovitch and he lived at Adelanto; that this man wanted to sell him a compressor and told him exactly where it was located, which was exactly where Mr. Moore's compressor had been located; that on November 29, 1941, he purchased this compressor, jack hammer and other tools from Monovitch for $100 down and a balance of $650; that he desired also to buy the pipe line but Mr. Monovitch said it belonged to Mr. Prado; that he paid the $100 down payment in bills and took a receipt for that, signed by Monovitch, but did not receive any bill of sale or contract of sale; that Monovitch was to call at his office for the balance of the payments; that he had never seen Monovitch since except that he saw him once at a distance on the street; and that he bought this compressor from Monovitch without seeing it, without knowing what it was worth and without making any investigation as to his title because Monovitch looked honest and he had always found miners to be straight and honest men.

After his arrest the appellant told a deputy sheriff that the compressor which he had bought from Monovitch and which he had directed Forker to get was located at New Crystal Springs on property run by Monovitch, that this was around the hill from Old Crystal Springs, and that the compressor he had directed Forker to get was not located on Mr. Prado's property. At the trial he testified that he knew there was but one Crystal Springs and that he had directed Forker to get the compressor from Prado's property and from the exact spot where Moore's compressor had been. The appellant also told the deputy sheriff that he did not know where Monovitch lived or worked and that he had never had his address. Before the trial he told Mr.

Moore that Monovitch lived at Fontana and at the trial he testified that Monovitch had given him his address as Adelanto. On at least two occasions after his arrest and before the trial the appellant endeavored to get the Moores to "drop this case," offering them an interest in his mine and other inducements if they would do so.

[1] Appellant's first contention is that the evidence is insufficient to support the verdict and judgment. While he concedes that the evidence amply proves that the compressor and tools which he directed Forker to get and which he received belonged to Mr. Moore and that these were taken without Moore's permission, he contends that the evidence fails to show any criminal intent on his part. In effect, it is argued that his testimony that he bought a compressor from one Monovitch, that he thought Moore's compressor had been removed to Moore's home, and that he did not know that the compressor which was then at Crystal Springs belonged to Mr. Moore, should have been accepted, and that the other evidence is not sufficient to show criminal intent on his part. He makes numerous complaints about the other evidence, relying on supposed conflicts and possible inferences therefrom, all of which affect the weight of the evidence only and which need not be here considered. It clearly appears from the other evidence that the appellant knew that the Moores had a compressor at this Crystal Springs mine, that he knew exactly where it was located and how it was attached, that he had endeavored to obtain the use of this compressor, that he talked to Forker about getting a compressor at that location, that this conversation was probably before he first claimed to have seen Monovitch, that he gave Forker specific directions for finding the compressor but told him to wait for further orders, that about that time and probably thereafter he ascertained that no one would be at the Moore mine, that he then instructed Forker to go and get the compressor, that he made no investigation as to the ownership of the compressor although when it was delivered to him Forker suggested to him that it was probably "hot," that without making any investigation he directed Forker to get a compressor from the very spot where he knew Moore's compressor had been as late as the middle of October, that when arrested he made statements in connection with the matter which differed from the facts as testified to by him and as established at the trial, and that he attempted to have the case against him dismissed. These and other circumstances are sufficient to support the jury's implied finding of criminal intent and there is nothing about the appellant's explanation which was conclusive upon the jury or which nullifies the other evidence. We seem to have here a reappearance of the familiar third person who so frequently appeared in cases during the prohibition era, the man whom no one knew and who could never be found.

[2, 3] It is next urged that the court erred in excluding evidence of certain conversations. In the first instance, a witness who testified that he had loaned the appellant $100 with which to buy the compressor, was asked what was said at the time he advanced the money and an objection was sustained. Aside from other considerations, this witness did testify that he loaned the appellant $100 for this purpose and that a few days later the appellant showed him a receipt showing that he had paid Monovitch $100 on a compressor. No reversible error appears in this connection or in connection with three other conversations which it is claimed should have been admitted, none of which could possibly have had any effect on the issues before the court. With respect to the fifth conversation which was excluded, the appellant was asked as to what Monovitch had said at the time the purported sale of this compressor was consummated. An objection to that question was sustained. In that connection the appellant offered to prove that Monovitch had then stated to the appellant that he had this compressor for sale, that this compressor was located at Crystal Springs, that he had been on the property for a week or two and had found the property worthless as far as talc was concerned, that Mr. Moore had moved his compressor and all the tools, having been kicked out by Mr. Prado, and that the compressor was under the trees against the bank and had the jack hammer and tools within it, and that the appellant had replied he knew where that would be exactly. The only material portion of the offered evidence which was not brought out by other evidence is that Monovitch had stated to the appellant that Mr. Moore had removed his compressor and tools. The appellant was allowed to testify that Monovitch had told him that his compressor was in the exact spot where Moore's compressor had been, and he testified that he thought Moore's compressor was then at Moore's home and

did not know that Moore owned the compressor which was then on the Prado property. With these alleged facts clearly brought out it would add little to let him testify that Monovitch had told him that Moore had removed his compressor from the property. However he got that information or idea, he testified that he thought Moore's compressor was at Moore's home, that is, that it had been removed from the Prado property. The important thing here is whether he believed that Monovitch had a compressor at that place which he in good faith attempted to purchase. It clearly appears from the appellant's testimony that he claimed to have believed at the time that Moore had removed his compressor, that the one then on the property and which he sent for belonged to Monovitch, and that he purchased the same from Monovitch. The rejected testimony would have added nothing which could have affected the result. The jury did not believe the rest of the appellant's testimony and it is not reasonable to think their view would have been altered by the slight addition he desired to make. A reading of the appellant's own testimony clearly discloses why the jury did not accept any of it. While we think this part of the rejected testimony should have been received, the error in its rejection could not be held to be prejudicial.

[4] The appellant complains of two instructions which were given. Among the general instructions which are usually given was the one which reads: "A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts." It is argued that this instruction was improper here since the intent with which the appellant took this property was a specific issue involved and under such circumstances it cannot be presumed that one intended to commit a crime. This was among the general instructions and the court repeatedly instructed the jury with respect to the matter of specific intent, as related to this case, in other instructions which will be later referred to.

In another of the general instructions, relating to a principal and an accessory, these words were used: "In this connection you are further instructed that if you find from the evidence beyond a reasonable doubt that L. R. Hopper was not actually present when the personal property of Charles E. Moore was taken but that said personal property was taken by an innocent party under the direction and instruction of the said L. R. Hopper, then you must find the defendant guilty as charged." It is urged that this instruction should have included the words "with the knowledge that it was the property of the said Moore, and without reasonable excuse for said taking," or equivalent language. It must be conceded that this instruction is deficient in the respect noted. However, the court instructed the jury that it should consider all of the instructions together and should not "single out any one or more of the given instructions and consider it or them separate and apart from the other given instructions"; and after the general instructions the court specifically instructed the jury that if it found that the appellant caused the removal of this compressor without the permission of the owner thereof "you must nevertheless acquit the said Louis R. Hopper of the charge of grand larceny, unless you find beyond a reasonable doubt that at the time he caused said removal he intended to steal it." And again, "You are instructed that if you find that the defendant Louis R. Hopper at the time of the taking of the compressor described in the information herein honestly believed he had purchased it, and that the title was in him, you must acquit him of the crime charged against him." Another instruction reads: "You are instructed that you cannot convict one of an intent to steal property which he believes to be his own. He may be careless and omit to make any effort to ascertain whether that property which he thinks he owns, belongs to another, but so long as he believes it to be his own, he cannot feloniously steal it." And the last instruction given to the jury was: "You are instructed that the crime of grand larceny must consist of two elements, the act constituting the larceny, and an intent to commit a theft; and that unless you are convinced beyond a reasonable doubt that the defendant did both the act constituting the crime and also intended to commit the crime, you must acquit him." We think these instructions cured any errors in the other instructions, in view of section 4½, article VI, of the Constitution. We have read the entire record and are not of the opinion that any errors which appear have resulted in a miscarriage of justice.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concurred.

55 Cal.App.2d 476

JUDSON v. HERRINGTON.

Civ. 2991.

District Court of Appeal, Fourth District, California.

Nov. 9, 1942.

Hearing Denied Jan. 6, 1943.

1. Judgment ⇐252(1)

Where defendant in his cross complaint in suit to quiet title only sought to quiet title to a certain quarter section and according to undisputed evidence, one of unpatented mining claims to which plaintiff sought to quiet title was situated within that quarter section, and defendant's answer to complaint only denied plaintiff's title and admitted that defendant claimed some interest in mining claims without alleging any interest in either of them, judgment quieting defendant's title to plaintiff's mining claim located outside quarter section lacked support of a proper pleading.

2. Mines and minerals ⇐38(24)

In action to quiet title to two unpatented mining claims, indefinite statement in the findings that original locator "attempted" to locate the claims could not be construed as a finding that the original locator erected the necessary monuments on the claims.

3. Mines and minerals ⇐29(4)

If original locator of unpatented mining claims and his successors held and were in possession of and worked the claims for five years, any defects in the locations were cured, and patents could have been obtained under statute. 30 U.S.C.A. § 38.

4. Mines and minerals ⇐23(1)

Where grantee of unpatented mining claims took the steps required by the various mining moratorium acts of Congress and he was not subject to payment of income tax, he was not required to do assessment work on the claims and they did not become open to relocation because of his failure to do assessment work on them. 30 U.S.C.A. § 28a.

5. Mines and minerals ⇐23(1)

Where no assessment work was done on unpatented mining claims under alleged locations in 1927, the property was open to relocation in 1930. 30 U.S.C.A. § 28.

6. Mines and minerals ⇐19(1)

Where description of unpatented mining claims located the claims as commencing at a substantial monument erected on the claims by the locator, the description was sufficient under the law.

7. Mines and minerals ⇐23(1)

Locations of unpatented mining claims prior to 1935 were not void because the locator failed to sink a shaft or tunnel or open a cut ten feet below the surface of the ground within 90 days after making each location as required by statute adopted in 1935, where there was no such requirement in the statutes prior to 1935. St. 1939, p. 1081, § 2304.

8. Mines and minerals ⇐38(16)

In action to quiet title to two unpatented mining claims, evidence was insufficient to sustain finding that locations of the claims by original locator under whom plaintiff claimed were invalid.

9. Trial ⇐395(1)

In action to quiet title to two unpatented mining claims, finding that assessment work was not done during years that plaintiff took advantage of moratorium acts was not sufficient to support judgment for defendant. 30 U.S.C.A. § 28a.

10. Mines and minerals ⇐27(1)

When a locator of a mining claim, or his successor, is in lawful possession of mining claims that have been properly located, those claims are not open to location by another.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action to quiet title by Paul Judson against E. H. Herrington, wherein defendant filed a cross complaint to quiet his title to a larger tract which included realty claimed by the plaintiff. From a judgment refusing to quiet plaintiff's title and quieting defendant's title, the plaintiff appeals.

Judgment reversed.

Vincent & Eaton, of Whittier, for appellant.

Willedd Andrews, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment refusing to quiet plaintiff's title to two unpatented mining claims called Brandywine No. 1, and Brandywine No. 2, in San Bernardino County, and quieting defend-

ant's title to a much larger tract which included those claims within its boundaries.

The complaint is in the usual form of an action to quiet title. The answer denied plaintiff's title and admitted that defendant claimed an interest in the properties. Defendant filed a cross-complaint to quiet his title to an unpatented mining claim called Bentonite No. 5, and described as the northeast quarter of section 31, township 28 south, range 41 east, M. D. M. in San Bernardino County.

Plaintiff traces his title to the Brandywine claims to W. L. Page, the original locator.

The trial court found that Page "attempted" to locate the claims on January 4, 1930, and recorded his location notices on February 3, 1930; that Page "attempted" to locate the mining claims on January 4, 1930, and recorded his location notices on April 10, 1930; that on March 17, 1933, Page and his wife conveyed the claims to E. T. Webb; that on August 8, 1933, Webb conveyed the property to Paul Judson, the plaintiff here.

The trial court also found that plaintiff, instead of performing his annual assessment work for the mining years ending in 1933 to 1938, inclusive, took advantage of the mining moratorium acts and recorded affidavits for the suspension of assessment work and notice of his desire to hold the mining claims during each of those years, and "that the said plaintiff, Paul Judson, did not in fact, by reason of said notices of suspension of annual assessment work or labor, actually resume or perform any annual assessment work upon said unpatented mining claims herein described and referred to as Brandywine No. 1, and Brandywine No. 2, for the years 1933, 1934, 1935, 1936, 1937 and 1938," and further that "Paul Judson, did perform his annual assessment work or labor upon the unpatented mining claims described in Paragraph 1 of plaintiff's complaint and known as Brandywine No. 1 and Brandywine No. 2, for the assessment year 1938-9."

It was also found that while plaintiff failed to do the assessment work on the claims for the years from 1933 to and including 1938, Herrington "was also in possession of said unpatented mining claims"; that he filed his notice of location on July 1, 1935, with proper descriptions and thereafter performed all necessary annual assessment work on each of the two claims up to the commencement of this action on June 15, 1939.

The material part of the location notice of Page for Brandywine No. 1 reads as follows:

"Commencing at this monument of discovery and running 300 feet westerly, thence 750 feet northerly to northwest corner, thence 600 feet easterly to northeast corner, thence 750 feet southerly to east side center, thence 750 feet southerly to southeast corner, thence 600 feet westerly to southwest corner, thence 750 feet northerly to west side center monument, thence 300 feet easterly to place of beginning.

"By this notice of Location the undersigned claims all forms of mineral deposits contained on, in and under the land above described, situated in unknown Mining District, County of San Bernardino, State of California."

On April 10, 1930, Page recorded a second location notice for the same claim in which the following was added to the description:

"This claim joins Brandywine number 2 on the west and is situated about one and one half miles Easterly from Searles Tunnel on the Southern Pacific Railroad, Owens Valley Branch."

The date of the discovery in this notice was given as January 4, 1930, as it was in the original notice.

The location notice for Brandywine No. 2 gives the date of discovery as January 4, 1930, and contains the following:

"Commencing at this monument thence northerly 300 feet to the northwest corner, thence 1500 feet easterly to the northeast corner, then 600 feet southerly to the southeast corner, thence 1500 feet westerly to the southwest corner, thence 300 feet north to this monument and place of beginning. This claim joins Brandywine Number One on the east. This claim is situated about one and one half miles from the south portal of Searless Tunnel on the Southern Pacific Railroad, Owens Valley Branch.

"By this Notice of Location the undersigned claims all forms of mineral deposits contained on, in and under the land above described, situated in unknown Mining District, County of San Bernardino, State of California."

Page testified that he made his discovery of bentonite in the two claims on January

4, 1930; that he erected discovery monuments on the two claims and put the location notices in each of them confined in Prince Albert tobacco cans; that he erected corner and side monuments on both claims; that all of these monuments were made of rock not less than three feet high and with substantial bases; that he recorded the location notices on February 3, 1930; that he recorded the second location notice of Brandywine No. 1 on April 10, 1930, and placed a duplicate in the tobacco can in the discovery monument. The reason for this second location notice does not appear.

Luis Martinez testified that all the monuments were in place on both claims when he went on them early in 1931 and remained in place for an undetermined length of time. Plaintiff testified that they were in place when he acquired the property in 1933.

Page leased the claims to a Mr. Thompson early in 1930, who went into possession and mined a number of tons of bentonite from them and then abandoned his lease in the fall of that year. Defendant states in his brief that this evidence of mining operations by Thompson was all stricken out. The record does not bear out this assertion. The only portion stricken was the following answer which referred to Thompson's proof of labor: "No, it was recorded though." Early in 1931, Page leased the claims to Luis Martinez and a Mr. Becker, who immediately commenced mining, shipping and selling bentonite from them.

Martinez testified that he and Becker worked three or four months following their lease early in 1931, for four or five months in 1932, and during the first three months of 1933; that reasonable wages were $5.50 per day each; that they worked more or less each year thereafter; that they mined and sold bentonite from the claims in 1937, 1938, 1939 and 1940.

Robert W. Glendenning testified that he bought bentonite for clients which was mined on the Brandywine claims each year between 1932 and 1940, inclusive; that the mining operations were done by Martinez and Becker except for a part of one year when one John Morehouse did the work for Kohn Company, which purchased the bentonite. Glendenning admitted he bought very little in the years 1935 and 1936. It is apparent that several hundred tons of bentonite was mined and sold from the properties by lessees or employees of plaintiff and his predecessors in interest.

We find in the record a proof of labor for the year ending July 1, 1933. There is evidence that sufficient labor was performed that year so that the finding that the necessary assessment work for that year was not done is contrary to the evidence.

Defendant testified that he first went on the property he now claims in October 1933; that J. H. McNish was living in a cabin a short distance southerly from the Brandywine claims; that he helped McNish complete a dugout to live in; that this was on the property he now claims but southerly from the Brandywine claims; that there were no monuments on either of the Brandywine claims; that defendant found bentonite on the property; that he took samples and had tests made to determine if it was of commercial quality; that cuts were made and shafts sunk from which bentonite was furnished to others to permit them to test its quality.

On July 1, 1935, defendant and his associates located the following property as mining claims: The northeast quarter of section 32; the northwest quarter of section 32; the southwest quarter of section 29; the southeast quarter of section 30; the northeast quarter of section 31; the northwest quarter of section 31, all in township 28 south, range 41 east, M. D. M. in San Bernardino County, California. Each claim contained 160 acres, more or less. They were named Bentonite Nos. 1 to 6, inclusive, respectively.

[1] As we have observed, defendant in his cross-complaint only sought to quiet his title to Bentonite No. 5, described as the northeast quarter of section 31. According to the undisputed evidence of both parties Brandywine No. 1 is situated within this quarter section, and Brandywine No. 2 is outside of it so the portion of the judgment quieting defendant's title to Brandywine No. 2 lacks the support of a proper pleading as the answer to the complaint only denied plaintiff's title and admitted that defendant claimed some interest in the claims without alleging any interest in him in either of them.

There are no findings on several material questions necessary to a decision of the controversy between the parties.

[2] There is no finding on the question of Page having erected the necessary

monuments on the two claims in January, 1930. The indefinite statement in the findings that Page "attempted" to locate the claims cannot be construed as a finding on that question. The great preponderance of the evidence is to the effect that the monuments were properly erected. The only evidence to the contrary is that of defendant that there were no monuments visible when he first saw the Brandywine claims in October, 1933.

There is no finding on the question of the possession of the Brandywine claims by Page and his successors in interest. The only finding on that question is "that while or during the time when, from 1933 up to and including the year 1938, continuously, the plaintiff herein, Paul Judson, failed to perform his annual assessment work * * * E. H. Herrington was also in possession of said unpatented mining claims * * *." Instead of indicating an exclusive possession by defendant this phraseology would indicate a joint possession by him and some other person. Further, Herrington and his associates did not locate their claims until July 1, 1935. Also there is no finding on the question of Page and his successors having worked the claims for five years after their location.

[3] These questions become important because, if Page and his successors had held and had been in possession of and worked the claims for five years, any defects in the locations would have been cured and patents could have been obtained under the provisions of section 38, chapter 2, title 30, U.S.C.A., § 2332, U.S.R.S. See Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777. In this connection it should be observed that Page located his claims on January 4, 1930, and that defendant and his associates did not make their locations until after July 1, 1935, more than five years thereafter.

A study of the record leads to the conclusion that the sole ground set forth in the findings for support of the judgment is that Judson and his predecessors failed to do the assessment work on the two claims for each of the mining years ending in 1933 to 1938 inclusive. As we have observed there is ample evidence that the assessment work was done for the first of those years as well as some of the others.

[4] Failure to do assessment work on the claims after July 1, 1932, furnished no valid grounds for forfeiture of the claims. Congress suspended the requirement for assessment work for the year ending on July 1, 1933, without the necessity for any action on the part of the locator or owner. Thereafter the requirement for annual assessment work was suspended upon the locator or owner conforming to the requirements of the various mining moratorium acts of Congress which are cited in section 28a, title 30, U.S.C.A. As Judson took those steps and as he was not subject to the payment of income tax during those years he was not required to do assessment work on the claims and they did not become open to relocation because of his failure to do assessment work on them.

Defendant seeks to support the judgment on several grounds. He first urges that as Page located the mining claims in 1927, they were not open for location in January, 1930. Page testified that he located some claims in the same district in 1927; that he never did any assessment work and went off and left them. From his testimony it is not at all clear that the two Brandywine claims were covered by the 1927 locations, though for the purpose of this opinion we will assume they were.

[5] Title 30, section 28, U.S.C.A., provides in effect that upon the failure to do the assessment work the claim shall be open to relocation in the same manner as though no location of the same had ever been made. See Kramer v. Gladding, McBean & Co., 30 Cal.App.2d 98, 85 P.2d 552. There was no mining moratorium act in effect during that time. As no assessment work had been done under the 1927 locations the property was open to relocation in 1930.

Defendant urges that the location notices recorded February 3, 1930, were void as the descriptions did not contain sufficient reference to some natural object or permanent monument so that they could be readily identified.

[6] A location notice quite similar to the original location notice of Brandywine No. 1, which was not as definite in this respect as the location notice for Brandywine No. 2, was before the court in Talmadge v. St. John, 129 Cal. 430, 62 P. 79. In that case, as here, the description located the claim as commencing at a substantial monument erected on it by the locator. This description was held to be sufficient under the law.

[7] Defendant maintains that the locations were void because the locator failed

to sink a shaft, or tunnel, or open a cut ten feet below the surface of the ground within ninety days after making each location as required by section 2304 of the Public Resources Code, St.1939, p. 1081, formerly section 1426da of the Civil Code. That section was first adopted in 1935. There was no such requirement in our statutes prior to that time.

[8-10] There is no finding of any fact from which the conclusion can be drawn that the Page locations were invalid. The finding that the assessment work was not done during the years that plaintiff took advantage of the moratorium acts is not sufficient to support the judgment. From the facts found the conclusion that the two Brandywine claims were open to location on July 1, 1935, may not be drawn. When a locator or his successor is in lawful possession of mining claims that have been properly located, those claims are not open to location by another. Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735; Ring v. United States Gypsum Co., 62 Cal.App. 87, 216 P. 409; Lind v. Baker, supra. It follows that the findings do not support the judgment.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.



55 Cal.App.2d 467

HENDRICKSON v. CALIFORNIA TALC CO. et al.

Civ. 2983.

District Court of Appeal, Fourth District, California.

Oct. 9, 1942.

Hearing Denied Jan. 6, 1943.

1. Mines and minerals ⇐29(4)

A location of mining claim on land temporarily withdrawn from entry was void as between locators and the government and also as to third parties acquiring rights in land.

2. Mines and minerals ⇐29(4)

Generally, mere occupancy of mining claim, continued in good faith, after void location thereof on land temporarily withdrawn from entry, may lead to valid location, in absence of valid entry by another, and only the government can complain of such occupancy.

3. Mines and minerals ⇐29(4)

The fact that mining claimant's entry on land temporarily withdrawn from entry is unauthorized does not prevent his occupancy thereof from becoming lawful on revocation of withdrawal order and restoration of land to settlement and entry before any rights can vest in third person.

4. Trusts ⇐102(1)

Where locators of mining claim associate themselves together for particular purpose of obtaining title to such claim and comply with all legal requirements, but their efforts are ineffective for time being because of land's temporary withdrawal from entry, and one of them, after discovering invalidity of such entry and without informing the others of such fact, relocates land for himself alone when right of entry is restored, he is "trustee" for other locators, even if locators are not strictly speaking co-tenants, as trust results from parties' "fiduciary relationship".

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee" and "Fiduciary Relationship".

5. Tenancy in common ⇐10, 11

A "fiduciary relationship" exists between tenants in common, and one of them may not gain a present advantage by acting adversely to his fellow tenants.

6. Mines and minerals ⇐38(2)

Equitable rules and principles are applicable in determining interests of various parties in mining claim though original location thereof was void as made while land was temporarily withdrawn from entry.

7. Joint adventures ⇐4(1)

Generally, parties engaged in common enterprise owe duty to each other with respect to all matters in connection therewith, a "trust relationship" is inherent in such association for common purpose, and one of such parties will not be allowed to deal with subject matter of association for his own advantage.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust Relationship".

8. Joint adventures ⇐4(1)

Associates in common enterprise owe each other duty to make full disclosure of any preference or profit not common to all associates.

9. Trusts ⇐102(1)

Where several parties entered into joint enterprise for purpose of obtaining title to land as mining claim, location of which by them was invalid because land had been temporarily withdrawn from entry without their knowledge, and one of them, after his discovery of such fact and vacation of withdrawal order, located other claims including part of such land for himself and family only, such re-location inured to benefit of other original locators, for whom he was "trustee", so that they had interest in part of relocated land within original claim.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Oscar Hendrickson against the California Talc Company and others to determine the interests of various parties in certain mining claims and quiet their title thereto, in which O. B. Aman filed a cross-complaint to quiet his title to an interest in one of the claims. From the judgment entered, plaintiff and cross-complainant appeal.

Reversed, with directions.

Best, Best & Gabbert, of Riverside, for appellants.

Kenyon F. Lee, of Los Angeles, and Duckworth, Mussell & King, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action to determine the interests of various parties in certain mining claims and to quiet their title thereto. On a former appeal, on the judgment roll alone, the judgment was reversed because of inconsistent findings and the cause was remanded for a new trial with respect to the ownership of Co-operation No. 1 mining claim. Hendrickson v. California Talc Co., 35 Cal.App.2d 544, 96 P.2d 175, 176.

Thereafter the plaintiff and the cross-complainant filed amended pleadings each seeking to have it established that he was the owner of an undivided 1/6th interest in that part of the land which was originally included in the Co-operation No. 1 claim, and to have his title quieted thereto. In amended answers, the defendants alleged that the Co-operation No. 1 claim was located at a time when the land had been withdrawn from entry; that after the land was restored to entry the defendants Oscar L. Hoerner, his wife Mabel E. Hoerner, his brother Harry J. Hoerner and several other parties had located four mining claims called Company No. 1, No. 2, No. 3 and No. 4, and which included within their borders a large part of the land which had been included within Co-operation No. 1 mining claim; that all of the other locators had, twelve days later, conveyed their interests to the defendants Hoerner; that these three defendants were the owners of these four claims; and that the National Lead Company was entitled to possession of them under an agreement with the Hoerners. The defendant M. M. Stephens claimed a portion of the plaintiff's 1/6th interest in the land included in the Co-operation No. 1 claim, under an agreement with him.

After a retrial of the action the court found in favor of the defendants, finding that the attempted location of the Co-operation No. 1 claim was void since it was made at a time when that land was not open to public entry, and that the parties who had made that location had acquired no right, title or interest in the land thus located. A judgment was entered decreeing that the plaintiff and the cross-complainant take nothing by reason of this action, and quieting title to Company No. 1, Company No. 2, Company No. 3 and Company No. 4 mining claims in the Hoerners, subject to the rights of the National Lead Company under its agreement with them. From this judgment the plaintiff and the cross-complainant have appealed.

The appellants contend that the evidence does not support the court's findings to the effect that no relation of trust or confidence existed between Oscar L. Hoerner and the colocators of Co-operation No. 1 claim, that neither of the appellants is the owner of any interest in the property included in the Co-operation No. 1 claim, that nothing was done by any of the respondents to deprive, cheat or defraud the appellants, or either of them, of their interests in the Co-operation No. 1 claim, that none of the defendants have repudiated the right or title claimed by the appellants and that the location of the Company Nos. 1, 2, 3 and 4 claims on December 15, 1931,

by Oscar L. Hoerner and his then associates was not a relocation or jumping of the Co-operation No. 1 claim as theretofore attempted to be located.

There is no material conflict in the evidence. On June 7, 1930, appellant Aman and respondents Oscar L. Hoerner, Scott and Farnum were on the Mojave desert on business connected with another claim which is not here involved. Noticing a white hill to the northwest, they went over, discovered a deposit of Bentonite clay and located the Co-operation No. 1 claim. Desiring to take in 120 acres, they included as colocators the names of appellant Hendrickson and respondent Ratcliffe. They described and marked on the ground a parcel of land some 8500 feet long and 600 feet wide and erected a discovery monument and boundary monuments. A location notice was written out in longhand with the names of all six colocators and carbon copies were placed in tobacco cans and inserted in the monuments. No contention is made that all requirements for making such a location were not met and observed. On the same day, they informed Hendrickson that he had been included as one of the locators of this claim and shortly thereafter Ratcliffe was informed of his inclusion. For many months thereafter these colocators proceeded with plans for the development of this claim, many letters were exchanged between various members of the group with reference thereto, and the court found that all requirements with respect to the performance of work thereon were met and fulfilled.

It appears, however, that the land covered by the Co-operation No. 1 claim was included in a large tract of land which was temporarily withdrawn from public entry pending the fixing of a definite location of the line of an aqueduct to be constructed for the purpose of bringing waters from Boulder Dam into this state, which withdrawal order had been made on June 4, 1930, three days before that claim was located. This land was not restored to public entry until August 6, 1931. The fact that this land had been withdrawn from entry was unknown to any of these parties on June 7, 1930, and was unknown to the appellants until after the land was relocated by certain of the respondents. That fact was learned by Oscar L. Hoerner and by Scott, Ratcliffe and Farnum shortly after the attempted location of Co-operation No. 1 claim, but none of these parties informed their associates Hendrickson or Aman of this fact. In November, 1930, March, 1931, and May, 1931, and before the land had been restored to entry, these four respondents attempted to locate the land now included in Company claims Nos. 1, 2, 3, and 4, including the larger part of the old Co-operation No. 1 claim, without including the appellants as colocators. These attempted locations being invalid, on December 15, 1931, and after the land had been restored to entry, the respondent Oscar L. Hoerner located Company claims No. 1, No. 2, No. 3 and No. 4, respectively, including as colocators his wife, his brother and five of the other respondents. A few days later, the other five conveyed their interests to the Hoerners and still later the Hoerners entered into an agreement with the California Talc Company, which was thereafter assigned to the National Lead Company. The court found that each of these corporate respondents entered into these agreements with notice that the appellants each claimed an undivided 1/6th interest in and to that part of the land which had been included in the Co-operation No. 1 claim. Hoerner testified that in locating the four company claims on December 15, 1931, he did not intend to exclude these appellants from that portion of the land which was embraced within the Co-operation No. 1 claim; that if they had any right in that claim they should have it yet; that it was up to the court whether or not they had any interest in that part of the land; and that his idea had been that if their claim was good they would have their interest in the Co-operation land, and if their claim was not good he would get the land under his company claims.

The controlling question is whether, under these circumstances, the respondent Oscar L. Hoerner had a right to relocate this land for his own benefit, after it was restored to entry, and whether he thereby secured a valid location as to that part of the land included in the former Co-operation No. 1 claim, free from any equitable claims on the part of the appellants. The gist of the respondents' contention is that the original location being void any of the original locators had a legal right, after the lands were restored to entry, to unite with other locators in making a new and valid location free from any duty or responsibility to the appellants, who were their associates in the original attempted location. In speaking of a similar conten-

tion on the former appeal, this court said: "Conceding that the latter contention is true under some circumstances it is, under other circumstances, subject to equitable rules and considerations which may be controlling."

[1-3] There is no question that the attempted location of this claim on June 7, 1930, was void as between the locators and the government (Wilbur v. United States, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445), and that the same would be void as to third parties who acquired rights in the land. Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735. Even in such cases the general rule is that until a valid entry is made by another a mere occupancy of a mining claim, continued in good faith, may lead to a valid location and only the government can complain of such occupancy. 40 C.J. 777. Even as against third parties the rights of an occupant were recognized in Capron v. Van Horn, 201 Cal. 486, 258 P. 77, 82. In that case the defendant settled upon land at a time when an order withdrawing it from entry was in force. The court there said: "However, the fact that defendant's entry upon the land was unauthorized would not prevent his occupancy from becoming lawful, if, before any right could vest in a third person, the withdrawal order should be revoked and the land again restored to settlement and entry while occupied by the defendant."

In the instant case, while there was no occupancy in the sense that the locators were living upon the property at all times, there was the form of possession which is usual in mining claims with the usual notices, monuments and activity with reference to the proposed use and development of the property and, as the court found, the law with respect to the doing of the work was complied with regularly through the years. The situation here presented is one where the government is not complaining, where no third party is involved, where one of the original locators discovered that the method by which they were proceeding was defective because the land had been temporarily withdrawn from entry, which fact was unknown to the others, and where this party without informing the others concerning the situation attempted to relocate or, as he says, to "locate" the claim for his own benefit.

[4, 5] With respect to the invalidity of mining claims and the rights of colocators, the courts have long recognized that a different situation may prevail as between the colocators themselves and that which governs as between a locator and the government or a third party. In Speed v. McCarthy, 181 U.S. 269, 21 S.Ct. 613, 616, 45 L.Ed. 855, the court said: "The court held that the relation of cotenant existed between McCarthy and Franklin when Franklin located the Holy Terror and Keystone claims; that original locators may resume work at any time before relocation; that Franklin's acts of relocation did not terminate the fiduciary relation between himself and McCarthy; and said: 'We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the Federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." Rev.Stat.U.S. § 2324 [30 U.S.C.A. § 28]. It is contended that if Congress intended to have the relocator regarded as a trustee under any circumstances, such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute.'"

The respondents argue that the trustee principle there applied has no application here since in that case the original entry was valid while here it was invalid. No cases are cited where such a distinction is drawn and since the trust arises from the relation of the parties it should no more be defeated by a temporary withdrawal order than by a failure to comply with a statute originally giving a right of entry. In fact, the former situation results from ignorance and inadvertence, while the latter involves a more positive disregard of the law. No good reason appears for drawing such a distinction or applying a different rule in such a case as this. If such a rule applies to a subsequent failure to comply with the law where the original location was valid, the reasons for the rule would seem to apply with even greater force where the locators have associated themselves together for the particular purpose of obtaining title to a particular claim, where they have complied with all of the requirements of law in that regard, where their efforts are

ineffective for the time being because of the temporary withdrawal of the land from entry, and where one of the associates discovers the invalidity of the entry and without informing the others proceeds to locate the land for himself when a right of entry is restored. The usual rules that a fiduciary relationship exists between tenants in common and that one cotenant may not gain a present advantage by acting adversely to his fellow tenants should be applied to such a case. If it may be said that, strictly speaking, these parties were not cotenants since a complete right of possession did not exist, similar principles should still be applied. To paraphrase what the court said in Speed v. McCarthy, supra, "The trust results from the fiduciary relation of the parties, and not from" whether or not they may technically be said to be cotenants.

[6] We find nothing in the cases relied upon by the respondents which supports their contention that the fact that this land had been withdrawn from entry is controlling and that all equitable rules and principles are inapplicable because the attempted location was void in law and in fact. There is no distinction in this regard between a mining enterprise and other enterprises for which men associate themselves with an express or implied agreement to work together for their common good and to a desired end. Equitable rules have frequently been applied in controversies over mining claims. Speed v. McCarthy, supra, is an example of such cases.

[7, 8] The general rule is that parties engaged in a common enterprise owe a duty to each other with respect to all matters in connection therewith, that a trust relationship is inherent in such an association for a common purpose, and that one of the parties will not be allowed to deal with the subject matter of the association for his own advantage. In Munson v. Fishburn, 183 Cal. 206, 190 P. 808, 810, the court said: "It is well settled that associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates." These general principles are applicable here and the arguments that the Hoerner location in December, 1931, was not a "relocation" since there had been no legal location theretofore, that the parties were not cotenants and that some of the elements of a partnership as between these parties were lacking, are beside the point.

[9] These parties entered into a joint enterprise having for its object the obtaining of title to this particular land as a mining claim and the resulting fiduciary relationship between the parties could not thus lightly be ignored. As he admitted, Hoerner, without the knowledge of the others, attempted thereafter to locate the same ground as a mining claim for the benefit of himself and his family. The fact that the original attempted location was invalid, the land not then being open to entry, is not the conclusive or determining fact. When the withdrawal order was vacated and the land was restored to entry no third party acquired any rights and the original locators, having otherwise complied with the law, were free to make a valid location. Having found out the facts which were unknown to the appellants Hoerner made such a location without including the appellants as parties thereto but, in so doing, he was not free to act for himself alone. Since he occupied a fiduciary position the equitable rules apply and his act in relocating the land under such circumstances must be held to have inured to the benefit of the appellants, for whom he was a trustee. The evidence does not sustain the essential finding that there was no trust or fiduciary relationship between Oscar L. Hoerner and these appellants. It follows that the other findings, to the effect that the appellants have no interest in that part of his land which was found to be embraced within the limits of the Co-operation No. 1 claim, as attempted to be located by these associates on June 7, 1930, are without support in the evidence.

The portions of the judgment which affect the appellants are reversed with directions to enter judgment in favor of the plaintiff with respect to a 1/6th interest in that part of this land which was found by the court to be within the limits of the Co-operation No. 1 claim, as attempted to be located on June 7, 1930, with appropriate provisions protecting any rights of M. M. Stephens as to a part of that interest, and in favor of the cross-complainant with respect to a similar 1/6th interest in that part of this land within the limits of the Co-operation No. 1 claim as attempted to be located on June 7, 1930. The appellants to recover their costs on this appeal.

MARKS and GRIFFIN, JJ., concurred.

55 Cal.App.2d 410

In re FLOOD'S ESTATE.

McAVOY et al. v. MURPHY.

Civ. 12167.

District Court of Appeal, First District, Division 1, California.

Nov. 6, 1942.

Hearing Denied Dec. 31, 1942.

1. Descent and distribution ⇐6

The law in effect at time of decedent's death controls in matter of succession to his estate.

2. Statutes ⇐225

The statutes providing that childless decedent's property, which was community property of decedent and previously deceased spouse or separate property of such spouse, from whom it came to decedent by gift, descent, devise, or bequest, goes to such spouse's children or their descendants, should be construed together. Probate Code, §§ 228, 229.

3. Deeds ⇐8
Wills ⇐6

The statutes providing that childless decedent's property, which was community property of decedent and previously deceased spouse or separate property of such spouse, goes to such spouse's children or their descendants, do not limit surviving spouse's right to dispose of such property by will or conveyance. Probate Code, §§ 228, 229.

4. Wills ⇐229

A widow, conveying to her daughter by gift deed realty conveyed to widow by her husband's gift deed, obtained new title thereto under daughter's will leaving her entire estate to widow, and former status or character of such realty as community property or husband's separate property was not restored, so that husband's grandchildren, as his sole heirs, acquired no such interest in widow's estate as to entitle them to contest probate of her will leaving her estate to her niece. Probate Code, §§ 228, 229, 370, 380.

5. Wills ⇐229

The right to contest a will is limited to persons interested in testator's estate, a question of law. Probate Code, §§ 370, 380.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Catherine Flood, deceased. From an order dismissing a petition by Edward J. McAvoy and others to revoke the probate of deceased's will leaving her estate to Katherine Murphy, petitioners appeal.

Affirmed.

Albert Picard, of San Francisco, for appellants.

Boynton & Boynton and Chas. C. Boynton, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from an order dismissing the petition of appellants to revoke the probate of the will of Catherine Flood, deceased, the petitioners being grandchildren of James Flood, the previously deceased spouse of Catherine.

The estate of Catherine Flood was inherited from her daughter Mary Frances Flood. It consists almost entirely of two parcels of real property in the city and county of San Francisco originally transferred to Catherine Flood by her husband James Flood in 1912 shortly before his death, by gift deed. In 1925, Mrs. Flood, also by gift deed, conveyed the two parcels of property to their daughter, Mary Frances Flood, and the mother and daughter continued to reside on one parcel up to the time of the death of the daughter in 1940. The daughter left her entire estate, consisting principally of the above two pieces of real property, to her mother. She executed three wills, in each of which she declared that her mother had given her all of said property; that it was her mother's and must be returned to her. Mrs. Flood died in 1941, leaving her estate, acquired as above stated from her daughter, to her niece Katherine Murphy, and appellants seek to revoke the probate of her will.

The question involved on the appeal is whether sections 228 and 229 of the Probate Code, providing that if the decedent left no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, or was the community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the previously deceased spouse and to their descendants by right of representation, are

applicable to this situation, at least to the extent of conferring upon such children or descendants such an interest in the estate of Catherine Flood as entitles them to contest the probate of her will.

[1, 2] In the matter of succession, the law in effect at the death of decedent controls. At the time of Mrs. Flood's death, both sections included gifts made by a predeceased husband, if otherwise subject to the provisions of either section 228 or 229, which "should be construed together." In re Rattray's Estate, 13 Cal.2d 702, 91 P. 2d 1042, 1046. The appellants are the sole heirs of decedent's predeceased husband, whether the property was separate or community. The usual complex problem of tracing ancestral property is not involved on this appeal. The sole question presented is whether appellants under the facts as stated are entitled to contest the will.

[3, 4] In re Putnam's Estate, 219 Cal. 608, 28 P.2d 27, 28, is controlling on this appeal. In that case the widow of Timothy Halstead married J. F. Putnam, and with the proceeds from a sale of property inherited from her first husband she purchased stock, the certificates for which were taken in the joint names of herself and her second husband. Approximately two years later Mr. and Mrs. Putnam endorsed the certificates and new certificates were issued in the name of Mrs. Putnam, who subsequently died intestate. The probate court distributed the stock to her surviving husband and to certain of her relatives. The daughter of the predeceased husband appealed from the decree of distribution. It was held that the purpose of section 229, Probate Code, was, in the absence of testamentary disposition, to restore property coming under its provisions to the source whence it came, but that "the section never sought to limit the right of the wife to dispose of it by will or conveyance" and that Mrs. Putnam "had effectively removed the property from the status it had formerly held." Such rule must be applied to the facts of the present case. In other words, if the deed from Mrs. Flood to her daughter "effectively" changed the status of the property, her subsequent title as devisee of her daughter did not restore the former status or character thereof. In the Putnam case the right to follow property in a changed form is recognized (In re Brady's Estate, 171 Cal. 1, 151 P. 275), but not after it has been clothed with a complete "new title." In re Putnam's Estate, supra, 219 Cal. at page 612, 28 P.2d 27. In the present case, Mrs. Flood obtained a new title.

[5] The right to contest a will is limited to persons interested in the estate, a question of law. Prob.Code, §§ 370, 380; In re Nelson's Estate, 191 Cal. 280, 216 P. 368.

To succeed, appellants must present convincing arguments that the conclusion reached in the Estate of Putnam is incorrect as applied to the present appeal. In this, they have failed.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



55 Cal.App.2d 459

TEATER et al. v. GOOD HOPE DEVELOPMENT CORPORATION et al.

Civ. 2982.

District Court of Appeal, Fourth District, California.

Nov. 9, 1942.

1. Replevin ⇐10

In replevin action where evidence sustained finding that property sought to be recovered was not in possession of defendants but in possession of cross-complainant, judgment for defendants must be sustained, since possession is a necessary prerequisite in a replevin action.

2. Assignments ⇐90, 100

Assignee of a chose in action ordinarily acquires all of the rights and remedies possessed by assignor for its enforcement, subject, however, to the defenses which may be urged against assignor.

3. Assignments ⇐1

An assignment of a chose in action for the purpose of collection is valid.

4. Chattel mortgages ⇐201(2)

In chattel mortgagee's action to recover possession of certain fixtures from lumber company which purchased fixtures at execution sale under attachment suit

judgment obtained by lumber company against mortgagor, evidence sustained finding that at time lumber company furnished material and parted with the value constituting basis of its judgment, lumber company had no notice or knowledge of unrecorded chattel mortgage on fixtures.

5. Chattel mortgages ⇐197(1)

Where lumber company purchased certain fixtures at execution sale under attachment suit judgment based in part on note assigned to lumber company by bank, lumber company's rights to fixtures were superior to rights of mortgagee under unrecorded mortgage where neither lumber company nor bank had notice or knowledge of mortgage at time material was furnished and credit advanced to mortgagor, and only notice given was a letter written by mortgagee four days after levy of attachment. Code Civ.Proc. § 700.

6. Chattel mortgages ⇐201(2)

In replevin action by chattel mortgagee against purchaser of mortgaged fixtures at execution sale, evidence did not support implied finding that attorney, whose claim against mortgagor for services rendered formed part of basis for judgment under which sale was had, did not have notice of unrecorded chattel mortgage at time services were performed, where attorney was one of the attorneys in moratorium proceeding involving the chattel mortgage.

7. Chattel mortgages ⇐201(2)

In replevin action by holder of chattel mortgage on fixtures against purchaser of fixtures at execution sale, evidence sustained implied finding that one who made loan to mortgagor, upon which judgment supporting execution sale was partially based, had no knowledge or notice of unrecorded chattel mortgage at time loan was made.

8. Chattel mortgages ⇐197(2)

Where judgment against chattel mortgagor was made up of several claims most of which represented material or money furnished in good faith without notice of unrecorded mortgage on fixtures before parting with value, execution sale of fixtures under judgment was valid as against mortgagee where the sum realized at the sale was less than the total amount of good faith claims, even though assignors of other claims making up the judgment had notice of the mortgage.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action in replevin by Velna L. Teater and others against the Good Hope Development Corporation and others to obtain possession of certain described fixtures, wherein defendant Dill Lumber Company filed a cross-complaint to quiet its title to fixtures. From an adverse judgment, plaintiffs appeal.

Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellants.

Alford P. Olmstead, of Los Angeles, in pro. per., and Best, Best & Gabbert, of Riverside, for respondents.

GRIFFIN, Justice.

[1] This is an appeal from a judgment of the trial court rendered after making a finding on certain issues under instructions from the Supreme Court on a previous appeal. Teater v. Good Hope Development Corporation, 14 Cal.2d 196, 93 P.2d 112. A further hearing was had in the trial court. The pleadings were amended and further findings were made. It will be remembered that the original action in the instant case was an action in replevin instituted by the plaintiffs and appellants to recover the possession of the fixtures described in the complaint from the named defendants. As the defendants Bank of Perris, C. R. Stewart, sued under the name of H. C. Stewart, C. H. Marker, James H. Hyde, Maude C. Marker, Eugene Best and Alford P. Olmstead admittedly did not at the time in question have possession of the fixtures, the trial court could enter no other judgment except one in their favor on that issue. Possession is a necessary prerequisite in a replevin action. The judgment in their favor was affirmed. Teater v. Good Hope Development Corporation, supra. As the evidence was confusing whether the sheriff Carl Rayburn, Good Hope Development Corporation (hereinafter referred to as Development Corporation) and/or the Dill Lumber Company (hereinafter called the Lumber Company) still retained possession of certain of the fixtures, they were retained as party defendants in the replevin action

and the trial court ordered to clarify the record by appropriate amended pleadings and to make further findings so that the question as to who had actual possession of the fixtures might be determined from the pleadings and record on appeal. Apparently an amended answer was filed clarifying this issue and the trial court has now found (1) that certain fixtures described in the findings were stored in warehouses in Perris, and at the time this action was commenced were in the possession and owned by the defendant Development Corporation; (2) that defendant Carl Rayburn, sheriff, took possession of the above mentioned fixtures, and after due proceedings sold them to the Lumber Company, which company now has possession of them; (3) that appellants are the owners of and entitled to the possession of a certain portion of the property described in their complaint, which includes the windows from corrugated iron mill building, referred to in the previous decision, together with certain other articles found to be a part of the appurtenances and improvements attached to the realty which were wrongfully removed. It was found that all of these fixtures were at all times in the possession of the Development Corporation and not in the possession of the other defendants. It further appears from the findings that the appellants, since the commencement of the action, came into the possession of the articles the court found to have been wrongfully removed by the Development Corporation. It therefore now appears that since the evidence supports the finding that these remaining defendants and respondents Carl Rayburn and the Development Corporation did not have possession of the fixtures involved, the action for replevin would not lie as to them and the trial court's judgment in their favor in this respect must be sustained. The only remaining defendant, the Lumber Company, alone filed a cross-complaint against appellants based upon its own claim and the assigned claims of other creditors, endeavoring to quiet title to the fixtures by virtue of a sale under a levy of execution after attachment issued and under a judgment obtained against the Development Corporation. The only issue, therefore, remaining is the question of the validity of that sale.

[2, 3] It is unnecessary to repeat the rule that an assignee of a chose in action ordinarily acquires all of the rights and remedies possessed by the assignor for its enforcement, subject, however, to the defenses which may be urged against the assignor. 3 Cal.Jur., § 41, p. 292. The record here indicates that the Lumber Company was the assignee of the assigned claims and for the purpose of collection. This assignment is allowable. Hopkins v. Contra Costa County, 106 Cal. 566, 39 P. 933. The enforcement of the assignor's rights by the assignee depends upon the rights of the assignors.

The former judgment in this action was reversed for the main purpose of having the trial court make a finding as to whether the cross-complainant in respect to its own claim and as assignee of the claims of its assignors, had notice of the provisions of the conditional sales agreement, which conditional sales agreement was held to be a chattel mortgage in respect to certain properties, before parting with the consideration upon which their debts (assignors) were founded. The original cause of action was commenced June 23, 1936, by the Dill Lumber Company. It consisted of several causes of action. The first was a count alleging that the Lumber Company furnished material to one Marker for the benefit of the Development Corporation in the sum of $773.68, between July 22, 1933, and July 21, 1934. The conditional sales contract, held to be a chattel mortgage, was entered into on June 1, 1933. It was not recorded until September 13, 1934. For reasons stated in the previous opinion, the chattel mortgage was held to be valid only between the maker and persons who, before parting with value, had actual notice thereof. After a further hearing on this issue, the trial court found in part as follows: that the Lumber Company "is now the owner of, in possession of, and entitled to the possession of the property described in * * *" its cross-complaint; that the judgment in favor of the Lumber Company and against the Development Corporation was based in part upon valuable lumber and other building materials furnished by the said company; and that at the time the Lumber Company furnished said materials and parted with the value which constituted the basis of said judgment, it had no notice or knowledge of the contract of January 3, 1933, or of any of its terms or provisions.

[4] The record discloses that the Lumber Company, in respect to its claim on

the first count, had no notice of the claimed chattel mortgage or its terms, or that appellants claimed any lien on the fixtures. This fact is not disputed. The finding of the trial court in reference to this count is supported by the evidence.

[5] Count two involves an assigned claim of the Bank of Perris, based upon a $2,400 note executed by the Development Corporation on June 10, 1936, for money theretofore loaned to the company covering the period from 1933 to 1936. On the retrial of the issues here presented, Mr. Stewart, who handled loans for the bank, testified that the bank had no notice or knowledge of the contents of any agreement between appellants and the Development Corporation or Marker involving the Good Hope Mine prior to June 23, 1936, which was the date of the levy of the attachment of the machinery located in the warehouse which machinery was found to have been in the possession of the Development Corporation. If appellants relied upon the terms of their letter dated June 27, 1936, to the Lumber Company, to the effect that they were claiming that the removal of the machinery from the mining property was wrongful and in which they demanded the return thereof, as notice to the bank or respondent Lumber Company of a lien they claimed thereon by virtue of a chattel mortgage, such notice was ineffectual for that purpose as the letter was dated four days after the property was attached, and long after the consideration for the loan had been parted with, and after the attachment lien had become affixed. Under these circumstances it has been held that the attachment lien created a lien superior to the chattel mortgage herein involved. § 700, Code Civ.Proc.; Old Settlers' Investment Co. v. White, 158 Cal. 236, 110 P. 922; Farnum v. Hefner, 79 Cal. 575, 21 P. 955, 12 Am.St.Rep. 174; Churchill v. More, 4 Cal.App. 219, 88 P. 290; Jones on Chattel Mortgages and Conditional Sales, Bower's Ed., vol. 1, p. 504, § 317; 10 Am.Jur., p. 786, § 109. Therefore, any notice acquired by the assignor bank or the assignee Lumber Company, on the 27th day of June, 1936, after the attachment was levied on the property here involved, would be immaterial. Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767; Chelhar v. Acme Garage, 18 Cal.App.2d Supp. 775, 61 P.2d 1232; Alferitz v. Scott, 130 Cal. 474, 62 P. 735.

The cases cited by appellants (Boye v. Boerner, 38 Cal.App.2d 567, 101 P.2d 757, and Farmers' Exchange Bank v. Purdy, 130 Cal. 455, 62 P. 738), involve mortgages upon real property. The parties involved in those actions were subjected to the rules applicable to sections 1107 and 1214 of the Civil Code. The mortgage here under discussion was a chattel mortgage and should be construed as in the case of Old Settlers' Investment Co. v. White, supra.

The Supreme Court in the instant case, in reversing the previous decision, stated [14 Cal.2d 196, 93 P.2d 120]: "There is considerable evidence in the record that would support the finding that the Dill Lumber Company, or at least some of the assignors of its various claims, had notice of the provisions of the contract of purchase. It therefore becomes material to the issue presented to determine this fact in support of the judgment quieting title to the property involved. * * *"

The court then ordered: "* * * the judgment is reversed with instructions to the trial court to take further evidence, if necessary, to allow an amendment of the pleadings to conform to the proof and make the necessary finding on the issue of notice of the appellants' lien, value parted with, if any, by cross-complainant * * *."

At this second hearing the court should have found on the question of notice as to each assignor in order that we could analyze the evidence on this question. However, the trial court has found that the Lumber Company, as cross-complainant, did not have notice of appellants' lien, which in effect and by inference found that the assignors had no notice thereof because the assignee Lumber Company took such assignment or choses in action subject to all defenses against the assignor. 3 Cal.Jur., § 38, p. 289. The limited finding on this subject was adequate.

The question involved in the remaining counts is whether the evidence supports the finding that the assignors had no notice of appellants' lien before parting with value and prior to the levy of attachment. The trial court took no further evidence on counts three and four. The third count involved an assigned claim by Alford P. Olmstead in the sum of $1,450, for services as an attorney claimed to have been rendered for the Development Corporation. That count alleges that Olmstead per-

formed legal services for the Development Corporation between October 4, 1934, and June 23, 1936; that the claim was assigned June 23, 1936, to the Lumber Company. On the former hearing Olmstead testified that he was attorney for the Development Corporation in certain matters; that he was not general counsel for it; that he was attorney of record for it in the "moratorium case" filed August 1, 1935; that he argued to the court in that matter "whatever the contract shows."

[6] The moratorium proceeding involved the very contract here in issue. At the further hearing of this case, after reversal, Olmstead failed to testify further in respect to his knowledge or lack of knowledge of its contents. The uncontradicted evidence on this subject does not support the implied finding of the trial court that Olmstead, and accordingly his assignee the Lumber Company (in respect to this claim) did not have notice of the provisions of the contract at the time his services were performed. Treat v. Burns, 216 Cal. 216, 13 P.2d 724. The sale, therefore, in respect to this count, standing alone, would only have passed such title as the Development Corporation had in the fixtures to the Lumber Company, the assignee, subject to the lien of appellants. § 2968, Civ.Code; Burns v. Peters, 5 Cal. 2d 619, 625, 55 P.2d 1182.

The fourth count involves a similar assigned claim by attorney Best in the sum of $100 for legal services claimed to have been performed by him in the same proceedings with Mr. Olmstead. What was said in reference to the Olmstead claim is equally true as to the Best claim.

[7] The fifth count involved an assigned claim of Mrs. Marker, mother of C. H. Marker, in the sum of $2,633.42, for money claimed to have been loaned by her to the Development Corporation in 1936. C. H. Marker, on the rehearing of this issue, testified that Mrs. Marker had no knowledge of the contract or mortgage here involved at the time the money was loaned or at any time prior thereto. The evidence in respect to lack of notice of the terms of the chattel mortgage by the assignor Mrs. Marker is sufficient to support the implied finding of the trial court on this count.

[8] It therefore follows that the trial court has at least inferentially found, upon sufficient evidence, that the claim of the Lumber Company in the sum of $773.68, the claim of the Bank of Perris in the sum of $2,400, and the claim of Mrs. Marker in the sum of $2,633.42, totaling $5,807.10, were made in good faith, for value, and without notice of appellants' claimed lien under its unrecorded mortgage before parting with value. It must be held, then, that the sale in connection with these particular claims was valid and effectual. The property here involved was sold at the execution sale to the Lumber Company for the sum of $5,000. This sum is less than the total of the above mentioned claims. As the judgment against the Development Corporation was valid, and the sale under counts 1, 2 and 5 above mentioned was effectual and not void and the proceeds under the sale were not sufficient to satisfy even the lien of those claims, appellants cannot now be heard to complain because the claimed liens of the other creditors, Olmstead and Best, under counts 3 and 4, were secondary to appellants' claimed lien on the property here involved. Henry v. Phillips, 163 Cal. 135, 140, 124 P. 837, Ann.Cas.1914A, 39. The Lumber Company was in rightful possession of the property here involved. Therefore, appellants were not entitled to relief in their replevin action as against that company. The judgment of the trial court quieting its title to that property must be affirmed.

Some exception is taken by appellants to certain rulings of the trial court at the second hearing because it is claimed that the trial judge refused to consider certain testimony respecting a claim filed by the Lumber Company through an assignee against one Keeler under the Federal Bankruptcy Act, 11 U.S.C.A. § 1 et seq. It appears that the claim was filed after the execution sale and after the first trial of the present action. We have examined the record in this respect and find no sufficient record or competent evidence from which it could be said that the court erred in its rulings.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

21 Cal.2d 188

MUELLER v. ELBA OIL CO. et al.

S. F. 16772.

Supreme Court of California.

Nov. 2, 1942.

1. Bankruptcy ⇐149, 354

An individual partner's property when taken over by bankruptcy court after partnership has been adjudicated bankrupt must be applied first to payment of the individual partner's individual debts, and the surplus, but only the surplus, is then added to the partnership assets, and if any surplus of partnership property remains after paying its debts, such surplus is added to the assets of the individual partners in the proportion of their respective interests in the partnership. Bankr.Act § 5, sub. g, as amended in 1938, 11 U.S.C.A. § 23, sub. g.

2. Bankruptcy ⇐429

Any number of general partners may be jointly adjudicated bankrupt in partnership proceedings, and those who are so adjudicated and who otherwise comply with the bankruptcy law are entitled to discharge from their individual as well as their partnership debts. Bankr.Act § 5, subs. a, j, as amended in 1938, 11 U.S.C.A. § 23, subs. a, j.

3. Bankruptcy ⇐404(1)

Ordinarily, where any provision of the Bankruptcy Act relating to discharge of a bankrupt is amended, the right to discharge will be governed by the law as it stands at the time the petition for discharge is filed, or the court acts on it

4. Bankruptcy ⇐4

The Bankruptcy Act is to be interpreted and administered liberally in favor of the bankrupt.

5. Bankruptcy ⇐429

Where prior to the effective date of the 1938 amendments to the Bankruptcy Act, trustee in bankruptcy of partnership filed petition for marshaling assets of partners, and an offer was made on behalf of members of partnership to compromise marshal assets controversy by paying certain sum to trustee, bankruptcy court had jurisdiction to discharge the members of the partnership from liability for the partnership debts without the necessity of their being adjudicated bankrupt. Bankr.Act § 5, subs. a, g, j, as amended in 1938, 11 U.S. C.A. § 23, subs. a, g, j.

6. Bankruptcy ⇐252

The provision of the Bankruptcy Act that the receiver or trustee in bankruptcy may, with approval of court, compromise any controversy arising in the administration of the estate, on such terms as he may deem for the best interest of the estate, gives a bankruptcy court the power to dispose of a bankrupt's claims or assets of doubtful value, in an expeditious manner, other than in the usual and ordinary manner prescribed by statute for marshaling the assets of a bankrupt estate. Bankr. Act § 27, 11 U.S.C.A. § 50.

7. Judgment ⇐251(1)

An order is not "void on its face" though it is not in accordance with the petition on which it is based.

See Words and Phrases, Permanent Edition, for all other definitions of "Void on Its Face".

8. Bankruptcy ⇐252

Petition of compromise which was filed by trustee in bankruptcy of partnership, and which sought an order that members of partnership were fully released from all individual liabilities to each creditor who filed claim in bankruptcy proceedings of partnership, and which prayed that members of partnership be discharged from all individual liabilities to each creditor who filed claim in the bankrupt estate, was jurisdictionally adequate. Bankr.Act § 27, 11 U.S.C.A. § 50.

9. Bankruptcy ⇐252

Contention that trustee in bankruptcy of partnership was entitled as of course to compel members of partnership to marshal their assets, and that therefore there was no controversy to compromise, was devoid of merit, where substantially every fact disclosed in connection with proceeding to marshal assets and to compromise belied it. Bankr.Act § 27, 11 U.S.C.A. § 50.

10. Bankruptcy ⇐252

Referee in bankruptcy had the right to consider the uncertainty and cost of litigation in determining the advisability of offer on behalf of members of bankrupt partnership to compromise marshal assets controversy, and also had the right to determine the sufficiency of the petition on which the referee acted. Bankr.Act § 27, 11 U.S.C.A. § 50.

11. Bankruptcy ⇐252
Constitutional law ⇐306

Where ambiguities in petition of trustee in bankruptcy of partnership to compromise marshal assets controversy did not deprive bankruptcy court of its jurisdiction to proceed, and assignee of claim against partnership had notice of meeting of creditors and of court hearing on petition to compromise, there was "due process of law" in the compromise proceeding, and the assignee was bound thereby. Bankr. Act § 47, sub. a(10, 13, 14), 11 U.S.C.A. § 75, sub. a(10, 13, 14).

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

12. Bankruptcy ⇐252

Where proceeding in bankruptcy court by trustee in bankruptcy of partnership to marshal assets of members of partnership was instituted, and trustee's compromise offer was made prior to effective date of 1938 amendments to the Bankruptcy Act, the law as it then existed was as much a part of the offer as though it had been written therein, since the compromise offer involved substantive rights and not merely matters of remedy or procedure. Bankr.Act § 27, 11 U.S.C.A. § 50.

13. Judgment ⇐829(3)

The state courts of California give "full faith and credit" to the final judgments and orders of the federal district courts, and where the judgment of a federal court determines a right under a federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

14. Judgment ⇐489

As regards collateral attack on a judgment, "jurisdiction" is but the power to hear and determine, and does not depend on the correctness of the decision made.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

15. Judgment ⇐829(3)

Action by assignee of creditor of partnership against partnership and members of partnership to recover the price of goods sold and delivered to partnership, was a "collateral attack" on judgment of federal court for compromise of marshal assets controversy and release of members of partnership and hence would not lie. Bankr.Act § 27, 11 U.S.C.A. § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

TRAYNOR, CARTER, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by D. J. Mueller against the Elba Oil Company and others, to recover the price of goods sold and delivered by the plaintiff's assignor to the named defendant. From a judgment in favor of the defendants Frank Raiter and Louis Oleari, the plaintiff appeals.

Judgment affirmed.

For prior opinion, see 124 P.2d 132.

Mueller & Westover, of San Francisco, for appellant.

Rosendale, Thomas & Muller, of Salinas, for respondents.

SCHAUER, Justice pro tem.

This is an appeal by plaintiff from a judgment for defendants Frank Raiter and Louis Oleari in an action to recover the price of goods sold and delivered by plaintiff's assignor to the Elba Oil Company, a partnership, in which the two defendants above named were among the general partners. Except as otherwise specifically noted the term plaintiff will hereinafter be used in referring either to plaintiff or to his assignor and the term defendants will be understood as designating the respondents Raiter and Oleari. All italics within quotations are added.

As previously mentioned the merchandise was sold to the partnership. The debt was unsecured. Subsequent to the sale but prior to trial of this action the partnership, upon involuntary petition, was adjudicated a bankrupt and in due course was discharged from its scheduled debts, including that sued on here. In course of administration of the bankrupt partnership estate the trustee instituted a proceeding to marshal the individual assets of the general partners. Such proceeding, or more technically, the controversy arising out of it, was compro-

mised upon terms approved by order of the bankruptcy court. The compromise was predicated on, among other things, a disclosure of the assets and personal liabilities of the defendants. Its terms, as established by the order, included payment of $7,500 in cash, advanced by a bank for the defendants, to the trustee and the reciprocal consideration "that upon receipt of said sum of $7500.00 by the Trustee that the said Frank G. Raiter and Louis G. Oleari, and each of them are fully and completely released and discharged from any and all claims, demands, liability, causes of action or judgments against them or either of them, as general partners of the above-named bankrupt." It is stipulated that "the sum of $7,500, was * * * received, accepted, and expended by said Trustee in accordance with said order."

This action is predicated on the personal liability of defendants as general partners. Their defense is based on two propositions: (1) Release and discharge effected by the order of the bankruptcy court above mentioned; (2) discharge in bankruptcy of the individual partners as legally incident to formal discharge of the bankrupt partnership. The case was tried upon an agreed statement of facts which the trial court impliedly found to sustain the defenses above mentioned. Plaintiff challenges both the defenses, contending that the order of the bankruptcy court in the compromise proceeding was void as to plaintiff and that the discharge of the partnership did not operate to discharge the defendants individually. We find that the determination of but one major question is essential to our decision: Is the order of the bankruptcy court, approving the compromise and releasing the defendants, binding on plaintiff? In reaching an affirmative conclusion we survey the pertinent provisions of the bankruptcy law as it stood both before and after the 1938 amendments, together with appropriate decisions of both federal and state courts throwing light on the jurisdictional questions involved. In our discussion of the bankruptcy act and of federal court decisions construing its provisions we are not to be understood as assuming in any instance to declare what constitutes the true rule or better practice on a federal question in a federal tribunal. We are interested not at all in determining what constitutes in a federal court a proper as distinguished from an erroneous ruling. We are concerned only with noting rulings authoritatively made showing the jurisdictional compass of the court.

For clarity and brevity of presentation the following chronology of facts is convenient:

Dec. 31, 1937	Involuntary Petition in Bankruptcy filed (against Elba Oil Company naming defendants among general partners).
Jan. 4, 1938	Partnership adjudicated bankrupt. (Schedule filed in due course correctly and adequately listing debt due plaintiff's assignor.)
March 11, 1938	Notice given all creditors. (In due course trustee was regularly elected, appointed, and qualified.)
April 4, 1938	Trustee filed petition for marshaling assets of partners.
April 7, 1938	Order to show cause on petition to marshal assets issued and served on defendants.
April 14, 1938	Second order to show cause on petition to marshal assets issued and served on defendants.
June 28, 1938	Offer on behalf of defendants to compromise marshal assets controversy (by paying $7,500 to trustee) submitted to trustee.
Sept. 22, 1938	The 1938 amendments to the bankruptcy act became generally effective.
Dec. 19, 1938	Third order to show cause on petition to marshal assets issued and served (controversy still continuing).
Jan. 30, 1939	Trustee filed in bankruptcy court his petition to compromise the controversy, based on the offer of June 28, 1938. (Petition regularly set for hearing on February 14, 1939, and due notice given *all* creditors including plaintiff's assignor.)
Feb. 14, 1939	Meeting of creditors; order of court for compromise of controversy and release of defendants

made and entered. (This terminated the marshal assets proceeding; the $7,500 was then accepted by trustee and expended pursuant to court order; the order was not appealed from and became final.)

March 6, 1939 The partnership was discharged and its bankruptcy administration closed. (This order implies approval of and reliance upon the compromise-termination of the marshal assets proceeding and the receipt and expenditure of the $7,500 thereby obtained.)

The offer of compromise in the marshal assets proceeding, insofar as it was reduced to writing, was submitted by a bank on behalf of the defendants, was addressed to the trustee, and was in words and figures as follows:

"Enclosed herewith is our cashier's check in the sum of $7500.00, dated June 28, 1938, numbered 7794 and payable to you as trustee of the Estate of Elba Oil Company, bankrupt. This check is delivered to you for the sole and exclusive purpose of using the same and the proceeds thereof for effecting, completing, and paying a composition of creditors of said Elba Oil Company, No. 31187-Y, of the District Court of the United States, Southern District, Central Division, according to the terms and conditions of offer heretofore made or hereafter to be made by our clients, Frank E. Raiter and Louis G. Oleari, as copartners of said Elba Oil Company.

"We are advised that the terms and conditions of said offer are or will be as follows: (1) that all secured creditors of said Elba Oil Company shall take and accept all properties described in their respective securities in full satisfaction and discharge of the debts secured thereby; (2) that *all unsecured creditors* and all trustees' fees, attorneys' fees, receivers' fees, costs, etc., *shall be fully satisfied and paid out of said sum of $7500;* and (3) that each creditor of said Elba Oil Company shall execute in writing a full and complete release and discharge of our clients, Frank E. Raiter and Louis G. Oleari, of and from any and all individual liability to each of said creditors. If you effect, complete, and obtain confirmation of a composition of creditors upon such terms and conditions, you are authorized to use the proceeds of said check for payment of said fees, costs, claims of unsecured creditors, etc., but for no other purpose, and in the event that you are unable to effect, complete, and obtain confirmation of such composition within three months from the date hereof, you shall return said sum of $7500.00 to us without deduction of any kind whatsoever. *Until and unless said composition shall be so effected, completed, and confirmation thereof obtained, said sum of $7500.00 shall be and remain the property of the undersigned.*"

While such offer of compromise uses the words "composition of creditors" in referring to the purpose of the offer, the ends to be attained and the conditions for payment of the money are specified as (1) that all secured creditors of the partnership shall accept their securities in full satisfaction of the secured debts; (2) that all unsecured creditors and fees and costs "shall be fully satisfied and paid out of said sum of $7500; and (3) that each creditor of said Elba Oil Company shall execute in writing a full and complete release and discharge of * * * Frank E. Raiter and Louis G. Oleari, of and from any and all individual liability to each of said creditors." In other words, the ultimate and controlling objective of the offer to pay $7,500 apparently was the complete release or discharge of the defendants Raiter and Oleari from individual liability for debts of the partnership. *It was not sought to secure their release or discharge from their individual debts outside of their partnership liability.*

It has been held that technically a partnership is an entity which may be adjudged bankrupt irrespective of any adjudication of the individual partners as bankrupts (Luse v. Peters, 1933, 219 Cal. 625, 629, 28 P.2d 357; see cases cited in note 7, annotations to § 23, tit. 11, U.S.C.A.), although it has been said to be error or at least incongruous, to adjudicate and discharge a partnership firm without adjudication and discharge of the individual partners (see note [hereinafter quoted in part] on page 669 of L.R.A. 1915F and cases cited). In any event, it was authoritatively held that under the bankruptcy act prior to the 1938 amendments the adjudication of a firm gave the bankruptcy court jurisdiction to take over the separate estates of the partners and to administer them so far as necessary to complete settlement of the partnership

estate. (Dickas v. Barnes (6 Cir., 1905), 140 F. 849, 72 C.C.A. 261, 5 L.R.A.,N.S., 654, 656, 15 A.B.R. 566; Francis v. McNeal, (1913) 228 U.S. 695, 33 S.Ct. 701, 57 L.Ed. 1029, L.R.A. 1915E, 706, affirming (3 Cir., 1911) 186 F. 481, 108 C.C.A. 459, 26 A.B.R. 555.)

[1, 2] An individual partner's property when taken over must be applied first to the payment of his individual debts and the surplus, but only the surplus, is then added to the partnership assets, and if any surplus of partnership property remains after paying its debts such surplus is added to the assets of the individual partners in the proportion of their respective interests in the partnership. (§ 23, sub. f, tit. 11, U.S.C.A., becoming § 23, sub. g, tit. 11, in 1938 [§ 5, sub. g Bankr.Act].) Jointly in the partnership proceeding, as the law now stands, any number of general partners may be adjudicated bankrupt. (§ 23, sub. a, tit. 11, U.S.C.A. [§ 5, sub. a Bankr.Act].) Those who are so adjudicated and who otherwise comply with the bankruptcy law are entitled to discharge from their individual as well as from partnership debts. (§ 23, sub. j, tit. 11, U.S.C.A. [§ 5, sub. j Bankr.Act].)

Prior to the effective date of the 1938 amendments to the bankruptcy act it was held by high authority that partners who were not individually adjudicated bankrupt were, nevertheless, by the discharge of the bankrupt firm, themselves discharged from further liability for partnership debts. (Abbott v. Anderson, (1914) 265 Ill. 285, 106 N.E. 782, L.R.A. 1915F, 668, Ann.Cas. 1916A, 741; see, also, Francis v. McNeal, supra, (1913) 228 U.S. 695, 33 S.Ct. 701, 57 L.Ed. 1029, L.R.A.1915E, 706.) In the note on page 669 of L.R.A.1915F, annotating Abbott v. Anderson, supra, after referring to Francis v. McNeal, supra, it is stated that "The law can therefore be regarded as settled that a discharge of a partnership in bankruptcy discharges the members thereof from liability for *firm debts,* whether the bankruptcy court brought in the members of the firm and their property or erroneously discharged the firm as an entity without an adjudication of the individual members." It will also be noted that the Supreme Court in Francis v. McNeal, supra, overruled In re Bertenshaw, (8 Cir., 1907) 157 F. 363, 369, 85 C.C.A. 61, 17 L.R.A., N.S., 886, 13 Ann.Cas. 986, in its earlier *arguendo* ruling (at page 369 of 157 F.) that "the creditors of the partnership may subject the individual property of the unadjudicated partners to the payment of their debts before during or after the bankruptcy proceedings, by actions at law, by suits in equity or by other proceedings." Furthermore, as to the jurisdiction and power of the bankruptcy court to discharge partners from liability for firm debts although they remain technically unadjudicated as bankrupts, the Circuit Court of Appeals, Eighth Circuit, in Armstrong v. Norris, (1917) 247 F. 253, 255, 159 C.C.A. 347, said: "The bankruptcy of their firm made Brown and Norris as individuals parties to the proceeding, so far as their rights and liabilities as debtors were necessarily involved in its scope and effect. They were in court jointly and severally. The partnership debts were their debts. Their individual liability therefor was primary and direct, not collateral. The partnership property that was administered was their property, for a deficiency of which to pay the debts their individual estates, if any, were bound, and were subject to the jurisdiction of the court in that proceeding for equitable marshaling and application. * * * Ordinarily it is true that a discharge in bankruptcy implies a prior adjudication of the person discharged, but the rule should not be applied too literally. When a partnership alone has been adjudged bankrupt, the individual partners and their estates are drawn into the proceeding and are subject to the jurisdiction of the court; and when all the conditions and requirements of the Bankruptcy Act have been observed by them, jointly and severally, there is no sound reason why the court should not, upon their application in the same proceeding, discharge them from further liability for the partnership debts."

The 1938 amendments to the bankruptcy law (§ 23, sub. j, tit. 11, U.S.C.A. [§ 5, sub. j Bankr. Act]) changed the rule quoted above from L.R.A. 1915F, page 669, as to the effect on individual partners' liability of a discharge of the partnership, by providing that "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from both his partnership and individual debts." Assuming for the purpose of this opinion, but not holding that the amendment just quoted is of jurisdictional significance as limiting or defining

the power of the bankruptcy court in the premises, we give consideration to its applicability.

[3, 4] As to the applicability of the 1938 amendments to the present controversy it is to be recognized that normally where any provision relating to discharge is amended, the right to discharge will be governed by the law as it stands at the time the petition for discharge is filed or the court acts on it (Farmers' Sav. Bank of Grimes, Iowa, v. Allen, (8 Cir., 1930) 41 F.2d 208, 210; In re Farrow, (D.C.Cal.1939) 28 F.Supp. 9, 10) but it is also to be noted that in enacting the 1938 bankruptcy legislation Congress prescribed a conditional saving clause as to pending proceedings, making applicability of the new law to such proceedings dependent on *practicability*. The clause is as follows (§ 6, sub. b, 52 Stat. 940, tit. 11, U.S.C.A., § 1 note[1]): "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings *so far as practicable* in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto." It also must be remembered that the bankruptcy act is to be interpreted and administered liberally in favor of the bankrupt (Morris Plan Bank of Richmond, Va. v. Henderson, (D.C.N.C. 1932) 57 F.2d 326, 327; Farmers' Sav. Bank of Grimes, Iowa, v. Allen, supra, (8 Cir., 1930) 41 F.2d 208, 212).

[5] From what has been said as to the law prior to the effective date of the 1938 amendments to the bankruptcy act (September 22, 1928) it clearly appears that at the time initially pertinent proceeding (the petition to marshal assets of the defendants) was filed (April 4, 1938) and likewise at the time (June 28, 1938) of the making of the offer to compromise the controversy represented or precipitated by such position, the bankruptcy court had jurisdiction and authority to discharge these defendants from liability for the partnership debts without the necessity of their being adjudicated bankrupt and if the local bankruptcy courts were following the rule stated in the note on page 669 of L.R.A. 1915F, above quoted, the discharge of the firm during that period would have impliedly and effectively discharged these defendants from liability for firm debts. Again we state that we are not holding that the L.R.A. 1915F rule was the only holding the bankruptcy court could have made. We are cognizant of such decisions as First Nat. Bank of Herkimer v. Poland Union, (2 Cir., 1940) 109 F.2d 54, at page 57, wherein it is asserted in effect that the weight of authority denies discharge to an unadjudicated partner even though his assets may be seized by the firm trustee. The only proposition which we are concerned in depicting is that indubitably the bankruptcy court had jurisdiction, whether properly or erroneously, to release or discharge individual partners from firm debts without the formality of adjudication of the partners.

At the time the petition to marshal assets was filed and at the time of the compromise offer, section 27 of the Bankruptcy Act (§ 50, tit. 11, U.S.C.A.) provided that "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate." No material change was made in this section of the act in 1938. In reliance upon this section and apparently in the light of the law as it existed at the time the petition to marshal assets was filed and likewise as it stood at the time the compromise offer was made, the trustee on January 30, 1939, filed his petition to compromise the controversy. Such petition is entitled "In the District Court of the United States," and is denominated "Petition to Compromise Controversy." It alleges the appointment and qualification of the trustee, the filing of the petition to marshal the assets of the individual partners, including defendants, the issuance of the several orders to show cause, the discussion between counsel for the parties, of the matters involved; that "the assets of said persons [defendants] were disclosed, and the personal liabilities of said persons were likewise made known; that from the information received by your petitioner it appears that the value of the assets of said persons after the liquidation of the personal liabilities of said persons would amount to practically nothing." It is further averred in such petition to compromise that "your petitioner recommended that if the sum of $7500.00 was paid over to the Trustee herein in full and complete settlement, release, and discharge of the individual liability of said Frank E. Raiter and Louis G. *O'Leari* to the creditors of the above entitled bankrupt, your

[1]Now in Pocket Part.

petitioner would present to the court a petition *based thereon* to compromise the controversy; * * * that your petitioner is informed and believes, and therefore alleges, that said sum is being advanced by said [a] bank for and on behalf of said Frank E. Raiter and Louis G. *O'L*eari." A further allegation is that "a basis of compromise has been arrived at between [*sic*] all of the parties to the litigation hereinabove set forth." As grounds for the compromise and indicative of the character of the controversy which existed, it is alleged "That your Trustee believes it is for the best interests of the creditors of this estate that the compromise herein be approved for the reason that it is doubtful that the estate herein can realize any greater sum than that which is being paid by the said Frank E. Raiter and Louis G. *O'L*eari from any order that may be made directing them to turn over their assets to the Trustee herein to marshal the same. There is also some doubt as to the ability of your Trustee to prevail in the said proceeding to marshal the assets of the said Frank E. Raiter and Louis G. *O'L*eari. That the acceptance of the compromise at this time will eliminate costly and long drawn out litigation and will redound for the benefit of the creditors of this estate."

The allegations of the petition for compromise so far as recited up to this point are consistent with the object of the offer which was made by defendants—their complete release or discharge from firm debts —but unfortunately it contains another allegation which is inconsistent with the general plan and which is dwelt upon strongly by the plaintiff. Such allegation is that "Said controversy *may* be compromised upon the following basis, to-wit:

"That in consideration of an order being made and entered herein, wherein and whereby Frank E. Raiter and Louis G. *O'L*eari are fully and completely released and discharged of and from any and all individual liabilities to each and every one of the creditors *who have filed claims* in the above entitled bankruptcy proceedings, being the Elba Oil Company, a copartnership, the said Frank E. Raiter and Louis G. *O'L*eari will, through the Monterey County Trust & Savings Bank, pay to the Trustee herein the sum of $7500.00."

Following the same inconsistency the prayer of the petition, in addition to asking that notice be sent to creditors and that an order be made authorizing the compromise, requests "an order made and entered herein fully and completely releasing and discharging the said Frank E. Raiter and Louis G. *O'L*eari of and from any and all individual liabilities to each and every one of the creditors *who have filed claims* in the above entitled bankrupt estate." Plaintiff's claim, although duly scheduled by the bankrupt partnership, was not filed or proved by plaintiff or his assignor, and at the date the petition for compromise was filed (Jan. 30, 1939) the time for filing creditors' claims had expired (§ 93, sub. n, tit. 11, U.S.C.A.). The stipulation of facts shows "that said petition for compromise was duly and regularly set down for hearing * * * and due notice of said hearing was mailed and given to all creditors of said Elba Oil Company, including" plaintiff's assignor.

Upon the above described petition the matter came on regularly for hearing in the bankruptcy court and the referee properly took cognizance of the actual terms of the compromise offer. Apparently the inconsistencies in the petition were ignored as no amendment thereto appears to have been made, and an order was made which includes the following explicit language: "Now, therefore, IT IS HEREBY ORDERED that said compromise is approved and confirmed, and the Trustee is authorized and directed to compromise said controversy by accepting the sum of $7500.00, paid to said Trustee for and on behalf of Frank E. Raiter and Louis G. Oleari, upon condition that said Frank E. Raiter and Louis G. Oleari are released from *any and all liability* which may or might exist against them or either of them as general partners of the above-named bankrupt.

"IT IF FURTHER ORDERED that upon receipt of said sum of $7500.00 by the Trustee that the said Frank G. Raiter and Louis G. Oleari, and each of them are *fully and completely released and discharged from any and all claims, demands, liability, causes of action or judgments against them or either of them, as general partners* of the above-named bankrupt."

The agreed statement of facts further establishes that no appeal was taken and that the order above quoted from has become final; that the $7,500 was accepted by the trustee and expended pursuant to the order; and that the partnership was discharged in bankruptcy. The discharge recites that the "Elba Oil Company, a copartnership, composed of * * * Jo-

seph E. Barrett, J. S. Lees, Louis *O'Leari* and F. E. Raiter * * * had been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf."

Probably inspired by the use of the term "composition of creditors" in the compromise offer of June 28, 1938, there has been some argument between the opposing parties on this appeal as to whether the proceeding to marshal assets of the defendants and the compromise proceeding based thereon, were not in law what they appear to be but, combined with the offer, together constituted either a never-properly-instituted attempt at a composition of creditors under the then-existing sections 12 and 74 (§§ 30 and 202, tit. 11, U.S.C.A.) of the Bankruptcy Act (sections now recast and incorporated as far as pertinent here in chapter 11, §§ 701–799, title 11, U.S.C.A. [§§ 301–399, Bankr.Act], dealing with arrangements) or a prematurely commenced or inept effort to achieve an "arrangement" pursuant to the provisions of chapter 11, title 11, U.S.C.A. (see, particularly, § 721, et seq., tit. 11, U.S.C.A. [§ 321, et seq., Bankr.Act]) as amended in 1938. A reading of the sections above cited makes it apparent that the proceedings here involved were not designed to, and did not, constitute either a composition or an arrangement. Certainly under the law prior to the 1938 amendments the defendants *could* have filed composition proceedings (§ 202, tit. 11, U.S.C.A. [§ 74, Bankr.Act]) and would have been entitled to conclude them under *that law* (§ 799(3), tit. 11, U.S.C.A. [§ 399(3), Bankr.Act]) and likewise, subsequent to the effective date of the 1938 legislation, the defendants could have filed a petition for an arrangement pursuant to the provisions of section 721, title 11, U.S.C.A. (§ 321, Bankr.Act). But the defendants did not elect to institute any such proceedings. Jurisdictionally, they were not required so to do. Whether it would have been better practice for them to have pursued one of those courses we need not speculate. The fact is that they were placed in the position of defendants in an adversary proceeding—the petition to marshal their assets in the partnership bankruptcy administration—and they offered a settlement by way of compromise, upon terms which the bankruptcy court had jurisdiction to entertain.

So far as due process of law is concerned, it does not appear that plaintiff has been deprived of any right by any misapprehension that the compromise proceeding was in fact a composition or arrangement proceeding. Its character as a compromise proceeding is apparent upon mere inspection of the petition; the petition is that of the trustee, not that of the defendants or of the bankrupt firm; the substance of the petition obviously seeks compromise and does not purport to set forth the allegations specifically required by the bankruptcy act to be contained in a petition for composition or arrangement. (See sections cited supra in reference to "composition" and "arrangement.") Furthermore, in the agreed statement of facts plaintiff stipulates "that on or about the 28th day of June, 1938, defendants * * * made unto said Trustee, and through said Trustee to the creditors of said bankrupt, *an offer of compromise and composition,* the terms of which are set forth in Exhibit '4' * * *; that thereafter * * * said Trustee filed in said Court and matter his *petition to compromise the controversy* between said Trustee and said defendants. * * *"

[6] At the date when the petition to compromise was filed, and likewise when it was acted upon, section 50, title 11, U.S.C.A. (§ 27, Bankr.Act), previously herein quoted in its pre-1938 form and which as mentioned above was not amended in 1938 in any respect material to our consideration, declared that "The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate." Under this section the bankruptcy court had power to dispose of claims or assets of the bankrupt, of doubtful value, in an expeditious manner, other than in the usual and ordinary manner prescribed by statute for marshaling the assets of a bankrupt estate (Scott v. Jones, (10 Cir., 1941) 118 F.2d 30, 31). In Hamilton-Brown Shoe Co. et al. v. Ben L. Berwald Shoe Co., (5 Cir., 1925) 10 F.2d 275, there was a factual situation very similar to that which was before the bankruptcy court here. It differed to the extent that in the cited case the suing creditors claimed personal liability on the part of the defendants not only on account of unpaid stock subscriptions, which could have been recovered in the bankruptcy administration by the trustee, the same as the personal liabilities of defendants as partners could have been enforced by the trustee here, but

also in the cited case there was a claim against the defendants arising out of their activities as officers of a bankrupt corporation. The liability of the defendants in that case as officers of the corporation was personal to certain creditors and could not have been enforced by the trustee in bankruptcy. The bankruptcy court therefore did not have power to release what it did not have jurisdiction over but insofar as the facts before it were similar to our case, the Circuit Court of Appeals said (10 F.2d at page 276): "It may be conceded that the trustee may, with the approval of the court, compromise any controversy concerning the bankrupt estate, and for this *he represents all of the creditors* under the law. Such would be his claim for the unpaid portions of the stock subscriptions and his right of action to set aside a preference. (Bankruptcy Act, § 27 (Comp.St., Sec. 9611 [11 U.S.C.A. § 50]) The proceedings in this case to that extent are regular, and would be binding on appellants, if that were all."

[7, 8] The plaintiff's assignor was a scheduled creditor. Notice of the compromise proceeding was given as required by section 94, subdivision a, (3) and (6), title 11, U.S.C.A. (§ 58, subd. a, (3), (6), Bankr.Act.) Such assignor had a right to appear and contest the proceeding even though no claim had been filed and the time for filing claims had expired. Furthermore the offer of compromise was made before the time for filing claims had expired. It was made to the trustee, who, as stated in the above quotation from Hamilton-Brown Shoe Co. et al. v. Ben L. Berwald Shoe Co., represented *all of the creditors.* Such offer clearly stated the conditions on which it was made. The trustee could not alter those conditions and, as also held in substance in the case last cited, 10 F.2d at page 276 thereof, the offer had to be accepted in substantial compliance with those conditions or not at all. The petition to compromise was at worst only ambiguous. It contained the statement that the trustee "recommended that if the sum of $7500.00 was paid over to the Trustee herein in full and complete settlement, release, and discharge of the individual liability of said Frank E. Raiter and Louis G. *O'Leari to the creditors of the above entitled bankrupt,* your petitioner would present to the court a petition *based thereon* to compromise the controversy." In our own state courts it is established that an order is not void on its face although it is not in accordance with the petition on which it is based. (In re Morehouse, (1917) 176 Cal. 634, 636, 169 P. 365; In re Gardiner's Estate, (1941) 45 Cal.App.2d 559, 564, 114 P.2d 643.) Even if the question here is not settled for us by the fact that the bankruptcy court determined its own jurisdiction we must hold that the petition was jurisdictionally adequate.

[9, 10] In connection with the attack on the compromise proceedings, it is asserted that the trustee was entitled as of course to compel the defendants to marshal their assets, and on that premise plaintiff contends that there was no controversy to compromise. Such contention is devoid of merit; substantially every fact disclosed in connection with the proceeding to marshal assets and to compromise the same belies it. The mere fact that the trustee had the right as of course to maintain the proceeding did not make the fact or amount of net recovery for the partnership estate any less controversial. The trial court in bankruptcy (the referee) had the right to consider the uncertainty and cost of litigation in determining the advisability of compromise (Petition of Stuart, (6 Cir., 1921) 272 F. 938, 941) and it also had the right to determine the sufficiency of the petition upon which it acted (In re L. M. Axle Co., (6 Cir., 1925) 3 F.2d 581, 582).

[11] It is regrettable that the trustee in preparing the petition to compromise permitted the ambiguities, which have been noted above, to appear. But those ambiguities did not deprive the court of its jurisdiction to proceed. Not only did the plaintiff's assignor have notice of the meeting of creditors and of the court hearing on the petition to compromise, but also it must be presumed that the law took its regular course and was complied with, i. e., that there was a final meeting of creditors before the discharge of the bankrupt partnership and that in compliance with subdivisions (13) and (14) of subsection a of section 75, title 11, U.S.C.A. (§ 47, Bankr. Act) the trustee did "make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; and (14) lay before the final meetings of the creditors detailed statements of the administration of the estates." Another duty of trustees, prescribed by section 75 sub. a(10) is to "furnish such information concerning the estates of which they are trustees and their

administration as may be requested by parties in interest." We are satisfied that there was due process of law in the compromise proceeding and that plaintiff is bound thereby.

Regardless of the form of the mesne proceedings in the bankruptcy court, or of irregularities or errors therein, the controlling fact is that that court had jurisdiction over the subject matter and the parties before it. It had jurisdicion over the partnership as an entity, over its estate, over these defendants as partners and as individuals, over their individual estates, and over all of the scheduled creditors of the partnership. Its jurisdiction included the power to compromise any controversy among the parties before it and to discharge the defendants from liability to the creditors of the bankrupt firm.

[12] The proceeding to marshal assets was instituted and the compromise offer was made prior to the effective date of the 1938 amendments. The law as it then existed was as much a part of that offer as though it had been written therein. (6 Cal.Jur. 310, § 186; Brown v. Ferdon, (1936) 5 Cal.2d 226, 231, 54 P.2d 712; Wing v. Forest Lawn Cem. Ass'n, (1940) 15 Cal.2d 472, 476, 101 P.2d 1099, 130 A.L.R. 120.) The compromise offer involved substantive rights (see Brown v. Ferdon, supra), not mere matters of remedy or procedure. Not only were the defendants' interests concerned, but so also were the interests of the bank which advanced the $7,500 and the interests of the individual creditors of defendants.

The offer of compromise, it will be recalled, specified the conditions on which the tendered money could be used and explicitly reserved title in the bank pending fulfillment of those conditions. It concluded "Until and unless said composition shall be so effected, completed, and confirmation thereof obtained, said sum of $7500.00 shall be and remain the property of the undersigned." If we were to hold that the subsequent amendments of 1938 deprived the court of jurisdiction to approve the compromise offer on the terms upon which it was made we would in effect convict the trustee of converting the money paid to him, the referee of authorizing and directing such conversion, and the district court judge of ratifying and approving such conversion. We think such an application of the amendments would give them an impracticable effect and that it would have been impracticable for the bankruptcy referee or judge to have so applied them to the proceedings here involved. Such proceedings therefore (upon the assumed hypothesis) constituted a proper case for actuation of the conditional saving clause of the amendatory act hereinabove quoted. It is obvious, of course, that if application of the 1938 amendments to the proceedings concerned would not deprive the bankruptcy court of its power to release or discharge the defendants then, notwithstanding applicability of the amendments, the questioned orders would still remain valid.

[13] Our state courts give full faith and credit to the final judgments and orders of the United States District Courts (Code Civ.Proc., § 1908; Bank of America v. McLaughlin etc., Co., (1940) 40 Cal.App.2d 620, 626, 627, 105 P.2d 607), and "where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" (Stoll v. Gottlieb, (1938) 305 U.S. 165, 170, 59 S.Ct. 134, 137, 83 L.Ed. 104, 108.) Further establishing the conclusiveness of the bankruptcy proceedings on plaintiff in this state court action, we find in an opinion delivered for the Supreme Court by Mr. Chief Justice Hughes, the following statement of the law: "Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of res judicata are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it. * * *

"The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process,

to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally." (Chicot County Drainage District v. Baxter State Bank, (1939) 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329, 333; see, also Bank of America v. McLaughlin, etc., Co., supra, (1940) 40 Cal.App.2d at page 627, 105 P.2d 607.) By express definition in the Bankruptcy Act the word "court" "shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending." (§ 1(9), tit. 11, U.S.C.A.)

[14] Jurisdiction is but the power to hear and determine and does not depend upon the correctness of the decision made. (Gray v. Hall (1928) 203 Cal. 306, 315, 265 P. 246.) If a judgment ordered without a trial cannot be attacked collaterally, as has been held (Ex parte Bennett, (1872) 44 Cal. 84, 87; Johnston v. San Francisco Sav. Union, (1888) 75 Cal. 134, 139, 16 P. 753, 7 Am.St.Rep. 129; Holland v. Superior Court, (1932) 121 Cal.App. 523, 531, 9 P.2d 531), then certainly the order of the bankruptcy court, made upon the proceedings hereinabove related, is not open to collateral question. There has been no suggestion of extrinsic (or other) fraud at any stage in the proceedings.

[15] From what has been said the conclusion is reached that plaintiff here is making a collateral attack on a final order and judgment which the United States District Court had jurisdiction to make. Such attack fails.

It is also to be noted that the release of these defendants depends not alone on the referee's order of February 14, 1939, and its implied approval by the district judge in making the order discharging the bankrupt firm and closing the bankruptcy administration. The conclusion has been hereinabove developed that because of impracticability under the facts the 1938 amendments relating to the discharge of unadjudicated partners did not apply to this case; at least it would have been impracticable for the bankruptcy court to have applied such amendments in this case if the application thereof would have precluded consummation of the compromise according to the terms of the offer made prior to the effective date of such amendments. Upon the same reasoning, if we were to conclude that the compromise order of the referee was not in itself adequate to release the defendants from liability for the firm debts we would still be bound, for the preservation of practicability of application, to conclude that the discharge of the partnership should be entitled to the effect it could have had before those amendments were enacted. As we have shown, there was then respectable authority for holding that discharge of a partnership had the effect of discharging the partners from individual liability for the discharged firm's debts. Therefore, even if there were otherwise some question as to the efficacy of the order of compromise in releasing these defendants from the partnership debts, the doubt would be removed by the proper (in the premises) effect given to the discharge of the firm. Certainly the United States District Court judge must be presumed to have concluded either that the referee's order was final and conclusive as to plaintiff's rights in the premises against these defendants or that his own order of discharge of the partnership in bankruptcy operated to discharge these defendants, as otherwise he would have been approving a conversion of the $7,500 belonging to the bank which made the compromise offer for defendants and would have been closing the partnership bankruptcy administration with no determination of the proceeding to marshal defendants' assets.

Perhaps upon appeal, or other form of review in the federal courts, it might have been held that the referee's order of compromise and release was erroneous and that discharge of the bankrupt firm did not operate to discharge these defendants individually, but the state court is not a court of review for proceedings in the federal bankruptcy court. It appears irrefragably from the agreed statement of facts and the considerations stated above that the federal court construed its proceedings in the premises as efficacious to release or discharge the defendants from all liability for partnership debts. For us to confute those proceedings by holding that the federal court's orders are void as between plaintiff and defendants here would be tantamount to reviewing and reversing those orders.

The judgment is affirmed.

GIBSON, C. J., and SHENK and CURTIS, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent.

The opinion of the District Court of Appeal in this case by Presiding Justice Peters, modified in part, sets forth the reasons that lead me to conclude that the judgment should be reversed [124 P.2d 132, 136]:

"Where a partnership has been adjudicated a bankrupt the individual assets of the general partners may be drawn into the administration of the bankrupt estate, and any surplus remaining after paying individual creditors is applicable to the partnership debts. Section 5, sub. g, of the Bankruptcy Act, 11 U.S.C.A. § 23, sub. g; Francis v. McNeal, 3 Cir., 186 F. 481, 108 C.C.A. 459; [Id., 228 U.S. 695, 33 S.Ct. 701, 57 L.Ed. 1029, L.R.A.1915E, 706]; 6 Remington on Bankruptcy (4th Ed.), p. 499, 505. * * *

"The 1938 amendment added to § 5 of the Bankruptcy Act, paragraph j, reads as follows: 'The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts.' 11 U.S.C.A. § 23, sub. j. The amendatory act contained the following provision: 'Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect.' 52 Stats., p. 940, 11 U.S.C.A. § 1 note; see, In re Wm. Akers, Jr., Co., Inc., D.C., 31 F.Supp. 900. In view of this provision section 5, sub. j, 11 U.S.C.A. § 23, sub. j, governs the interpretation of the discharge herein.

"Prior to the enactment of § 5, sub. j there was some doubt as to whether a discharge of the partnership only had the effect of discharging the individual liability of the partners for the partnership debts. Myers v. International Trust Co., [273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692], supra; 7 Remington on Bankruptcy, 5th Ed. p. 863; 8 C.J.S., Bankruptcy, § 580, p. 1546, 37 Harv.L.Rev. 614. The 1938 provision removed this doubt. * * *

"The Act, prior to the 1938 amendment, provided only two methods whereby a bankrupt could secure a discharge—the discharge granted following full administration in bankruptcy, and a discharge upon confirmation of a composition of creditors. Welles-Kahn Co. v. Klein, supra [81 Fla. 524, 527, 88 So. 315]. Under the 1938 amendment a discharge may be secured upon confirmation of an arrangement. The right of a partner to secure a discharge from individual liability to partnership creditors where the bankrupt is a partnership is similarly limited. The individual assets of a partner may be drawn into the bankruptcy administration. The Act makes no provision whereby one whose assets are subject to the jurisdiction of the court in a bankruptcy proceeding may secure a discharge from liability to creditors of the bankrupt in any other way. See In re Northampton Portland Cement Co., D.C., 185 F. 542."

In the present case, the alleged discharge of the liability of the partners for partnership debts did not follow from full administration in bankruptcy. The majority opinion concludes, however, that although there was no composition or arrangement plaintiff was bound by the referee's order discharging defendants from liability for partnership debts. At the date of the order the bankruptcy act provided: "The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate." 11 U.S.C.A. § 50. Even if it be assumed that the alleged dispute as to whether or not liquidation of the individual assets of defendants would yield any surplus for partnership creditors could be made the subject of a "compromise of controversy" under this section, the bankruptcy court had no jurisdiction to discharge the individual liability of the partners to partnership creditors in proceedings brought to compromise a controversy arising in the administration of the estate of the bankrupt partnership. Hamilton-Brown Shoe Co. v. Ben L. Berwald Shoe Co., 5 Cir., 10 F.2d 275. The power of the trustee of a bankrupt partnership to seize and administer the assets of the individual partners does not give the trustee power to control the claims of creditors against the partners individually. The creditor's right to an in personam judgment against the partner is not the property of the partnership or a right that can be enforced by the partnership trustee. First Nat. Bank of Herkimer v. Poland Union, 2 Cir., 109 F.2d 54.

"We are of the view that the referee's order of February 20, 1939, by which he purported to discharge Raiter and Oleari from individual liability for partnership debts was void on its face for the reason

that as an order confirming a composition under § 12 of the Bankruptcy Act * * * it was required to be made by the judge, and could not validly be made by a referee. * * *

"In the case herein, while proceedings to bring the assets of the partners into the bankruptcy were pending, Raiter and Oleari offered $7,500 to be applied in part payment of the partnership creditors on condition that they be released and discharged in full from individual liability to such creditors. The plan was essentially one for a composition. A composition of creditors is a 'proceeding, voluntary on both sides, by which the debtor, of his own motion, offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities.' 6 Am.Jur. 776, § 416. The offer of composition may be of a lump sum, as in the case herein. In re Bickmore Shoe Co., D.C., 263 F. 926.

"A composition when confirmed operates as a discharge in bankruptcy. 'The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.' 11 U.S.C.A. 32, sub. c, see cases cited p. 133, note 631; for similar provision as to arrangements under the 1938 amendments, see 11 U.S.C.A. § 771; Myers v. International Trust Co., 273 U. S. 380, 47 S.Ct. 372, 71 L.Ed. 692. Before confirmation of the composition is sought it is required that it be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of claims. 11 U.S.C.A. §§ 30, 202. Since a composition when confirmed is binding on creditors who do not assent, it is settled that there must be strict compliance with the statutory requirements. In re Palmer, D.C., 2 F.Supp. 275, 277; In re Frear, D.C., 120 F. 978; 8 C.J.S., Bankruptcy, § 653, p. 1689.

"Prior to the 1938 amendments to the Bankruptcy Act, compositions were provided for by §§ 12 and 74. 11 U.S.C.A. §§ 30, 202. Under the 1938 amendments these sections were superseded by provision for 'arrangements.' 52 Stats. 840, enacting clause, and Chap. XI at p. 905, 11 U.S.C.A. § 701, et seq. The new procedure includes compositions in the term 'arrangements.' This is plain from the definition as follows: '"Arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms.' 11 U.S.C.A. § 706. An arrangement is not required to be confirmed by the judge. Under the 1938 amendments referees are invested with jurisdiction, subject to review by the judge, to 'confirm or refuse to confirm arrangements or wage-earner plans, or set aside the confirmation of arrangements or wage-earner plans and reinstate the proceeding or cases.' 11 U.S.C.A. § 66; see, also, 11 U.S.C.A. §§ 761–772, providing for confirmation by the 'court,' but not requiring confirmation by the 'judge.'

"These sections are not applicable to this proceeding. The 1938 amendments expressly provide that §§ 12, 73 and 74, as amended, 'shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act.' 52 Stats. p. 916; 11 U.S.C.A. § 799(3). The composition in the present case is referable to § 12. A composition under § 74 is initiated by the filing of a petition or answer in which the debtor states that he desires to effect a composition. Upon the judge approving the petition the composition proceeding goes forward with a meeting of creditors and other formalities. 11 U.S.C.A. § 202. Such procedure was not followed in the present case. A composition under § 12 originates in an 'offer of composition.' 11 U.S.C.A. § 30; Nassau Smelting & Ref. Works v. Brightwood Bronze F. Co., 265 U.S. 269, 271, 44 S.Ct. 506, 68 L.Ed. 1013; Myers v. International Trust Co., 273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692; 8 C.J.S., Bankruptcy, § 653, p. 1688. The offer in the present case was made 'on or about June 28, 1938,' according to the agreed statement of facts. The 1938 amendments were approved on June 22, 1938, and by terms of the amendatory act went into effect three months later, that is, on September 22, 1938. 52 Stats., p. 940. * * *

"By virtue of the express provision of the amendatory act above-referred to, § 12 was applicable to the pending proceeding herein involved. Section 12 provides that 'the judge shall confirm a composition.' 11 U.S.C.A. § 30; In re Bloodworth-Stembridge Co., D.C., 178 F. 372; In re Everick Art Corp., 2 Cir., 39 F.2d 765, 768. When the act uses the term 'court,' the referee may be included, but when the term 'judge' is used the referee is excluded.

In re McMurray, D.C., 8 F.Supp. 449; 8 C.J.S., Bankruptcy, §§ 268, 270, pp. 976, 978; 2 Remington on Bankruptcy, 5th Ed., 92. Section 1 of the act provides: ' "Judge" shall mean a judge of a court of bankruptcy, not including the referee.' 11 U. S.C.A. § 1, subd. 16; subd. 20 under the section as amended in 1938.

"The judge's subsequent order of discharge does not operate as a release of the individual liability of the partners for the partnership debts. The discharge was of the partnership. It was provided therein that 'Elba Oil Company, a copartnership composed of Joseph E. Barrett, J. S. Lees, Louis Oleari and F. E. Raiter, be discharged from all debts and claims which are made provable by said Acts against its estate, and which existed on the 31st day of December, A. D. 1937, on which day the petition for adjudication was filed against it; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.' * * *

"There appear to be other defects in the proceeding viewed as a composition, in addition to the absence of confirmation by the judge. Where the offer of composition is made by partners of a partnership adjudicated bankrupt it should not be made until after the schedule of individual assets and liabilities as well as of partnership assets is on file. In re Palmer, D.C., 2 F. Supp. 275, 277. This is because the creditors in determining whether it is to their advantage to assent to an offer of composition should have full information as to assets available to satisfy their claims. Any surplus of individual assets after paying individual debts may be used to pay partnership claims. In the present case the offer was made while proceedings to compel the partners to file their schedules were still pending and before individual schedules had been filed.

"The notice to creditors was of a petition praying for discharge of the liability of the partners Raiter and Oleari to creditors who had filed claims, whereas the order of the referee entered on the petition discharges them from any and all liability which might exist against either of them as partners.

"The bankruptcy papers included in the present record also show a failure to comply with the requirement that before confirmation is sought the composition must have been accepted in writing by a majority of the creditors. 11 U.S.C.A. § 30. The apparent reason for these omissions will be discussed hereafter. It is not necessary to determine whether these irregularities singly or together would render the composition void as a discharge. It is clear that, where the act requires the judge to confirm a composition, confirmation by a referee, a subordinate official of the court, is of no legal effect. Such confirmation is void on its face as to creditors who did not participate in the composition. The composition is binding, however, as a common law composition, on those who participated in it. In re Clarence A. Nachman Co., 2 Cir., 6 F.2d 427; Paris Medicine Co. v. Lusby, 174 Ark. 749, 297 S.W. 1015; Welles-Kahn Co. v. Klein, 81 Fla. 524, 527, 88 So. 315; 8 C.J.S., Bankruptcy, § 653, p. 1688.

"The fact that plaintiff's assignor had not filed a claim in the bankruptcy proceeding does not bar it or its assignor from attacking the void order of confirmation. The offer of composition was made on June 28, 1938. The adjudication took place on January 4, 1938. Hence, the offer of composition was made within six months' period following adjudication of bankruptcy, in which claims are required to be filed. 11 U.S.C.A. § 93, sub. n; 44 U.S. Stats. 666, amending § 57 of the Bankruptcy Act. The claim of plaintiff's assignor was listed in the partnership schedules filed. An offer of composition should extend to all creditors whose claims are listed by the bankrupt. 8 C.J.S., Bankruptcy, §§ 654, 658, pp. 1689, 1692; 7 Rem., 4th Ed., pp. 196, 238; 8 Collier on Bankruptcy, 14th Ed., pp. 959, 1237, 1238; Nassau Smelting & Refining Works v. Brightwood Bronze F. Co., 265 U.S. 269, 44 S.Ct. 506, 68 L.Ed. 1013; In re Adamson, 2 Cir., 83 F.2d 211. Thus it has been held that where the bankrupt makes an offer of composition before the time to file claims has passed, creditors whose claims are scheduled by the bankrupt need not make proof of claims to share in the composition. Nassau Smelting & Refining Works v. Brightwood Bronze F. Co., supra.

"It should be noted that the terms of the offer of composition here involved did not confine it to creditors who had filed claims, nor did the referee's order of approval so limit it. But the trustee's interpretation of the offer evidently was that payment should be made only to those who had proved claims, since he prayed in his petition that Raiter and Oleari be released

from individual liability to creditors who had filed claims. In any event no payment was made to plaintiff's assignor, nor did it in any way participate in the composition proceedings. In the circumstances the void order of confirmation did not operate as to it to discharge the individual liability of the general partners Raiter and Oleari.

"It appears that the failure to follow the procedure prescribed for a composition was due to the fact that the matter was handled as 'a compromise of controversy.' The act provides: 'The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.' 11 U.S.C.A. § 50; 2 Remington on Bankruptcy, 5th Ed., p. 717; 8 C.J.S., Bankruptcy, § 305, p. 1032. Since approval of the 'court,' rather than of the 'judge' is required, approval of a compromise may be given by the referee.

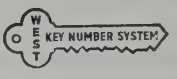
"But that which is as a matter of law a composition may not be accomplished without complying with the statutory requirements under the guise of being a compromise of controversy. 'This section (§ 27, 11 U.S.C.A. § 50) should not be confused with § 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge.' Gilbert's Collier on Bankruptcy, one vol., 4th Ed., p. 570.

"A 'compromise of controversy' implies a dispute to be settled. In the case herein the papers in the bankruptcy proceeding which have been made part of the record in the present case show a dispute as to whether certain persons who claimed to be limited partners were in fact general partners. But there is no intimation of any dispute as to the status of the four general partners, including Raiter and Oleari. The trustee's petitions described them as general partners and the stipulation of facts upon which the present action was heard so describes them.

"The petition to compromise recites that it is doubtful that the estate can realize from marshaling of the individual assets of Raiter and Oleari a greater sum than they offered to pay, that is, $7,500, and that 'there is also some doubt as to the ability of your Trustee to prevail in the said proceeding to marshal the assets of the said Frank E. Raiter and Louis G. Oleari.' However, as to general partners the authority of the trustee to marshal assets to the end of applying any surplus remaining after paying individual debts to partnership obligations exists as a matter of right, unless, perhaps, where it appears unlikely that any surplus above individual debts will result. It would seem, therefore, that on the record the only dispute which could exist was whether liquidation of the individual assets of Raiter and Oleari would yield any surplus for partnership creditors. In our view such a dispute may not be made the subject of a compromise of controversy which will result in discharge of general partners from individual liability to partnership creditors. * * *

"To summarize—the court in bankruptcy was without jurisdiction to discharge the individual liability of Raiter and Oleari as general partners except following full administration in bankruptcy or upon composition proceedings which met the statutory requirements. The referee's order was void as a discharge of the individual liability of Raiter and Oleari. It was void as a composition of creditors under § 12 of the Act because it lacked confirmation by a judge. The provision for compromise of controversies does not authorize a discharge of the individual liability of a partner to partnership creditors."

EDMONDS and CARTER, JJ., concurred.



21 Cal.2d 224

BAKEWELL v. BAKEWELL.

L. A. 18422.

Supreme Court of California.

Nov. 9, 1942.

1. Appeal and error ⇐66

An appeal lies only from a final judgment unless an appeal from an interlocutory decree or judgment is expressly authorized by law. Code Civ.Proc. § 963.

2. Judgment ⇐217

The general test for determining whether a judgment is "final" is that, when

no issue is left for future consideration except fact of compliance or noncompliance with terms of the first decree, decree is final, but, where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is "interlocutory".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Decree".

3. Appeal and error ⇐80(3)

Where, under judgment in suit to dissolve a partnership and to wind up partnership affairs, further audit of partnership books was required and receiver was directed to report thereon in order that court might ascertain amount due as between the partners and the judgment did not assume to establish proportional rights by use of percentages and judgment made it clear that payment of a specified sum to plaintiff was to be made upon entry of the final judgment thereafter to be rendered, the judgment was not an appealable "final judgment". Code Civ.Proc. § 963.

4. Appeal and error ⇐870(1)

On appeal from a final judgment, the rulings and decision of trial court on all the issues are reviewable. Code Civ.Proc. § 956.

5. Judgment ⇐203

Only one final judgment may be entered in an action.

6. Appeal and error ⇐80(1)

That trial court, in judgment in suit to dissolve a partnership and to wind up partnership affairs, improperly assumed to establish certain rights of the parties and to make orders effective immediately, was not sufficient to render the judgment an appealable "final judgment". Code Civ.Proc. § 956.

7. Appeal and error ⇐478

On petition for writ of supersedeas to stay the effect of a judgment pending petitioner's appeal, upon a declaration by Supreme Court that the judgment was interlocutory, Supreme Court would not assume that trial court would attempt to enforce provisions of judgment which were improperly declared to be immediately effective. Code Civ.Proc. § 956.

8. Appeal and error ⇐478

Where defendant's petition for writ of supersedeas to stay the effect of a judgment pending his appeal failed to present a case where no further questions could come before the trial court except such as were necessary to carry the judgment into effect, petitioner was not entitled to supersedeas; but, where trial court had improperly incorporated provisions which alone were not properly contained in an interlocutory judgment, the application was denied without prejudice. Code Civ.Proc. § 956.

In Bank.

Action by G. G. Bakewell against Harding F. Bakewell to dissolve a partnership and to wind up the partnership affairs. A judgment was entered, and defendant appeals. On petition by defendant for writ of supersedeas to stay the effect of the judgment pending his appeal.

Order to show cause discharged, and petition denied without prejudice.

George R. Larwill, Frank S. Balthis, Jr., Michael F. Shannon, and Thomas A. Wood, all of Los Angeles, for petitioner.

C. E. Spencer, E. R. Young, and E. L. Searle, all of Los Angeles, for respondent.

SHENK, Justice.

This is a petition by the defendant for the writ of supersedeas to stay the effect of a judgment pending his appeal. The judgment is entitled "Judgment (Interlocutory)." If it is, in truth, an interlocutory judgment, an appeal therefrom does not lie and the petitioner is not entitled to the writ.

In May, 1942, after a partial hearing, the court made findings of fact and conclusions of law, and rendered a judgment which, as stated, was called an interlocutory judgment. The conclusions of law and judgment include intermingled statements of fact and conclusions of law, but the following clearly appears:

The plaintiff G. G. Bakewell and the defendant Harding F. Bakewell were partners engaged in the manufacture of airplane parts and machine tools under the name of "Bakewell Manufacturing Company."

In July, 1941, the plaintiff commenced an action to dissolve the partnership and wind up the partnership affairs. On August 6,

1941, a receiver was appointed who has since been operating the business.

The trial court determined the existence of the partnership and the plaintiff's right to a dissolution; that during the existence of the partnership the defendant had obtained title to six letters-patent covering a mechanical device known as the Bakewell Precision Tapping machine, and that the defendant holds the same in trust for plaintiff and himself as copartners; that plaintiff is entitled to the repayment of $10,895.88, as an advancement beyond his agreed contribution, and that certain other charges and credits should be made in each partner's account. The judgment provided that a division be made of the cash, accounts receivable and securities in kind, and that the remainder of the assets and the good will of the business be sold; that the physical assets of the partnership plant were being used exclusively for the manufacture of machines necessary for the defense of the United States in the present world conflict; that the conduct of the business could not be stopped without interfering with the war efforts of the United States, and that the partnership should be wound up as soon as it could be done without interrupting those activities.

The judgment ordered the defendant to deliver to the receiver the original letters-patent and the official receipts for applications within fifteen days after entry of the judgment, and to execute and deliver to the receiver certain assignments in respect to the patents, which the receiver was directed to record. It also ordered other acts to be done and reports to be made by the receiver, and granted certain injunctive relief against wrongful assignment by the defendant or any interference with the receiver's conduct and management of the business. It decreed the plaintiff's right to money due him from the partnership, but left the amount thereof, and the proper distribution of sums derived from the operation of the business and the sale of the assets for ascertainment by the court for incorporation in the final judgment. It was found, however, that in August, 1937, the plaintiff advanced $10,895.88 to and for the benefit of the partnership beyond his agreed contribution and that he is entitled to immediate repayment of that sum. The judgment ordered "that said receiver shall immediately pay said sum to plaintiff from the funds of the partnership in his possession."

The judgment further provided "that final judgment herein shall provide for payment of the sums due plaintiff, and for the payment of all costs, expenses, charges and accounts of said receiver, and payment of all claims against the partnership and said receiver, and for distribution of the sums derived from the operation of said business and the sale of said assets in accordance with the findings and conclusions of law heretofore filed herein, and shall also provide that this court shall retain jurisdiction in this matter to enable it to determine the validity of all claims against the partnership and its assets, receive and settle all accounts of said receiver, fix and determine all fees and charges of said receiver and his attorneys, make all orders necessary in connection with the conduct of said receivership, make from time to time all orders necessary to complete the windup of the partnership between plaintiff and said defendant Harding F. Bakewell, on termination of the receivership to declare the partnership fully terminated and wound-up, and make all orders necessary to carry the judgment into effect."

With conceivable justification the defendant became apprehensive that the judgment was not truly interlocutory as denominated, and filed his notice of appeal on May 20, 1942. On June 9, 1942, the receiver filed a report pursuant to the directions contained in the judgment, and sought instructions from the court upon the taking of the appeal and the refusal of the defendant to comply with the order for delivery of original letters-patent and assignments. The plaintiff moved for orders based on the receiver's report. Before the hearing on the motion the defendant commenced the present proceeding to stay the effect of the judgment pending the appeal. This court issued an order to show cause coupled with a limited temporary stay to the end that the conduct and management of the partnership by the receiver be not interrupted.

[1] An appeal lies only from a final judgment unless an appeal from an interlocutory decree or judgment is expressly authorized by law. Johnson v. Solomons, 124 Cal.App. 43, 12 P.2d 140; People's Ditch Co. v. Foothill Irrigation District, 103 Cal.App. 321, 284 P. 514; see § 963, Code Civ.Proc. The defendant does not contend that his appeal is based on any provision of law save the provision of said

section 963 which allows an appeal from a final judgment.

[2] The general test for determining whether the judgment is final is "that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11, 17.

[3] A consideration of the issues and of the terms of the judgment discloses that further judicial action on the part of the trial court must be had before all the rights of the parties can be finally determined. Further audit of the partnership books is required and the receiver is directed to report thereon in order that the court may ascertain the amounts due as between the partners. Compare Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104. The court did not finally determine the relative rights of the partners in the partnership assets. Those rights have yet to be ascertained. The judgment did not assume to establish the proportional rights by the use of percentages. Compare Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. Notwithstanding the declared effect of the judgment that the receiver "shall immediately pay" to the plaintiff the sum of $10,895.88 out of the assets of the estate, the subsequent provisions of the judgment make it reasonably clear that the payment is directed to be made upon the entry of the final judgment thereafter to be rendered.

[4-7] On appeal from the final judgment the rulings and decision of the court on all the issues are reviewable. Code Civ. Proc. § 956. Only one final judgment may be entered in an action. Middleton v. Finney, supra; Doudell v. Shoo, 159 Cal. 448, 114 P. 579. The fact that the court in the judgment before us assumed improperly to establish certain rights of the parties and to make orders therein effective immediately is not alone sufficient to render it a final judgment. This fact may have served as justification for the present application, but upon a declaration by this court that the judgment is in effect interlocutory it will not be assumed that the trial court will attempt to enforce those provisions of the judgment which are improperly declared to be immediately effective.

[8] Since the petition fails to present a case where no further questions can come before the trial court except such as are necessary to carry the judgment into effect, the petitioner is not at this time entitled to the writ of supersedeas. But since the judgment contains provisions which taken alone were improperly incorporated in an interluctory judgment and are therefore subject to the objections noted, the denial of the application should be without prejudice.

The cases of Perry v. West Coast Bond & Mortgage Co., 136 Cal.App. 557, 29 P.2d 279; Sondergard v. Breaum, 83 Cal.App. 352, 256 P. 580, and People's Ditch Co. v. Foothill Irrigation District, supra, relied upon by the defendant, are not controlling. In those cases it appeared that the judgment determined all of the issues.

The order to show cause is discharged and the petition is denied without prejudice.

GIBSON, C. J., CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and SPENCE, Justice pro tem., concurred.



55 Cal.App.2d 399

PEOPLE v. McCLAIN.

Cr. 3612.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1942.

Hearing Denied Dec. 3, 1942.

1. Criminal law ⇐620(1)

Under Penal Code, trial court is authorized to consolidate for purpose of trial two or more criminal actions where indictments charge commission of two or more different offenses of same class of crimes. Pen.Code, § 954.

2. Criminal law ⇐620(1)

That different crimes charged against defendant were committed at different times and places does not deprive trial court of power to order consolidation of informations before trial if offenses charged are of same class of crimes. Pen.Code, § 954.

3. Criminal law ⇐620(1)

Action of trial court in ordering information charging robbery and attempted robbery and another information charging robbery consolidated for trial, although offenses were committed at different times and places, was not abuse of discretion. Pen.Code, § 954.

4. Criminal law ⇐1171(1)

Action of district attorney in stating at time he made motion of consolidation of two informations that he believed he could prove a case of robbery charged by one of the informations which subsequently was dismissed on suggestion of trial judge that state's witness was an accomplice of defendant in alleged robbery, was not "misconduct" requiring reversal of conviction under other information, where testimony of state's witness, if believed, showed witness was not an accomplice and would sustain defendant's conviction under dismissed information.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Criminal law ⇐1028

A reviewing court will not consider alleged errors in refusing to grant continuance of hearing of motion for new trial unless motion for continuance is supported by affidavits which would warrant trial court in granting the motion.

6. Criminal law ⇐959

Refusal of continuance of hearing of motion for new trial, unsupported by affidavits, for purpose of obtaining affidavits from New Mexico lawyer showing that accused's driver's license was in New Mexico at time of trial, and therefore could not have been picked up near scene of robbery by officer on night accused was charged with having robbed the officer, was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Clarence J. McClain was convicted of robbery and attempted robbery, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty of (1) robbery, and (2) attempted robbery, after trial before a jury defendant appeals. There is also an appeal from the order denying his motions for a new trial.

Over the objection of defendant, the trial court upon motion of the district attorney consolidated for the purpose of trial, with the information containing the counts upon which defendant was convicted (No. 85902), another information (No. 88803) charging defendant with robbery at a time and place different from that alleged in either count contained in the information upon which defendant was convicted and from which judgments of conviction he has appealed.

Count I, Attempted Robbery

December 5, 1940, Mr. MacIsaac, his wife, and Mr. Leach in their automobile drove up in front of an apartment house in South Pasadena. Mrs. MacIsaac and Mr. Leach started into the apartment house while Mr. MacIsaac remained in the car to listen to a news broadcast. He had been listening for a few minutes when the door on the right side of his automobile was opened and he saw a man facing him with a gun pointing in his direction. At about the same time the door on the left side of his car was opened and another man told him to move over and to look like nothing had happened. The man on the right side said that they were going for a ride and that if Mr. MacIsaac behaved himself he would not be hurt. This same man started the motor and shut off the radio.

At about this time Mrs. MacIsaac and Mr. Leach started to come out of the apartment house. At the same time the man on Mr. MacIsaac's right jumped out of the car, grabbed Mrs. MacIsaac by the arm, pointed the gun which he held at Mr. Leach, and brought them toward the automobile. As he was attempting to open the door to the rear seat, Mrs. MacIsaac screamed and ran into the street. The man in the front seat with Mr. MacIsaac started to drive the car away and as he put both hands on the wheel Mr. MacIsaac grappled with him. A tussle ensued. The man jumped out of the car and escaped. Later Mr. MacIsaac identified the defendant as the man with whom he had struggled in the car.

Count II, Robbery

December 5, 1940, Officer Allen learning of the attempted robbery of the MacIsaacs and obtaining a description of the suspects, started to look for them. He found a 1938 Ford V-8 sedan that had blood on the seat. The keys were in the car and the motor was still warm. Officer Allen removed the keys from the car and got in the back seat of the automobile and waited to see if anyone would come to claim it. About ten minutes later defendant got into the car and upon discovering Officer Allen in the back seat asked who had been driving his car. Officer Allen asked defendant to show him his driver's license. As defendant held his driver's license out to Officer Allen, he struck the officer and took the officer's gun away from him. Defendant then jumped out of the car and ran away, being later apprehended.

Information No. 88803

November 19, 1940, the Eureka Iron and Metal Company, located in Los Angeles, was robbed of approximately $1,568 by two bandits. Witness Madge Rodin testified that she knew Raymond Wilson, Harry Farrell, and defendant; that she went to the vicinity of the Eureka Iron Works with the three men just mentioned; that the automobile in which they were riding was stopped at a parking lot in the vicinity of the Eureka Iron Works plant; that defendant got out of the automobile and into another car and drove away, whereupon she, Mr. Wilson, and Mr. Farrell drove home; that on the following day she was driven in a Pontiac sedan to within about half a block of the Eureka Iron Works plant; that defendant drove up and parked in front of the Eureka Iron Works; that thereafter Messrs. Wilson and Farrell came back and got in the car in which she was riding while defendant got in his car; and that they then all drove to Mr. McClain's apartment, whereupon money was divided between the three men. The witness further testified that she was merely sitting in the car near the Eureka Iron Works waiting for her husband Harry Farrell; that she had no idea of what he was doing there, had no conversation with him before they went to the Eureka Iron Works, and that she had no duties whatsoever to perform either as a lookout, driver, or otherwise in connection with the robbery; and that she could not drive an automobile. She did not receive any share of the proceeds of the robbery.

At the conclusion of the foregoing testimony relative to the crime charged in information No. 88803, upon the suggestion of the trial judge that Madge Rodin was an accomplice of defendant in robbing the Eureka Iron Works, the district attorney moved to dismiss the charge contained in information No. 88803. This motion was granted.

Defendant relies on three propositions for reversal of the judgment, which will be stated and answered hereunder seriatim.

First: The trial court committed prejudicial error in ordering the consolidation for trial of information No. 85902 and information No. 88803.

[1] This proposition is untenable. Section 954 of the Penal Code authorizes the trial court to consolidate for the purpose of trial two or more criminal actions where the indictments charge the commission of two or more different offenses of the same class of crimes. (§ 954, Pen.Code.)

[2, 3] The fact that the different crimes charged against the defendant were committed at different times and places does not deprive the trial court of power to order the consolidation of the informations for trial, if the offenses charged are of the same class of crimes. (People v. Feigelman, 65 Cal.App. 319, 320, 223 P. 579.) Clearly in the instant case the several indictments charged offenses of the same class of crimes and the trial court did not abuse its discretion in ordering the informations consolidated for the purpose of trial.

Second: The district attorney committed misconduct in stating at the time he made a motion for consolidation of the two informations that he believed he could prove a case of robbery under the charge contained in information No. 88803.

[4] This proposition is likewise untenable. It is our opinion that, as the record is presented to this court, there is no evidence to show that the witness Madge Rodin was an accomplice of defendant in robbing the Eureka Iron Works. She testified that she did not know that a robbery was going to be committed and that she did not participate in it in any way. Had the trial judge believed this testimony, she clearly would not have been an accomplice of defendant and the testimony which she gave, if believed by the trier of fact, would have been sufficient to sustain a conviction of defendant under the charge

in information No. 88803. This being true, the district attorney had ample grounds to believe that his statement on the motion for consolidation of the informations was correct when he stated that he believed he could prove the charge contained in information No. 88803.

Third: The trial court committed prejudicial error in not granting defendant's motion for a continuance of a hearing of his motion for a new trial.

[5, 6] This proposition is likewise untenable. The law is established in California that an appellate court will not consider alleged errors of the trial court in refusing to grant a continuance of a hearing of a motion for a new trial, unless the motion for a continuance is supported by affidavits which would warrant the trial court in granting the motion. See People v. Rokes, 18 Cal.App.2d 689, 694, 64 P.2d 746. In the instant case this rule was not complied with. At the time of the hearing of the motion for a new trial defendant's counsel requested a continuance of the hearing unsupported by affidavits for the purpose of obtaining affidavits from a lawyer in New Mexico to the effect that defendant's driver's license was in fact in New Mexico at the time of the trial and therefore could not have been picked up near the scene of the robbery of Officer Allen on the night defendant was charged with having robbed the said officer. It is therefore evident that the trial court did not abuse its discretion in denying defendant's motion for a continuance of the hearing.

For the foregoing reasons the judgments and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



55 Cal.App.2d 108

PIRE et al. v. GLADDING McBEAN & CO. et al.

Civ. 12134.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1942.

Hearing Denied Dec. 22, 1942.

Automobiles ⇐246(58)

In action for death of one who was struck by truck at night while he was pushing his stalled automobile at left side near steering wheel, trial court was not justified in refusing to give instruction on "last clear chance" doctrine, on theory that because a passenger who had been riding with decedent saw the on-coming truck and managed to step aside, decedent could have done likewise, where evidence disclosed that passenger was on the extreme right side and that truck driver tried to pass to left of decedent's automobile and right front portion of truck struck the left rear portion of decedent's automobile, so that their possibilities of escape were different.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

On petition for rehearing.

Petition denied.

For prior opinion, see 130 P.2d 143.

George Olshausen and John K. Hagopian, both of San Francisco, for plaintiffs and appellants.

Bronson, Bronson & McKinnon and J. T. Blalock, all of San Francisco, for defendant and respondents.

STURTEVANT, Acting Presiding Justice.

In his petition for rehearing, defendant Hickey states that this court failed to mention in its opinion the "strongest point" urged by defendant in support of the refusal of the trial court to give instructions on the last clear chance doctrine. Said point is stated in the petition as follows: "The decedent could have extricated himself from the dangerous position by the exercise of due care and he, not petitioner, had the last chance to avoid the accident." This point was raised in defendant's brief but we did not believe it was seriously urged.

Defendant's argument seems to be that because the passenger, who had been riding with decedent, saw the on-coming truck of defendant and managed to step aside, decedent could have done likewise. Said defendant states, "It may be assumed that both were in approximately the same relative position with regard to Hickey's oncoming equipment." The uncontradicted evidence was all to the contrary. It appears therefrom that the decedent was on the left side of his car near the steering wheel and that the passenger was on the extreme right side. Hickey tried to pass to the left of decedent's car and the right

front portion of Hickey's truck struck the left rear of decedent's car. The positions of the two men and their possibilities of escape were therefore quite different. But in any event, if it may be said that there was any basis for an argument to the jury along the line suggested by said defendant, it certainly cannot be said as a matter of law that the decedent could have extricated himself from the dangerous position by the exercise of ordinary care or that the decedent had the last chance to avoid the accident. We therefore reiterate our former conclusion that instructions on last clear chance should have been given and that the jury should have been permitted to decide the questions of fact presented by such instructions.

The petition for rehearing is denied.



55 Cal.App.2d 579

SHIELDS v. SHIELDS.

Civ. 13597.

District Court of Appeal, Second District, Division 3, California.

Nov. 17, 1942.

1. Divorce ⇐311

In view of provisions of Civil Code indicating similarity between mode of enforcement of orders for child support and for alimony, divorced husband could not avoid liability for payments for child support which were more than five years overdue on ground that order was not a "judgment" and could not be enforced under statute relating to execution of judgments after five years. Civ.Code, §§ 136–139; Code Civ.Proc. §§ 685, 1007.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

2. Divorce ⇐263, 311

A provision of Code of Civil Procedure that an order for payment of money may be enforced by execution applies to orders made pursuant to provisions of Civil Code relating to alimony and support of children and wife on divorce. Code Civ.Proc. § 1007; Civ.Code, §§ 137, 139.

3. Divorce ⇐263, 311

Under provision of Code of Civil Procedure relating to execution of judgments after five years, orders for payment of alimony and child support may be enforced although payments are more than five years overdue. Code Civ.Proc. § 685.

4. Divorce ⇐311

Where divorce decrees required husband to pay $60 per month for support of minor daughter, and wife thereafter brought four criminal proceedings to enforce husband's obligation, but was unable to do so because of husband's apparent financial incapacity, the court did not abuse its discretion at a time when husband's net worth was over $63,000, although payments were then more than five years overdue, in ordering execution to issue to enforce the payments. Code Civ.Proc. §§ 681, 685; Civ. Code, § 139.

5. Divorce ⇐311

The notice by which divorced wife initiated proceeding to enforce by execution overdue payments for child support, although defective because it did not explicitly state grounds of motion, was sufficient where accompanied by affidavit setting forth provisions for payment, and husband's failure to pay. Code Civ.Proc. §§ 685, 1010.

6. Divorce ⇐311

The fact that divorced husband received only nine days' notice, instead of ten days' notice, of motion to enforce by execution overdue payments for child support, did not deprive court of jurisdiction, where matter was continued so that hearing did not take place until 22 days after husband was served, at which time husband contested the motion on the merits. Code Civ. Proc. §§ 685, 1005.

7. Divorce ⇐311

Where divorced husband, against whom wife sought to enforce by execution overdue payments for child support, filed an answer, pleaded the five-year statute of limitations, filed an affidavit in opposition, and took the stand in his own behalf, he thereby made a "general appearance".

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

Appeal from Superior Court, Los Angeles County; Frank G. Swain and Myron Westover, Judges.

Suit for divorce by Grace Shields against Jack E. Shields, wherein the plaintiff

sought to enforce defendant's obligation under the divorce decree to pay for his daughter's support. From an order determining that the defendant had failed to pay for daughter's support and which authorized use of a writ of execution to collect that sum with interest, the defendant appeals.

Order affirmed.

Walter G. Danielson and LeRoy B. Lorenz, both of Los Angeles, for appellant.

Harold F. Pettee, Jr., and Fred W. Raab, Jr., both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

This appeal, taken by the defendant, is from an order which determined that the defendant had been directed, but failed, to pay for his daughter's support the sum of $2,908, and which authorized the use of a writ of execution to collect that sum with interest. The defendant has not pointed out any valid ground for reversing the order which he attacks and none appears.

It appears from recitals in the order itself that in July, 1925, an interlocutory judgment of divorce was rendered in plaintiff's favor, followed in March of 1927, by a final judgment of divorce. In each of these judgments the defendant was directed to pay to plaintiff, for the support of the minor daughter of the parties, the sum of $60 each month, "'said payments to continue until said minor child shall arrive at the age of eighteen years, or so long as said minor child shall be supported and maintained by [the plaintiff].'" Up until May 18, 1933, the daughter, not yet eighteen years of age, lived with and was wholly supported and maintained by the plaintiff. On May 18, 1933, the plaintiff remarried and thereafter her new husband shared in the support of her daughter, so that the defendant was not charged with any sum which accrued after that date. Such payments as he made after that date, however, were credited on the amount in which he was found to be then in arrears.

The defendant takes the position on this appeal that the court had no authority to order execution to issue for payments for child support that were more than five years overdue. In support of this position he contends that section 685, Code of Civil Procedure, is inapplicable, largely because it and its companion, section 681, have to do with executions on judgments, and so have no reference to orders for child support, which are not judgments because they can be modified at any time and their enforcement is always discretionary, never a matter of right. In this connection he insists that there is a distinction between orders for wife support and child support. The defendant further argues that the object of the law is to see that the child is supported, and any money recovered by the plaintiff at this late day would go to support her and her lawyer, not the daughter who is no longer a minor.

[1] It is not our purpose to point out at any length the reasons why defendant's arguments carry no conviction; in the main we shall find a reference to the authorities all sufficient. A reading of sections 136, 137, 138 and 139 of the Civil Code makes it clear that the authority given the court to order and enforce child support differs in no particular of significance to our problem from that given respecting alimony. Any order made for either may be modified, and so has that aspect of nonpermanency on which the defendant lays stress. The contention that such an order is therefore not a "judgment" was considered and answered adversely in Biltmore Drug Store v. Superior Court of Los Angeles County, 1929, 101 Cal.App. 363, 364, 365, 281 P. 710. See also Lisenbee v. Lisenbee, 1919, 42 Cal. App. 567, 183 P. 862.

[2] Section 1007 of the Code of Civil Procedure reads: "Whenever an order for the payment of a sum of money is made by a court pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment." It has been held that this section applies to orders made pursuant to sections 137 and 139, Civil Code. Van Cleave v. Bucher, 1889, 79 Cal. 600, 602, 603, 21 P. 954, 955; Edwards v. Superior Court of Los Angeles County, 1928, 88 Cal.App. 260, 262, 263 P. 347, 348.

[3] The appellate courts of this state have repeatedly upheld orders enforcing the payment of both alimony and child support which was more than five years overdue. In the following cases section 685, Code of Civil Procedure, was recognized as the source of the power. Harlan v. Harlan, 1908, 154 Cal. 341, 98 P. 32 [child support]. Saunders v. Simms, 1920, 183 Cal. 167, 190 P. 806 [child support]. Crowley v. Superior Court of Alameda County, 1936, 17 Cal. App.2d 52, 61 P.2d 372 [child support]. To these the case of Hale v. Hale, 1935, 6 Cal. App.2d 661, 45 P.2d 246, should probably be added, not because it mentions section 685 (Code Civ.Proc.), but because of the cases to which it refers. In any event, an

order was there approved for an execution to enforce alimony and child support payments which were more than six years delinquent. See also Parker v. Parker, 1928, 203 Cal. 787, 793, 266 P. 283, 285 and Radonich v. Radonich, 1933, 130 Cal.App. 250, 20 P. 51. By way of a reply to one of defendant's contentions we quote the two concluding sentences in the opinion of Saunders v. Simms (supra, this paragraph): "The original judgment of the court directed the payment of this money to the mother to assist her in the support of the child placed in her custody. Having furnished such support from her own resources she is clearly entitled to recover it in this proceeding in her own name and for her own reimbursement, and the trial court properly disregarded the attempted release by the daughter." [183 Cal. 167, 190 P. 808.]

[4] The defendant further argues that it was an abuse of the court's discretion to make the order appealed from. In her affidavit supporting her motion for execution the plaintiff set forth the endeavors she had made, during the years, to compel the defendant to keep up his payments. Within two years after the entry of the interlocutory decree she instituted criminal proceedings against him for failure to provide for his daughter, a conviction following. In each of the years 1929, 1932 and 1936, like criminal proceedings were instituted by her, that of 1932 being dismissed on the representation of the defendant that he had no funds, but the other two resulting in judgments of conviction, followed by orders of probation conditioned on the defendant making payments to the plaintiff. Only one execution was issued, close to two years after the entry of the interlocutory decree, but plaintiff "was not able to locate any assets of the [defendant]." During the years 1931–1933 the defendant wrote several letters in which he explained that his remissness in making remittances was due to his financial incapacity. It cannot be said that the trial court abused its discretion in holding these facts sufficiently explained the plaintiff's "failure to proceed in compliance with the provisions of section 681" as section 685 of the Code of Civil Procedure made it incumbent upon her to do. Perhaps we should note that at the time of the hearing of plaintiff's motion defendant's net worth, financially measured, was over $63,000.

[5] The defendant argues also that the trial court had no jurisdiction to make the order from which he appeals. His first contention is that the notice by which the plaintiff initiated the present proceedings was faulty in that it failed to state the grounds upon which the motion was to be made. The first sentence of section 1010, Code of Civil Procedure, requires that "Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." Plaintiff's notice, after stating the motion that was to be made (and when and where), continued: "said motion will be made upon the Affidavit of Plaintiff Grace Shields, also known as Grace Gold, served and filed herewith, upon Section 685 of the Code of Civil Procedure of the State of California, and upon all the records and files in the above-entitled cause," but it did not explicitly state the grounds of the motion, and in this it was at fault. The fault, however, was not a fatal one, for the grounds, as well as the factual bases, clearly appear from the notice and the accompanying affidavit. The grounds in this case are not "nebulous and uncertain" as stated by the defendant; the obvious ground of the motion was that a judgment remained unsatisfied in whole or in part. The notice was entitled: "Notice of Motion for Order of Court Fixing and Determining Amount for Which Writ of Execution shall Issue and for Order Granting Leave to Issue Execution Under Sec. 685, C.C.P." It was accompanied by plaintiff's affidavit, setting forth the provision for payments, the defendant's failure to pay, and the other matters already referred to. In the premises the purpose of the code provision requiring that the grounds of the motion be set forth was sufficiently served and that is all that the law requires. Savage v. Smith, 1915, 170 Cal. 472, 474, 150 P. 353, 354; Fink & Schindler Co. v. Gavros, 1925, 72 Cal.App. 688, 691, 237 P. 1083, 1084; Hecq v. Conner, 1928, 203 Cal. 504, 506, 265 P. 180, 181.

[6] On still another ground the defendant takes the position that the trial court had no jurisdiction to make the order appealed from. Referring to the provisions of section 1005, Code of Civil Procedure, he contends that as he was personally served in Kern County with the notice of motion, and at the time had no attorney, the nine days notice was insufficient; he was entitled to ten days notice. January 31, 1941, was the day set in the notice for the making of the motion, and on this day,

and again on the 6th and 13th days of February, days to which the matter was continued by court orders, the defendant appeared specially to object to the court's jurisdiction not only on the ground that insufficient notice had been given, but also for the reason that the notice of motion did not set forth any ground on which the motion was to be made. When, on February 13, his objection to the court's proceeding had been overruled, the defendant filed his "Answer to application of Plaintiff for Issuance of Writ of Execution" in which he admitted some of the matters alleged in plaintiff's affidavit, denied others, and pleaded the five year statute of limitations. In addition to this the defendant filed an affidavit in opposition to plaintiff's motion and then took the stand in his own behalf.

[7] It is obvious that defendant's contention is a technical one; as a fact he suffered no whit of prejudice by reason of receiving a nine instead of a ten day notice of a hearing which finally took place some twenty-two days after he was served. There is no occasion, therefore, to regret that whatever technical advantage he had upon which to stand he lost by taking the step which amounted to a general appearance, that is, his entry into a contest on the merits against plaintiff's motion. Remsberg v. Hackney Mfg. Co., 1917, 174 Cal. 799, 801, 164 P. 792; Jardine v. Superior Court of Los Angeles County, 1931, 213 Cal. 301, 304, 2 P.2d 756, 79 A.L.R. 291; Maple v. Walser, 1933, 131 Cal.App. 631, 634, 21 P. 2d 984.

None of appellant's points have any merit. The order appealed from is affirmed.

SCHAUER, P. J., and SHINN, J., concur.



55 Cal.App.2d 501

STEWART & NUSS, Inc. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 3065.

District Court of Appeal, Fourth District, California.

Nov. 10, 1942.

Rehearing Denied Dec. 10, 1942.

Hearing Denied Jan. 7, 1943.

1. Workmen's compensation ⇐208

In proceedings by dragline shovel operator to recover compensation for injuries received when moving shovel at direction of hauling contractor, where hauling contractor exercised a measure of control over shovel operator beyond the terms of the contract between hauling contractor and dragline company providing that dragline company was to operate and move shovel at its own expense, contract was not controlling in determining liability for operator's compensation.

2. Workmen's compensation ⇐243

The relation of the parties to a written contract of employment is "prima facie" that which is expressed by terms of the writing, but to determine the true relation so as to fix liability for compensation, contract should be considered in view of circumstances under which it was made and conduct of parties while work was being performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

3. Workmen's compensation ⇐203

In compensation cases an employee may at the same time be under a general and special employer.

4. Workmen's compensation ⇐208

The status of "special employer" giving rise to liability for compensation to injured employee arises from right to control and direct activities of employee of another beyond the directions which would be given to or control exercised over an independent contractor.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employer".

5. Workmen's compensation ⇐206

Where a special employer exercises a measure of control over employee beyond that which would be exercised in directing an independent contractor, employee under Workmen's Compensation Act can secure an award for injuries against both special and general employer.

6. Workmen's compensation ⇐1432

Evidence sustained finding that dragline shovel operator was "special employee" of contractor and that contractor as "special employer" was liable for compensation when shovel operator was injured while working under direction of contractor's foreman and drawing pay from contractor notwithstanding contract between contractor and dragline company under the

terms of which dragline company was to operate and move dragline shovel at its own expense.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employee".

Petition by Stewart & Nuss, Inc., and others to review an award of the Industrial Accident Commission in favor of Arthur W. Truman and others.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

BARNARD, Presiding Justice.

The petitioners seek, in so far as they are concerned, to annul an award of the Industrial Accident Commission in favor of Arthur W. Truman, who was injured on November 11, 1941, while assisting in moving a dragline shovel from a sand pit to a flying field at Lemoore. The commission found that Truman was injured while employed as a dragline operator by two persons doing business under the name of Dragline Rentals Company and their agent B. W. Kuhn as general employers, and by Stewart & Nuss, Inc., as his special employer. The award has become final as to the general employers, but it is here attacked by Stewart & Nuss, Inc., and their insurance carrier on the ground that Truman was solely an employee of Dragline Rentals Company, an independent contractor, and that there is no evidence to support the finding that Stewart & Nuss, Inc., was his special employer at the time in question.

The general facts may be briefly stated as follows: The Pacific Rock & Gravel Company had a contract with the federal government for the surfacing and construction of a flying field at Lemoore. On September 25, 1941, Stewart & Nuss, Inc., entered into a subcontract for the sale and delivery of certain rock, sand and gravel to be used in this work. Stewart & Nuss, Inc., then entered into a subcontract with Dragline Rentals Company which provided that the Dragline Rentals Company would, at its own expense, install a model 95 dragline shovel at a certain sand pit, and excavate the sand and load it on trucks to be supplied by Stewart & Nuss, Inc.; that Dragline Rentals Company was to receive 9 cents for each cubic yard of sand excavated and loaded; that Dragline Rentals Company would at its own expense provide workmen's compensation insurance covering its employees engaged in the work under the contract; that Stewart & Nuss, Inc., would advance each week to the Dragline Rentals Company an amount equal to that company's pay roll directly incurred in these operations, such advancement to be deducted from any sums to become due the Dragline Rentals Company; and that at a later date the Dragline Rentals Company would at its own expense move the model 95 dragline shovel from the pit to the flying field and there operate it in connection with the unloading and moving of rock and gravel, and at the same time replace it with another machine at the sand pit.

At the time this contract was executed the model 95 dragline was being overhauled at Friant Dam by the respondent Truman and a man named Hawley. These men had been hired by Kuhn under some arrangement with Dragline Rentals Company. Shortly after the contract was executed the dragline was moved on a truck owned by the Bellyea Company from Friant Dam to this sand pit where it was put in operation, Truman acting as operator and Hawley as oiler. It appears that Dragline Rentals Company had theretofore rented out their machines and that this was the first time it had undertaken to itself operate a machine on such a contract. That company had a number of machines in operation at various places throughout the state and Kuhn, under some arrangement with it, traveled around looking after these various machines. As a result, he visited the sand pit here in question only occasionally.

Stewart & Nuss, Inc., kept a man at the sand pit to check the loads of gravel as they were loaded and also furnished a man with a bulldozer to strip off the top surface so that the sand might be excavated. Its foreman, a man named Jellick, visited the sand pit several times a day and regulated the flow of sand as it was needed at the flying field. The work under this contract was coordinated with the work under various other contracts, all under the general supervision of an army engineer. At times the dragline shovel was not operated, due to rains or to the fact that sand had been arriving at the air field faster than it could be used. During one stoppage Stewart &

Nuss' foreman asked Truman to start the machine and load three or four trucks with sand which was needed in connection with a pipe line at the air field which Stewart & Nuss, Inc., were laying under a separate contract. About the same time Truman used the dragline to rescue one of the trucks which had become bogged down. When Truman complained of the delays Stewart & Nuss' foreman, by way of recompense for rescuing the truck and loading the three or four trucks for the other purpose, put Truman and Hawley on the Stewart & Nuss, Inc., pay roll for the pipe line contract for one day's work and paid them therefor. On another occasion, when Truman shut down operations on the dragline shovel because, as he said, sufficient trucks were not furnished to keep such a large machine busy, he was induced to restart operations by Stewart & Nuss, Inc., who promised to furnish more trucks.

On or about October 25, 1941, Kuhn appeared at the sand pit and Truman asked him when he was going to get some pay. Kuhn testified that up to then he had forgotten to take out compensation insurance, that he thought because they only had two men on the shovel these men might as well be carried on the Stewart & Nuss, Inc., pay roll, that he told this to Truman and later told the Stewart & Nuss, Inc., foreman that he had no compensation insurance. This was denied by Truman and Jellick. In any event, Kuhn then sent Truman to Stewart with a signed note which read: "Please give to Mr. Art Truman the sum of $415 which is the amount due him and his oiler on Lemoore job." Truman went to Mr. Stewart, who instructed his bookkeeper to give Truman a check saying that they were to advance an amount sufficient to cover the pay roll in accordance with the contract. The bookkeeper gave Truman a check for $415 and took a receipt for the $415 "for shovel operator and oiler pay rolls to October 25, 1941." The bookkeeper told Truman that it would be necessary for him to bring in itemized statements showing what the $415 was for, as these were needed in obtaining advances from the general contractor and in showing what had been done on the job. The bookkeeper gave Truman a half dozen printed forms which were used by Stewart & Nuss, Inc., as time sheets in making up their pay rolls. These statements were not filled out and returned by Truman in connection with the $415 first paid him, but at the end of each of the next two weeks Truman brought into Stewart & Nuss' office a time sheet made out on one of these forms. The heading "Stewart & Nuss, Inc." was left unchanged, and under the heading "Employee" these time sheets listed Truman and Hawley, giving the number of hours worked on respective days, the total hours worked, the rate per hour, and the amount of deductions for unemployment insurance and old age benefits, respectively, for each of the two men. Checks for the balance, after these deductions, were given by Stewart & Nuss, Inc., directly to these men and the amount of the deductions were still in the hands of Stewart & Nuss, Inc., at the time of the hearing, its intention being to turn these amounts over to Dragline Rentals Company, for payment to the government, on a final settlement under the contract.

A few days before November 11, 1941, it was decided to move the model 95 dragline shovel from the sand pit to the flying field as provided for in the contract. About that time Kuhn told Mr. Rogers of the Pacific Rock & Gravel Company, the general contractors, that he intended to "walk" the dragline shovel to the flying field under its own power. Rogers told him he thought the highway authorities would not permit this. Kuhn then asked Rogers to see if he could get permission for this. About this time some one arranged with a truckman named Brown to move the machine, but it does not clearly appear who did this. On November 10, Truman asked Jellick to find out from Rogers when the shovel was to be moved. When Jellick asked Rogers for this information Rogers tried to get a permit from the highway department for Brown to move this machine, but permission was refused because the Brown truck was too small. After they had made a number of telephone calls about the matter, Rogers telephoned to the Bellyea Company in Los Angeles and arranged to have that company send up a large truck that night with which to move the shovel on Armistice Day, permission for this having been granted by the highway department. The next morning the Bellyea truck had not arrived and Truman went to the flying field to see what the trouble was. Rogers then telephoned to Kuhn at Glendale, told him he had ordered the truck in his behalf and asked him to contact the Bellyea people. Kuhn did so, and reported that the truck was on its way. Later in the day the truck arrived at the sand pit and Truman supervised the placing of the

shovel on the truck, and while he was assisting in moving it down the highway the shovel boom caught on some high tension wires. Truman climbed up on the boom and was injured while attempting to force the boom under the wires.

[1, 2] It would seem from the record that Kuhn, who had forgotten to get compensation insurance, decided at the time Truman asked him for his pay to attempt to get the two employees of the Dragline Rentals Company placed directly on the pay roll of Stewart & Nuss, Inc. He testified to the effect that he thought this had been arranged when he later inquired of Truman about the matter and was informed by Truman that he was getting his pay checks from Stewart & Nuss, Inc. While this was denied by the other witnesses it is merely another of the existing conflicts. While the contract provided very clearly that the Dragline Rentals Company was to operate the shovel and move the shovel at its own expense and that Stewart & Nuss, Inc., were merely to advance funds as they might be needed to meet the Dragline Company's pay roll, and while it may well be that Stewart & Nuss, Inc., intended to proceed in accordance with the terms of the contract and did not enter into any clear-cut and definite agreement to change the terms thereof, a part of the evidence, with the reasonable inferences therefrom, supports the conclusion that Stewart & Nuss, Inc., in their zeal to keep the work going and possibly because of the absence of Kuhn from the scene of the operations during most of the time, did many things which were not strictly in accordance with the terms of the contract and that it actually assumed and exercised a measure of control which must be held to have modified the terms of the contract, so far as material here. As was said in Luckie v. Diamond Coal Co., 41 Cal.App. 468, 183 P. 178, 183: "Accordingly, it has been held that, in an action of this character, while, prima facie, the relation of the parties to a written contract of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed."

[3-5] It is well settled that in industrial accident cases an employee may at the same time be under a general and special employer. Independence Indemnity Co. v. Industrial Accident Com'n, 203 Cal. 51, 262 P. 757, 758; Department of Water and Power v. Industrial Accident Com'n, 220 Cal. 638, 32 P.2d 354. In the first of the cases just cited, the court said: "The authorities would seem to indicate, however, that for liability to attach to the special employer the injured person must have been at the time of the accident subject to the direction and control of such special employer, for it is this right to control and direct the activities of the employee that gives rise to the status of special employer." In Stacey Bros. Gas Const. Co. v. Industrial Accident Com'n, 197 Cal. 164, 239 P. 1072, 1074, it is said that "the real test of what constitutes special employment may be said to be found in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in the doing of the same." In Entremont v. Whitsell, 13 Cal.2d 290, 89 P.2d 392, 395, in speaking of these two cases, the court said: "These last two cases recognized that where the special employer exercises some measure of control comparable to the control here involved, an injured employee under the Workmen's Compensation Act can secure an award against both his special and general employer."

While recognizing these general rules, the petitioners argue that Stewart & Nuss, Inc., and its foreman acted merely as messengers in transmitting to Truman suggestions and information relating to the progress of the work in general and the wishes of the general contractors and government engineers, and the times at which sand could be delivered under the weather conditions and as governed by the progress of the work, that such orders as were given were such as are usually given to an independent contractor, being orders which affect the result only and not the methods by which such results are reached, and that no orders were given which indicate any authoritative control. Also, that nothing appears in connection with the circumstances under which money was paid to Truman by Stewart & Nuss, Inc., which indicates anything other than a mere advancement of the pay roll, which of itself cannot create an employment relationship. While a part of the evidence sustains these contentions there are other portions which support a contrary view and which, in our

opinion, reduce the matter to a question of fact with the evidence sufficiently sustaining the finding which is attacked.

Truman testified that no one had ever told him that in operating the equipment at the sand pit he was working for Dragline Rentals Company; that he assumed that he was working for Stewart & Nuss, Inc.; that he received his orders from and was paid by it; that Kuhn told him he was to receive $2 per hour, which would be paid by Stewart & Nuss, Inc.; that Kuhn never told him that he was to be in charge of the work or that he was to stop working if Stewart & Nuss failed to furnish enough trucks; that Jellick, superintendent for Stewart & Nuss, Inc., was at the sand pit daily; that Jellick told him "how deep and how wide (to excavate) and when I would have the trucks and what hours to start and what hours to stop"; that in bad weather Jellick told him not to operate; that Jellick would have his bulldozer strip off a part of the land and told him to work where the overburden was stripped off; that Jellick would tell him to stay out of the clay and not to go too deep where the sand was wet; that if he did not get the material desired Jellick would tell him just what he wanted; that Jellick was there several times a day and that he would "give me orders, line me out and then leave and come back"; that Jellick was the only one out there who gave him orders; that when he asked Kuhn about his pay Kuhn told him to go to Stewart & Nuss for his time and gave him a written order; that he did not make out a time sheet in connection with the $415 which he received the first time, but that later on two occasions he made out time sheets on Stewart & Nuss' forms, the way they told him to make them out and showing deductions for his unemployment insurance and old age benefits; that he put his social security number on his time sheets and on each of the two occasions received a check for the net amount due him, which he cashed; that no one else gave him orders on this job except Stewart & Nuss; and that Jellick told him to be ready to move the machine to the flying field and later came back and told him when to move it.

Charles Stewart, president of Stewart & Nuss, Inc., testified that on one occasion when the work had stopped "I told Jellick over the phone to tell Truman to put the dragline to work as we had to move sand"; that the last two checks which were given to Truman by Stewart & Nuss, Inc., were handled like the checks which were issued by Stewart & Nuss, Inc., to their regular employees on that job; and that after this accident subsequent advances which were made to Kuhn or the Dragline Rentals Company were made in lump-sum checks to that company and not by pay roll checks to the individuals working on the dragline. Jellick testified that on one occasion when the operation of the dragline shovel had been stopped he told Truman to restart the work; that on November 10 Truman asked him to find out when Brown was coming to move the machine and that after Rogers made some phone calls he conveyed word to Truman that the Bellyea truck would be there the next morning; and that the dragline shovel was being moved to the air field at the time of the accident for the purpose of continuing operations under the Stewart & Nuss, Inc., contract with the Dragline Rentals Company. Rogers testified that he and Jellick helped arrange for the moving of the machine to the air field and that he told the Bellyea Company that it was to be done for Kuhn.

[6] This evidence discloses the giving of orders which amount to something more than a mere interest in the results to be accomplished and is sufficient, we think, to bring this case within the rules governing a special employee. The manner in which the payments to Truman were handled prior to the accident, while it may not be controlling, is quite suggestive and further supports the conclusions reached by the commission on the main issue.

The petitioners further argue that Truman was injured while the dragline shovel was being moved to its new location, that under the contract this moving was to be done by the Dragline Rentals Company, and that Stewart & Nuss, Inc., were in no way interested in the moving of that machine and did not exercise the slightest control in connection therewith. It appears from the evidence that Stewart & Nuss, Inc., took a not inconsiderable part in arranging for the moving of the machine. In view of the situation which then prevailed, as outlined above, this part of the performance of the contract cannot be segregated from the other portions, and the evidence affecting Truman's relationship as a special employee of Stewart & Nuss, Inc., is applicable to the situation which prevailed during the time the machine was being moved as well as to that immediately

prior thereto. The facts in this connection and the activity of Stewart & Nuss, Inc., in the arrangements for the removal of the machine were all to be considered by the finder of fact. In our opinion, there is sufficient evidence to support the finding that Truman was at the time in question a special employee of Stewart & Nuss, Inc.

The award is affirmed.

MARKS and GRIFFIN, JJ., concurred.



55 Cal.App.2d 74

TROUSDELL v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

Nos. 12046, 12284.

District Court of Appeal, First District, Division 2, California.

Nov. 18, 1942.

Appeal and error ⇐832(1)

The District Court of Appeal would not grant rehearing to give reconsideration to rule announced by Supreme Court on issue of incontestability clause of life policy, since Supreme Court decision was controlling and District Court of Appeal would not be justified in departing from the decision notwithstanding existence of contrary decisions in other jurisdictions.

On petitions for rehearings.

Petitions denied.

For prior opinions, see 130 P.2d 173, and 130 P.2d 179.

J. Rainey Hancock, of San Jose, for plaintiff, cross-defendant, and respondent.

Pillsbury, Madison & Sutro, Eugene D. Bennett, and Harlow P. Rothert, all of San Francisco, for defendant cross-complainant and appellant.

NOURSE, Presiding Judge.

In its petitions for rehearings the appellant complains that we placed too great a burden upon them in reference to the issue of the alleged false representations preceding the executions of the contracts of insurance. The discussion referred to appears in the portion of the opinion relating to appellant's claim that the evidence was insufficient to support the findings upon this issue. We thought it was clear that the quoted language was taken verbatim from these allegations of the cross-complaint, which the trial court found to be untrue. It was not the purpose of the opinion to state a different rule as to the burden of proof upon that issue.

Appellant also urges rehearings in order to give reconsideration of the rule announced in Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 70 P.2d 602, and similar cases on the issue of the incontestability clause of the policies. We can see no purpose in taking such action. The decisions of the supreme court are controlling upon the district court of appeal, and we would not be justified in departing from the rule of the Coodley case notwithstanding the decisions to the contrary found in other jurisdictions.

The petitions for rehearings in both cases are denied.



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